

**CONFIRMATION HEARINGS  
ON FEDERAL APPOINTMENTS**

Y 4.J 89/2:  
S.HRG.105-205/PT.4

Confirmation Hearings on Federal Appointments, S.Hrg.  
105-205, Part 4, May 14; June 18; July 16; July 30, 1998

**HEARINGS**

BEFORE THE

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**ONE HUNDRED FIFTH CONGRESS**

**SECOND SESSION**

**ON**

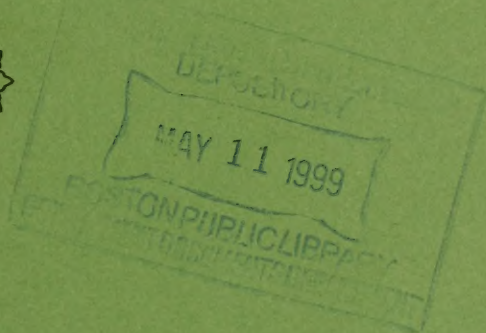
**CONFIRMATION OF APPOINTEES TO THE FEDERAL JUDICIARY**

**MAY 14; JUNE 18; JULY 16; JULY 30, 1998**

**Part 4**

**Serial No. J-105-4**

**Printed for the use of the Committee on the Judiciary**







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U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1999

53-708

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For sale by the U.S. Government Printing Office  
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402  
ISBN 0-16-058114-1

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**NOMINATIONS OF ROSEMARY S. POOLER AND  
ROBERT D. SACK (U.S. CIRCUIT JUDGES);  
VICTORIA A. ROBERTS, RICHARD W. ROBERTS,  
AND RONNIE L. WHITE (U.S. DISTRICT  
JUDGES)**

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**THURSDAY, MAY 14, 1998**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.***

The committee met, pursuant to notice, at 2:44 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Abraham, and Leahy.

**OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S.  
SENATOR FROM THE STATE OF UTAH**

The CHAIRMAN. We are happy to begin here today, and I apologize to my colleagues for being a little bit late. I have been under as much pressure, I think, as maybe all of you have been, and it has been a very tough day. I understand we are going to have a vote at 3 o'clock, so I want to make sure I can get all my colleagues taken care of before then.

So we will begin in this order. As I understand, it is pretty much agreed to. We will start with Senator Levin, then Senator Abraham, Senator Moynihan if he is here, Senator D'Amato, Senator Bond, Congressman Clay, and Congresswoman Norton, then Congressman Upton. We are happy to welcome you Congress people over here today. And then there is Congresswoman Kilpatrick here. Is that right? She is not here? Well, let's start in that order, anyway, and we will start with you, Carl.

**STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE  
STATE OF MICHIGAN**

Senator LEVIN. Thank you, Senator Hatch. Mr. Chairman, members of the committee, Senator Leahy, thank you for holding this hearing.

Our nominee here is Victoria Roberts, well-known to the people of Michigan and to the legal profession in Michigan; most recently, the president of the State Bar of Michigan, where she served with tremendous distinction. She is extraordinarily well qualified both by experience and by temperament to be a district court judge.

She has had a breath-taking amount of experience. She has been a plaintiff's lawyer, a defendant's lawyer, assistant U.S. attorney.

She has represented big companies, little companies, big people, little people, wealthy people, poor people.

I don't know of too many——

The CHAIRMAN. Sounds pretty good to me.

Senator LEVIN. Yes, she is pretty good. I am glad you noticed, Mr. Chairman.

Representative UPTON. Songwriters, too.

Senator LEVIN. She has represented songwriters.

The CHAIRMAN. Songwriters?

Senator LEVIN. She has done some copyright work, I think, too, Mr. Chairman.

The CHAIRMAN. Oh, my goodness. I think we need her here in Congress rather than——[Laughter.]

Maybe we need her here as a U.S. Senator. I don't know.

Senator LEVIN. We are ready.

The CHAIRMAN. OK.

Senator LEVIN. I won't tell you when, but we are ready.

Senator LEAHY. Which one of us do you want to toss overboard, Mr. Chairman?

The CHAIRMAN. Carl has been here long enough, it seems. [Laughter.]

Go ahead, Carl.

Senator LEVIN. To think I came here twice for this introduction, too. It is amazing.

Senator LEAHY. You are doing OK, Carl.

Senator LEVIN. We did OK, too, last night, by the way. We appreciated having two of our nominees confirmed last night by the Senate. We thank you and Senator Leahy very much for your efforts to accomplish that.

The CHAIRMAN. I appreciate that.

Senator LEVIN. Victoria Roberts has also been engaged in some public work. She was honored when she was selected by our mayor, Dennis Archer, to be the general counsel to his transition team, which was a tremendous responsibility. She has taught law at continuing education courses. She has written articles. Her demeanor is just what we need on the bench in terms of openness, being able to listen to people. Her experience guarantees that she will be sensitive to competing interests which appear before her as a district court judge.

So it is a real pleasure to have recommended her to the President. I am delighted that the President has nominated her, and we strongly recommend her to this committee, along with my colleagues that are here, and she will be introducing her friends and her family.

The CHAIRMAN. Thank you, Senator Levin.

We will turn to Senator Abraham now.

#### STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM. Thank you very much, Mr. Chairman. I am here to join Senator Levin in this introduction on behalf of Victoria Roberts for the eastern district of Michigan.

Ms. Roberts is a graduate of the University of Michigan, the Northeastern University School of Law, and has built a distin-



guished career as a litigator, a public servant, and a concerned citizen. Currently a sole practitioner, she practiced for nearly 10 years with the Detroit law firm of Goodman, Eden, Millender, and Bedrosian, and for her final 3 years she served as the firm's managing partner.

She has also served in the U.S. Attorney's Office for the eastern district of Michigan where she was an assistant U.S. attorney, was a senior litigation attorney for the American Motors Corp., and as Senator Levin indicated, as general counsel to the transition team for our mayor in Detroit, Dennis Archer.

Among her many awards, Ms. Roberts is the recipient of the 1996 D. Augustus Straker Bar Association Trailblazer Award and the Wolverine Bar Association's Damon J. Keith Community Spirit Award for 1997.

In 1987 and 1988, she served as president of the Wolverine Bar Association of Michigan, and in 1996-97 she served as the first black female president of the State Bar of Michigan.

In addition to her impressive professional record, she has taken an active interest in community organizations that have greatly benefited her State and, in particular, metropolitan Detroit. She served on the board of directors of the Fair Housing Association of Detroit from 1985 to 1991 and was its chair from 1986 to 1989.

In addition, she has worked with Big Brothers, Big Sisters of Michigan since 1987, serving as secretary, vice president, and member of the board of directors and advisory board.

I think all of this points, Mr. Chairman, to an individual who brings a well-rounded, as Senator Levin indicated, and very successful set of legal credentials here, but also somebody who has consistently given to her community and to her State as a volunteer in a variety of very important ways.

So, in sum, Ms. Roberts has built a distinguished record of professional and public service over her many years in the legal profession, and I am pleased to be here today to join Senator Levin in presenting her to the committee.

The CHAIRMAN. Thank you, Senator Abraham. I think that is high praise, indeed, for both Senators to come and do this.

I think, Fred, you are here for the same nominee.

#### **STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Representative UPTON. I am, Mr. Chairman. If I might, I just want to echo the remarks of both our Senators and add, certainly, a Republican voice to this, too.

I am not a lawyer. When I had the opportunity to recommend judges to President Reagan and President Bush, as we did not have a Republican Senator in some of those years, I had a committee made up of lawyers that interviewed and evaluated the credentials of those candidates before this committee for Michigan, and many of those members that I had then on that committee obviously are very active in the Michigan Bar Association. And they called me, and they told me about Victoria Roberts and the great things that she had done both as president and vice president of the State Bar, and I had the opportunity to meet with her the other day. I, too, just want to add my 2 cents' worth that I think that she would be

a valuable addition to our State, and I would urge that the committee favorably report her to the Senate floor for quick confirmation.

I thank you for allowing me the opportunity to come.

The CHAIRMAN. Thank you very much, and we appreciate you coming over from the House.

Senator LEAHY. Mr. Chairman, could I just add something here? Usually Congressman Upton and I agree, sometimes disagree, but I think we both agree that she would make a great judge.

Representative UPTON. That is right. Great. That is true.

The CHAIRMAN. All right. Thank you.

Representative UPTON. And probably not a sixth judge, but maybe a fifth.

Senator LEAHY. You might, too, Spence. [Laughter.]

The CHAIRMAN. Well, thank you for being here. Given the folks who had to leave at the conclusion of—let me just say we will put all statements of those who had to leave in the record as well. So we will keep that record open.

[The prepared statement of Ms. Kilpatrick follows:]

PREPARED STATEMENT OF HON. CAROLYN CHEEKS KILPATRICK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Thank you for the opportunity to speak to you today. I rise today in strong support of the nomination of Victoria A. Roberts as a United States District Judge to the Eastern District of Michigan. Attorney Roberts has been a strong fighter for truth, justice and fairness for all Americans, has been dedicated to many non-profit organizations and community service programs, and her 20 years of scintillating service as an attorney has earned her the right to be a U.S. District Judge. I unequivocally support her nomination, and urge that the Senate Judiciary Committee move as quickly as possible to ensure the confirmation of her most worthy nomination.

As many of the members of this Committee know, Congress passes many worthy laws that protect the human rights of our citizens. It is up to the courts of our nation, however, to ensure that these laws have real effect and purpose for all of our constituents. America is based upon the idea that all of its citizens are endowed "with certain inalienable rights" and that the purpose of Congress is "to secure these rights." Indeed, the idea of "rights" is the very crux and fulcrum of the balance of America. The idea of "rights" is why the City of Detroit recently welcomed the young man from China who was recently released to freedom—in the United States of America.

As Members of Congress, we have all taken an oath to support and protect the Constitution of the United States. It is the role and purpose of our courts, who have the power of judicial review, to declare those laws that are Constitutional and those that are void. The power to breathe life into the Constitution, and the Bill of Rights, is so sacred that only the best and the brightest should have this opportunity to do so. Indeed, the right against self-incrimination has been part of the Constitution since 1791; it was the case of *Maranda v. Arizona* in 1966 that required that police officers advise citizens of their rights upon being arrested. There are many other cases and legal precedents that evolved in our Constitution and Bill of Rights surpassing the Magna Carta, that English precedent that established the principle that the monarch's power was not absolute. I merely cite these examples to illustrate the importance and gravity of the judicial branch of government, and the persons who embody it.

Attorney Roberts has provided the members of this august body with a detailed, 25 page record of her achievements. In particular, Attorney Roberts has intervened in a significant case that made property owners change their rental practices and train their staff so as to not discriminate based on race or familial settings; won a decision that protected the rights of a mentally-impaired person from inappropriate and unethical behavior from their doctors; and a significant "takings" case for the City of Detroit. Attorney Roberts is the current President of the Michigan Bar Association, has been a Vice-President of the Women Lawyers Association of Michigan, is a member of the Special Committee on the Evaluation of the Magistrate Program for the U.S. District Court for the Eastern District of Michigan, and is a mediator for Wayne County Mediation Tribunal.



Attorney Roberts does not leave her obligations to the community as a barrister. She has served as a Chairperson of the Board for the Fair Housing Center of Metropolitan Detroit, was a member of the Board of Directors of the Big Brothers Big Sisters of Michigan; and is a life member of the NAACP. A few of the awards that Attorney Roberts has earned include being named as the "Outstanding Member of the Year" and "Trailblazer Award" from the Wolverine Bar Association; the "Member of the Year" award from the National Bar Association for the Michigan region; and the Distinguished Service Award from the University of Detroit—Mercy.

Attorney Roberts has true bi-partisan support. This is because she has earned the respect and admiration of her peers and friends. It is my hope and desire that the wisdom of this Committee, and that of the Senate, prevail in quickly confirming the nomination of Attorney Roberts to this position.

[The prepared statement of Senator Moynihan follows:]

PREPARED STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Today is a great day for New York. I am pleased to present to the committee three impressive New Yorkers nominated to positions on the Federal bench.

ROSEMARY POOLER

First, allow me to present to the committee Judge Rosemary S. Pooler, nominated to serve on the United States Circuit Court of Appeals for the Second Circuit.

On July 14, 1993, I had the pleasure of recommending Rosemary Pooler to be a U.S. District Court Judge for the Northern District of New York, a position which she currently holds. She was unanimously confirmed by the Senate on August 9, 1994. I might note that Judge Pooler is the first woman to serve on the Northern District bench and that she is the recipient of the New York Women's Bar Association 1996 Founders' Award.

In 1990 Rosemary Pooler was elected a Justice of the Supreme Court for the State of New York. She served on the Supreme Court bench until she was sworn in as a District Court Judge in 1994.

Judge Pooler has been a tireless public servant, acting as Director of the City of Syracuse's Consumer Affairs Unit, Councilor on the Common Council of the City of Syracuse, Executive Director of the New York State Consumer Protection Board, and Commissioner of the New York State Public Service Commission.

Judge Pooler was graduated from Brooklyn College and earned her law degree from the University of Michigan Law School. She also holds a Masters degree in History from the University of Connecticut and a Graduate Certificate in Regulatory Economics from the State University of New York at Albany. Judge Pooler has taught at the Syracuse University College of Law and is the author of numerous scholarly articles in addition to her decisions.

I believe that Judge Pooler's distinguished record merits appointment to the United States Court of Appeals for the Second Circuit and I am confident that, upon confirmation, she will serve with high distinction.

ROBERT D. SACK

Robert D. Sack has also been nominated to serve on the United States Court of Appeals for the Second Circuit.

A graduate of the University of Rochester, Mr. Sack received his law degree from Columbia University School of Law. He has had a distinguished career as a member of the Bar. Robert Sack began his legal career as a Law Clerk to Judge Arthur S. Lane of the United States District Court for the District of New Jersey. He worked at Patterson, Belnap, Webb & Tyler in New York for twenty-two years, taking a brief leave of absence in 1974 to serve as a special counsel to the House of Representatives Committee on the Judiciary's Impeachment Inquiry Staff. He is currently a partner at Gibson, Dunn & Crutcher in New York.

In addition, Mr. Sack is a Member of the Board of Directors of New York Lawyers for the Public Interest and the National Council on Crime and Delinquency. Since 1995 he has served as a Commissioner on the New York City Commission on Public Information and Communication, appointed by Mayor Giuliani. Might I add that Mr. Sack was also named one of the one hundred best lawyers in New York by New York Magazine in 1995.

## RICHARD W. ROBERTS

Richard W. Roberts, a native New Yorker who now makes his home in Washington, has been nominated to be a United States District Judge for the District of Columbia.

Mr. Roberts was born in Manhattan, raised in Queens, and educated in the New York City public schools. He was graduated cum laude from Vassar College, received his Masters in International Administration from the School for International Training in Vermont, and his law degree from Columbia University School of Law.

Mr. Roberts' career has been a distinguished one. He has represented public housing tenants and battered spouses at Morningside Heights Legal Services, served as Acting Chief of the Criminal Section and as a trial attorney at the Department of Justice, worked as an Associate at Covington & Burling and as an Adjunct Professor at the Georgetown University Law Center.

Mr. Roberts has worked for the U.S. Attorney's Office, both in the Southern District of New York and in Washington where he served as the Principal Assistant U.S. Attorney. Currently, Mr. Roberts is Chief of the Criminal Section of the Civil Rights Division of the Department of Justice. He received the Senior Executive Service Performance Award for his work there.

We have before us today three distinguished nominees. I am confident that, upon confirmation, each one will serve with high distinction.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

I appreciate this opportunity to introduce to the Committee Richard Roberts to be District Court Judge for the District of Columbia.

Mr. Roberts received his degree from Vassar College in New York before attending Columbia University Law School on two fellowships. He received his J.D. in May 1978, being recognized as Moot Court Best Speaker and serving as Associate Editor of the Human Rights Law Review. In the same year that he graduated from law school, he attended the School for International Training on an American Political Science Association Graduate Fellowship.

Mr. Roberts is a member of the New York and District of Columbia Bar. His professional career has primarily been in the District of Columbia where he started as a Special Assistant U.S. Attorney prosecuting criminal trials. From September 1978 to October 1982, he was a trial attorney with the U.S. Department of Justice, working in their criminal and civil rights divisions. He supervised FBI investigations and prosecuted cases of criminal civil rights violations nationwide including police brutality, involuntary servitude and racial violence.

Mr. Roberts joined Covington & Burlington as an Associate from November 1982 to February 1986, representing corporate clients in federal grand jury investigations. But he could not stay away from public service. Mr. Roberts became Assistant U.S. Attorney, working in New York for two and a half years and then in the District of Columbia for nearly five years. As Assistant U.S. Attorney, he represented the U.S. in all aspects of federal criminal prosecutions, including grand jury and appellate proceedings. He was promoted to Principal Assistant U.S. Attorney in October 1993, serving as second-in-command in the office, providing counsel on major personnel and policy issues and on major cases. In June 1995, he became Chief of the Criminal Section in the Civil Rights Division at the Department of Justice.

Mr. Roberts' extensive knowledge of criminal law and varied experience in handling cases makes him a viable candidate for this position with the District Court in the District of Columbia.

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REMARKS INTRODUCING ROBERT DAVID SACK

I would like to thank the Chairman and the Committee for moving on this nomination and am pleased to have this opportunity to introduce Mr. Robert Sack, who has been nominated to the Second Circuit.

Mr. Sack is a graduate of the University of Rochester, where he received his B.A., and of Columbia University School of Law, where he received his LL.B. Upon graduating from law school, Mr. Sack clerked for the Honorable Arthur S. Lane in the U.S. District Court for the District of New Jersey. He joined the firm of Patterson, Belknap, Webb & Tyler in 1964, staying with them until 1986, making partner in 1970. Since May 1986, Mr. Sack has been a partner with the firm of Gibson, Dunn & Crutcher, focusing largely on litigation and media matters. He has represented



Dow Jones as principal outside counsel, world-wide, on a daily basis and has also represented newspapers across the country.

Since 1978, Mr. Sack has been the Secretary for Ottaway Newspapers. His interest in media led to his position for nearly ten years as the vice president and de facto director of the William F. Kerby and Robert S. Potter Funds which supports legal defense of poor journalists abroad. He is a Member of the Board of Directors of the New York Lawyers for the Public Interest and has served on the Board, and for two years as Chairman, of the National Council on Crime and Delinquency. New York Magazine listed Mr. Sack as one of the 100 Best Lawyers in New York in their 1995 issue.

Mr. Sack has written extensively—including treaties and articles, and delivered lectures—on issues ranging from commercial speech to defamation. He has become an expert in issues relating to communications and has testified before Congress in 1986 and 1987 regarding tobacco advertising and computerization of campaign contribution records. His expertise in this area of law earned him the position of Commissioner of the New York City Commission on Public Information and Communication from 1995 to the present.

Mr. Sack's experience and expertise will be a tremendous asset for this position and his in-depth knowledge of all facets of communication law makes him a capable and well-qualified nominee to the Second Circuit.

I thank the Committee for this opportunity to present Mr. Robert Sack and urge the Committee's swift consideration of his nomination to the Second Circuit.

#### REMARKS INTRODUCING ROSEMARY SHANKMAN POOLER

I am pleased to present to this Committee an extremely qualified nominee to the Second Circuit. Judge Rosemary Pooler has capably served New York State in a number of different capacities and I look forward to her confirmation to be Circuit judge.

Judge Pooler received her undergraduate degree from Brooklyn College, a Masters degree from the University of Connecticut and her Law Degree from the University of Michigan Law School. While she left the state to receive her graduate level education, her entire professional career has been in New York—working for the people in our state.

After five years in private practice in Syracuse, New York, she served as an Assistant Corporation Counsel and Director of the City of Syracuse Consumer Affairs Unit. She joined the Common Council in the city of Syracuse and was Upstate Regional Coordinator of the New York Public Interest Research Group (NYPIRG). But that is only a taste of her diverse and extensive public service experience.

Judge Pooler served for five years as Chair and Executive Director of the State Consumer Protection Board and five years as one of seven commissioners of the New York State Public Service Commission, appointed by Governor Hugh Carey.

She viewed the legislative process, serving as Staff Director of the New York State Assembly's Subcommittee on Structure and Management of Regulated Utilities. She left there in order to take a prestigious position with Syracuse University College of Law—my alma mater—as a visiting professor.

For nearly 10 years, Judge Pooler served as an officer and member of the Board of the United Way of Central New York. For the last twelve years, she served on the board of a not-for-profit group that serves the elderly, particularly the elderly poor.

Her long list of credentials earned her a position on the State Supreme Court in 1991 and led to her appointment in 1994 as a U.S. District Court Judge for the Northern District of New York after confirmation by this Committee.

Judge Pooler's experience in general practice, managing government agencies, preparing for legislative hearings and trials and serving as a trial judge provides her with the ability to be a thoughtful, fair judge for the Second Circuit. She has ably served the people of New York throughout her entire career and I am confident that she will vigorously enforce the laws of this country.

I look forward to the Committee's swift approval.

The CHAIRMAN. Senator Bond, we will turn to you at this time.

#### STATEMENT OF HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman, Senator Leahy. It is a real pleasure to be able to join with my distinguished



colleague, the senior member of Missouri's congressional delegation, Congressman Clay, to urge that this committee act favorably upon and send to the floor for confirmation the nomination of Judge Ronnie White. Judge White is here with members of his family, and when he is called on, I am sure he will be able to introduce them, so I will leave that honor to the judge.

Judge White was born in St. Louis, MO, May 31, 1953. He earned a bachelor of arts degree from St. Louis University and graduated from the University of Missouri—Kansas City Law School in 1983. He served as a legal assistant for the Department of Defense Mapping Agency and practiced as a trial attorney for the public defender's office in both the city and county of St. Louis.

In 1987, he entered private practice as a principal with the law firm of Cahill, White & Hemphill and, while in private practice, was elected to serve three terms in the Missouri house of representatives. He served as chairman of the house judiciary and ethic committee as well as the civil and criminal justice committees.

In 1993, St. Louis Mayor Freeman Boseley, Jr., appointed Judge White as a city counselor for the city of St. Louis, and in 1994, Gov. Mel Carnahan appointed Judge White to the Missouri Court of Appeals for the Eastern District.

In 1995, Judge White served as a special judge for the Missouri Supreme Court and as an adjunct faculty member for the National Institute of Trial Advocacy. Governor Carnahan appointed Judge White to the Missouri Supreme Court in October 1995.

Judge White is a former commissioner of the St. Louis Housing Authority and a former board member of the Herbert Hoover Boys and Girls Clubs.

Judge White was nominated by President Clinton for the judgeship on the U. S. District Court for the Eastern District of Missouri on June 26, 1997, and I very much appreciate the committee giving him a hearing today.

My close friends and colleagues in the practice of law who have had the pleasure of working with Judge White over several years have assured me that he is a man of the highest integrity and honor. Judge White understands that the role of a Federal district judge is to interpret the law, not make the law.

I have always believed that one of the most important duties I have as a Senator is to evaluate carefully the nominees for the Federal judiciary. I believe Judge White has the necessary qualifications and character traits which are required for this most important job.

I thank you, Mr. Chairman and Senator Leahy, and I appreciate your allowing Congressman Clay and me to testify on his behalf.

The CHAIRMAN. We are very happy to have both of you. I think it is a great honor for this nominee to have you both here. And we know you are busy, Senator Bond. If you need to leave, we understand.

Congressman Clay, we are honored to have you here, and we look forward to hearing your testimony as well.

**STATEMENT OF HON. BILL CLAY, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF MISSOURI**

Representative CLAY. Thank you, Mr. Chairman and Senator Leahy. Of course, it is my privilege and honor to appear before this distinguished panel to introduce Judge Ronnie White, the nominee for the Federal District Court for the Eastern District of Missouri.

I have known Judge White for many years and have had the privilege of witnessing his sterling and historic career which Senator Bond just elucidated. His intellect and his judicial temperament are towering. Although only 45 years old, he has shattered barriers and achieved greatness in the process.

As Senator Bond has testified, he has worked as a trial attorney in the public defender's office in both the city of St. Louis and St. Louis County, and he has had extensive experience in private practice.

Judge White began his judicial career in 1994 when he was appointed by the Governor, as Senator Bond has said, to the Missouri Court of Appeals for the Eastern District. Realizing his legal brilliance, 1 year later the Governor appointed Judge White to the Missouri Supreme Court.

In addition to distinguishing himself in the legal profession, Judge White has also been a star in other arenas as well. He served three terms in the State legislature, is a former commissioner with the St. Louis Housing Authority, and was a member of the gender fairness implementation committee, which was appointed by the State Supreme Court—was a ruling of the State Supreme Court that provided for equity, gender equity.

He has been an outstanding jurist who has earned the respect and admiration of his colleagues and others familiar with his work. Judge White is a shining star who has risen very quickly and ably during his judicial career, and I am confident that he will be an outstanding addition to the Federal district court. And I ask your favorable consideration in confirming him to this significant post.

I might cite one incident that attests to the kind of relationship that Judge White has with many, and that is with a member of this committee—Senator Ashcroft. When I recommended Judge White to the President for nomination and the President nominated him, one of the first people that I conferred with was Senator Ashcroft. Senator Ashcroft then said he would get in touch with me at a later date.

At a later date, he told me that he had appointed six of the seven members to the Missouri Supreme Court. Ronnie White was the only one he had not appointed. He said he had canvassed the other six, the ones that he appointed, and they all spoke very highly of Ronnie White and suggested that he would make an outstanding Federal judge. So I think that is the kind of person that we need on the Federal bench.

I thank you for permitting me to testify this afternoon.

The CHAIRMAN. Thank you, Congressman Clay. We appreciate you taking time to come over. We know it is a long way over here from the House, but we appreciate you being here.

Representative CLAY. Thank you.

The CHAIRMAN. Thank you very much.

We will now turn to Congresswoman Norton.



**STATEMENT OF HON. ELEANOR HOLMES NORTON, A REPRESENTATIVE IN CONGRESS FROM THE DISTRICT OF COLUMBIA**

Representative NORTON. Thank you, Mr. Chairman. I appreciate the privilege of appearing before you to introduce Richard Roberts, who has been nominated to sit on the U.S. District Court for the District of Columbia. I will let Mr. Roberts introduce his own family. I will only say that he hopes to follow in his wife's footsteps because she has already been confirmed by the Senate of the United States.

Mr. Roberts has taken a classic route to this day and to his nomination for a judge by performing exemplary service as a Federal prosecutor most of his professional life. But this prosecutor has not been an ordinary U.S. attorney. He has performed with great distinction in unusually high and important positions in the Federal Government. He has been the principal U.S. attorney for the District of Columbia, which made him second in command of the largest U.S. Attorney's Office in the United States. He was second to Eric Holder, whom this committee has confirmed to be, of course, the deputy to Attorney General Reno.

While he was at the U.S. Attorney's Office, Mr. Roberts himself handled many difficult, high-profile prosecutions, and later supervised that very large office. He was recruited by this administration to come to the Justice Department itself and has served with great distinction in the Department as chief of the Criminal Section of the Civil Rights Division.

In short, this nominee has had deep experience with every aspect of civil and criminal litigation of precisely the kind that comes before the U.S. district court on which he seeks to serve. A graduate of Vassar and of Columbia, he has also deeply been involved with young people in the District in order to keep them out of the criminal justice system where Mr. Roberts has spent his career. He is a source of special pride to us in the District of Columbia, and it is my special pleasure to present him and to ask you for his support for U.S. District Court for the District of Columbia.

The CHAIRMAN. Thank you so much. That is high praise, indeed, and we really are honored that you would take time to come over, Congresswoman Norton.

Representative NORTON. Thank you, Mr. Chairman.

The CHAIRMAN. Thanks very much.

Well, if we can have the—are there any others here to testify, any other members?

Senator LEAHY. Mr. Chairman.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Mr. Chairman, I will simply put in the record my statement. I am glad to see that we have two nominees here from the second circuit. We have others pending, awaiting votes on the floor, and I would urge your and the Senate leadership's help in moving them quickly. Judge Winter has declared a judicial emergency in the second circuit. I watch this with some attention, of course, because it is my circuit.

All of the Senators, the six Senators from the States representing the second circuit have written letters to the majority leader to move forward with the judges. The first one is Sonia Sotomayor



whom I spoke about yesterday on the floor. The other is Chester Straub. Now we will have Rosemary Pooler and Robert Sack, who were nominated several months ago on November 6, 1997.

So I would hope these nominations might move quickly, and I know you will try to cooperate, Mr. Chairman. But we are getting into a very, very difficult situation in the second circuit.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Today the Senate Judiciary Committee has an important opportunity to move forward on two nominations to the Second Circuit Court of Appeals and on a number of district court nominations. I thank the Chairman for proceeding with the nominations of Judge Pooler and Mr. Sack and the other nominees here today.

The President sent us these Second Circuit nominees last November, more than six months ago. The Second Circuit is suffering from the judicial vacancy crisis with five vacancies among its 13 authorized judgeships. Chief Judge Winter has again been forced to certify the emergency circumstances caused by multiple continuing vacancies. The Chief Judge has certified the judicial emergency and authorized a three-judge panel to proceed again in May with only one Second Circuit judge. This is a continuing disgrace, and the fact that the Senate has allowed it to continue amounts to legislative malpractice.

I believe that the emergency that confronts the Second Circuit is real and that we should be taking additional steps to respond to it. When the Senate took a two-week recess in April without having voted on a single nominee to the Second Circuit all year, I introduced S.1906, the Judicial Emergency Responsibility Act of 1998. My bill asks the Senate to vote on judicial nominees to Circuits with certified emergencies under section 46(b) of title 28, United States Code. These are Circuits that cannot provide even two judges to the formation of appellate three-judge panels. My bill would require a vote on nominees, who have been pending for 60 days or more, before the Senate recesses for a 10-day break. The Senate should not take a vacation while a United States Court of Appeals does not have enough judges to function properly and when the Senate has pending before it nominees to fill those vacancies.

We have to find a way to end the unexplained stalling on the Senate floor and move forward to consider nominees for the courts of appeals, and then vote on them without these delays of many months.

I do not believe that the Senate should be leaving for another recess at the end of next week while leaving the Second Circuit with vacancies for which it has qualified nominations pending. This is too reminiscent of the government shutdown only two years ago and the numerous recent times when the Republican congressional leadership has recessed without completing work on emergency supplemental and disaster relief legislation, on the federal budget, and on campaign finance reform.

All four nominees to the Second Circuit ought to be voted on and ought to be confirmed before the upcoming Memorial Day recess. This hearing is a small but necessary step in that direction.

With the help and support of Chairman Hatch the nomination of Judge Sonia Sotomayor was reported to the Senate by a vote of 16 to 2 on March 5, 1998, over two months ago. Of course, her nomination has been pending since last June. Still, no action has been taken or scheduled on that nomination by the Senate, and no explanation for the delay has been forthcoming. This is the oldest judicial nomination pending on the Senate Executive Calendar. In spite of an April 8 letter to the Senate Republican Leader signed by all six Senators from the three States forming the Second Circuit, urging prompt action, this nomination continues to be stalled by anonymous objections.

Judge Sonia Sotomayor is a qualified nominee who was confirmed to the United States District Court for the Southern District of New York in 1992 after being nominated by President Bush. She attended Princeton University and Yale Law School. She worked for more than four years in the New York District Attorney's Office as an Assistant District Attorney and was in private practice with Pavia & Harcourt. She is strongly supported by Senator Moynihan and Senator D'Amato. She is a source of pride to Puerto Rican and other Hispanic supporters and to women. When confirmed she will be only the second woman and the second judge of Puerto Rican descent to serve on the Second Circuit.

On April 29, the Judiciary Committee also reported the nomination of Chester J. Straub to be a member of the Second Circuit to the Senate. That nomination has been received in February. Mr. Straub now awaits final action by the Senate.

This hearing includes the two remaining nominees to vacancies on the Second Circuit. Both Judge Rosemary Pooler and Robert Sack were nominated several months ago, on November 6, 1997.

Judge Pooler received her law degree from the University of Michigan Law School, had a distinguished career in New York State government and previously served as a New York Supreme Court Justice. She was appointed to the United States District Court for the Northern District of New York four years ago. She was active with the United Way Campaign and with efforts to serve the elderly.

Robert Sack received his law degree from Columbia University School of Law. He is a partner in the law firm of Gibson, Dunn & Crutcher LLP. He has written extensively on libel and slander and represents, as principal outside counsel, Dow Jones & Company, Inc., publisher of The Wall Street Journal.

I look forward to their appearing today and will urge the Committee to consider them and send their nominations to the Senate for favorable action without delay at our executive business meeting next week.

In his most recent Year-End Report on the State of the Judiciary, Chief Justice Rehnquist warned that persisting vacancies would harm the administration of justice. The Chief Justice of the United States Supreme Court pointedly declared: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."

The people and businesses in the Second Circuit need additional, qualified federal judges confirmed by the Senate without delay. Indeed, the Judicial Conference of the United States recommends that in addition to the five vacancies, the Second Circuit be allocated an additional two judgeships to handle its workload. The Second Circuit is currently suffering harm from Senate inaction. That is why the Chief Judge of the Second Circuit had to declare the Circuit in a state of emergency.

Judge Sotomayor, Judge Pooler, Robert Sack and Chester Straub can and should all be confirmed to the Second Circuit before the Senate adjourns for its Memorial Day recess.

The CHAIRMAN. Thank you, Senator Leahy.

If we could have all five nominees come forward: Rosemary S. Pooler, Robert D. Sack, Victoria A. Roberts, Richard W. Roberts, and Ronnie L. White. If you will all stand, please take the oath.

Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge POOLER. I do.

Mr. SACK. I do.

Ms. ROBERTS. I do.

Mr. ROBERTS. I do.

Judge WHITE. I do.

The CHAIRMAN. Thank you. Please be seated.

I notice we have a vote on, so why don't I ask you to go vote and then come back, and I will start. Then I will go vote, and you take over.

Senator Leahy is going to go vote, and then he is going to come back until I get back. Then he has another committee hearing, but he is going to try and accommodate us so that we don't have to have a big gap or delay here.

Senator LEAHY. I do want to note on the record, unless there is some extraordinary thing that comes out of this hearing I am not expecting—I have read the records of each one of these nominees, Mr. Chairman, and I intend to be very supportive of each of them. At least one I have known for some time. But I am going to be very supportive of them.

Thank you.

The CHAIRMAN. Thank you, Senator.

In the order that I called you as witnesses—Ms. Pooler, Mr. Sack, Ms. Roberts, Mr. Roberts, and Mr. White—do any of you



have any comments you would care to make? And you might want to introduce your families and guests who are with you, or friends.

**TESTIMONY OF ROSEMARY S. POOLER, OF NEW YORK, TO BE  
U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT**

Judge POOLER. I would like to do that, Mr. Chairman. I am Rosemary Pooler. Thank you for holding this hearing.

My father is not here. He is 92½ and thought that he would save his energy. I am disappointed my two children are on the west coast, a daughter taking final exams at Oregon State University, and a son in California who couldn't get here.

My husband is here, William Pooler.

The CHAIRMAN. Where are you seated, Mr. Pooler? Oh, I see. Great to have you here.

Judge POOLER. My cousin, Susan Horn; my law clerk, Tania Anderson. Some very dear friends, some of a lifetime, practically: Tina Stoll and Peter Sherman, Alan and Helene Ward; Layne Yranian, who used to be in the Northern District of New York, is now living and working here in Washington; Stephanie Nagel, another former Syracusean who is here.

Thank you for the opportunity.

The CHAIRMAN. Glad to have you here.

Mr. Sack.

**TESTIMONY OF ROBERT D. SACK, OF NEW YORK, TO BE U.S.  
CIRCUIT JUDGE FOR THE SECOND CIRCUIT**

Mr. SACK. Thank you. I very much appreciate, Mr. Chairman, both the committee and the committee staff for what they have done to prepare for this hearing and for holding it. I am personally deeply moved to be sitting in this committee room today.

I would like to, if I may, first express my regret that my wife, who is recovering from surgery, is not here.

The CHAIRMAN. We understand that.

Mr. SACK. She is very deeply disappointed. As you can imagine, she has been looking forward to this at least as eagerly as I have. And my father is on the west coast and couldn't make the trip.

However, all my three children are here. If the chair will permit, perhaps I can ask them to stand as I name them. My children: Deborah, Suzanne, and my son, David. And I would also like to recognize my secretary, Ann Wisniewski, who is here, and finally, to acknowledge, without naming them, some of my partners who are in the chamber today and whose support, emotional more than anything else throughout this process, is something for which I am immensely grateful.

The CHAIRMAN. Well, thank you. We are happy to welcome you all here, and you must be very proud.

Let's go now to Victoria Roberts.

**TESTIMONY OF VICTORIA A. ROBERTS, OF MICHIGAN, TO BE  
U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF  
MICHIGAN**

Ms. ROBERTS. Thank you, Mr. Chairman. I just want to thank you, as the others have, for convening this hearing and for allowing me the opportunity to appear.



I will introduce some people who have traveled far and who are very important to me. My mother, Grace Roberts, is here. She is standing on her own.

The CHAIRMAN. Mom, we are happy to have you here. [Laughter.]

Ms. ROBERTS. My sister, Theresa Smith; my sister, Joann Williams; my daughter, Rachel Gehrls, who has just completed her first year at the University of Michigan; my boyfriend, Sterling Anthony; and one of my former law partners, Richard Soble.

The CHAIRMAN. Great.

Ms. ROBERTS. Thank you, Mr. Chairman.

The CHAIRMAN. We are happy to welcome all of you here.

Mr. Roberts? You two aren't married, are you? [Laughter.]

The CHAIRMAN. She has a boyfriend. I was wondering. We have these laws against consanguinity, you know, too close relationships. Go ahead.

### **TESTIMONY OF RICHARD W. ROBERTS, OF THE DISTRICT OF COLUMBIA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA**

Mr. ROBERTS. You don't have to worry about it this time.

Thank you very much, Mr. Chairman. It is an honor to be here, and I appreciate your convening this hearing for us. And I would like the opportunity to introduce my family as well. I am very delighted that my wife, Ambassador Vonya B. McCann, is here. I am particularly grateful to her for having interrupted her bilateral negotiation on a treaty with the Governments of Spain and Italy to fly back across the Atlantic to be here. So I am grateful to her for being present.

The CHAIRMAN. Could she stand?

Mr. ROBERTS. If she could stand, I—

The CHAIRMAN. So happy to have you. We are honored to have you here.

Mr. ROBERTS. My children—Jordan Nash McCann Roberts, who is age 7; and my daughter, Jillian, age 4—are here as well.

The CHAIRMAN. There is quite a disparity in age there. That is great.

Mr. ROBERTS. My sister, Antoinette Roberts Smith, is a veteran public school teacher here in the District of Columbia.

The CHAIRMAN. Happy to have you here.

Mr. ROBERTS. Our childcare provider of 7 years, Mrs. Gladys Draper, is here. And I am very happy that my uncle, Gerald Roberts, who will be celebrating his 89th birthday, is also here on his own and representing his three other octogenarian siblings, including my father, Mr. Beverly Nash Roberts, who is in New York, but is here in spirit. And I see now that I have a number of friends and colleagues and former colleagues from the Department of Justice and the U.S. Attorney's Office who have joined me as well, and I am grateful for their presence.

The CHAIRMAN. Great. Glad to have you all here.

Mr. White.

**TESTIMONY OF RONNIE L. WHITE, OF MISSOURI, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI**

Judge WHITE. Thank you, Mr. Chairman. I, too, like the others, would like to thank you for convening this hearing this afternoon and providing me with an opportunity to appear. I don't have as many friends and relatives here as the others, but I would like to introduce those who are here with me: my wife, Sylvia; my son, Ronnie, who is real excited about being in Washington.

The CHAIRMAN. Way to go, Ronnie.

Judge WHITE. And my administrative assistant, Debbie Eiken, from Holts Summit, MO.

**QUESTIONING BY SENATOR HATCH**

The CHAIRMAN. Good to have you here.

Well, we are happy to welcome all of you here, the family members and friends. It is always nice to see you and nice to have you in these hearings. These are important hearings. This is one of the most important things that the Judiciary Committee does.

I have some questions for you. Maybe we can start with the two circuit court nominees first.

Are both of you committed to follow Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your district, the Supreme Court in your particular case, and giving the rulings of the Supreme Court full force and effect even if you personally disagree with such precedent or rulings?

Judge POOLER. I am absolutely so committed, Mr. Chairman.

Mr. SACK. Absolutely and without question, Mr. Chairman.

The CHAIRMAN. What would you do if you believed the Supreme Court had seriously erred in a decision? Would you nevertheless apply that decision or your own best judgment on the merits?

Mr. SACK. I would be obligated absolutely to follow the Supreme Court.

The CHAIRMAN. Ms. Pooler.

Judge POOLER. As would I, Mr. Chairman. I would follow the Supreme Court precedent.

The CHAIRMAN. Well, take, for example, the Supreme Court's recent decision in *City of Bourne v. Flores* where the Court struck down the Religious Freedom Restoration Act. A lot of us feel like they made a terrific mistake there.

The chairman feels like they made a——

[Laughter.]

Mr. SACK. I would be required, nonetheless, to follow the ruling of the Supreme Court of the United States, Mr. Chairman.

The CHAIRMAN. Well, as you can tell, I don't like that answer.

How about yours, Ms. Pooler?

Judge POOLER. I also would be required to follow that decision and know that the Congress has many times tried to draft legislation yet again that sometimes meets the constitutional challenge.

The CHAIRMAN. This really burns me up that you are not agreeing with me. [Laughter.]

The fact is it is up to us to draft legislation that is constitutionally permissible.

Under what circumstances do you believe it appropriate to declare a law unconstitutional? Should we start with you, Ms. Pooler?

Judge POOLER. Well, first let me state that any enacted legislation has the presumption of constitutionality so that is not ever a casual ruling. I would look at precedent—I am sorry. I would look at precedent seeking to find that the statute or similar language had been declared constitutional, and it would be a grave decision to find that an enacted statute was unconstitutional. I have never had to do that as a district court judge. Although I have been invited many times by many of my pro se plaintiffs to do that, I have declined the invitation whenever it has been offered to me.

The CHAIRMAN. Well, thank you.

Mr. Sack.

Mr. SACK. Again, all legislation would come to a court with a very strong presumption that it is constitutional, and I would think that as an appellate judge voting for that—to rule that a statute was unconstitutional would only do it if compelled by rulings of the U.S. Supreme Court or possibly previous rulings by which I would be bound if I were to become an appellate—a judge, previous rulings by the second circuit.

The CHAIRMAN. OK. Now, you other three, you have stated—you two have stated that you would be bound by Supreme Court precedent. How about you other three who are up for these other judge-ships?

Ms. ROBERTS. Mr. Chairman, my view would be the same as that stated by the nominees for the second circuit. I believe that I would be bound by the precedents set by the Supreme Court, by precedent that has been set by the circuit courts, and that I would not have any leeway to depart from that precedent.

The CHAIRMAN. How about you, Mr. Roberts?

Mr. ROBERTS. Mr. Chairman, I would agree with the previous comments. My duty as a judge, if I am confirmed, would be to follow that precedent and to follow the Supreme Court law, not to make new law according to my own whims. I would be bound by the precedent of the Supreme Court.

The CHAIRMAN. OK. How about you, Judge White?

Judge WHITE. Mr. Chairman, I, too, would be bound by the legal precedent of the Supreme Court and the circuit court. Unlike my job as a Supreme Court judge now, as a district court judge I will have taken an oath to follow the laws and be bound by the laws of the United States.

The CHAIRMAN. Let's start with you again, Mr. White, and then I am going to have to leave to go vote. But do you have any legal—and I will ask this of all of you, and we will just go across the table.

Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge WHITE. Absolutely not, Mr. Chairman. The U.S. Supreme Court has ruled in several cases that the death penalty is constitutional, it doesn't violate the eighth amendment, and as a Supreme Court judge, I have written opinions affirming death sentences and have concurred in many others.

The CHAIRMAN. Judge Pooler.



Judge POOLER. Mr. Chairman, there is nothing in my constellation of personal beliefs that would keep me from enforcing the law as promulgated by the Supreme Court and my circuit.

The CHAIRMAN. OK.

Ms. ROBERTS. Mr. Chairman, if a capital case was before me for trial, I would have no problem imposing the death penalty if that is what is required.

The CHAIRMAN. Mr. Roberts.

Mr. ROBERTS. Mr. Chairman, I, too, would follow the law, and, indeed, I have followed the law as the chief of the criminal section in the civil rights division in that the first Federal death penalty case in a civil rights Federal matter was sought and imposed during my terms as the chief of the criminal section.

The CHAIRMAN. OK. Mr. Sack.

Mr. SACK. I would have no such compunctions, Mr. Chairman. I would follow the law.

The CHAIRMAN. Let me ask you, please state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions—that is, hiring, promotion, or layoffs—college admissions and scholarships awards, and the awarding of government contracts. What would be your best independent legal judgment with regard to their lawfulness under the equal protection clause of the 14th amendment? Mr. White.

Judge WHITE. I think they would be lawful, but I believe that the U.S. Supreme Court just ruled in the *Adarand* case that if you are going to take race into the process in decisionmaking, it ought to be used and use the strict scrutiny test, which is the highest test under the Constitution, and that any decision should be drawn very narrowly.

The CHAIRMAN. Ms. Pooler.

Judge POOLER. I agree. I am prepared to follow the precedent of *Adarand*. I would also look for a compelling state interest, and, of course, what that decision did is apply to the Federal Government rules that had already been applied to the States, and that is entirely appropriate.

The CHAIRMAN. OK.

Ms. ROBERTS. Mr. Chairman, the U.S. Supreme Court in the *Adarand* case I believe cleared up all doubt and ambiguity with regard to the standard that must be applied whenever there is race-based classification involving the Government, and the Court did say that the strict scrutiny standard is to apply and that any race-based classification must serve a compelling interest and be narrowly tailored. And that is the law that I would apply.

The CHAIRMAN. Do you last two agree?

Mr. ROBERTS. I agree.

Mr. SACK. I agree, Mr. Chairman.

The CHAIRMAN. I was hoping that Senator Leahy would be back. I think we will just temporarily recess until he gets back. If he has any questions, then he will ask those, and then I will be back in a few minutes. OK? We will take a few minutes.

[Recess from 3:18 p.m. to 3:35 p.m.]

## QUESTIONING BY SENATOR ASHCROFT

Senator ASHCROFT [presiding]. If the committee would come back to order. The Senator who is the chairman, Senator Hatch, has welcomed me to begin with an opportunity to extend and continue the committee meeting. It is my understanding that he intends to return, but we are in the midst of what could be a series of votes, and so I think it is all in our best interest if we have an opportunity just to proceed. So I would be grateful for this opportunity, and I thank the nominees for having remained and for being available.

I am particularly pleased to have this opportunity to participate with you in this process, and I am happy to see someone from my home State, Judge White of the Missouri Supreme Court. I am pleased that he has the pleasure of serving with some individuals that I had the pleasure of appointing when I was Governor.

I left the State of Missouri as a result of term limits, which made it impossible for me to stay. I don't think you are term-limited. Apparently you have other reasons for being willing to leave, but I thank you very much for coming. I thank all of you for coming.

I would like to ask Judge White some questions, if I could, in order to clarify some items which I think would be important in my consideration.

Judge White, if the Supreme Court were to uphold a Federal partial-birth abortion ban as constitutional, would you have any difficulty in applying a decision of the Supreme Court which upheld such a law?

Judge WHITE. Absolutely not, Senator. When you take the oath of office, you swear to uphold the laws of the United States, and if that is the law, I would uphold it.

Senator ASHCROFT. Do any of you, any of the rest of you want to make a remark in terms of that? Do any of you feel like you would like to express yourself about that situation?

[No response.]

Senator ASHCROFT. Judge White, what about the current Supreme Court case law dealing with homosexual rights? Would you have any difficulty applying those decisions?

Judge WHITE. No, Mr. Chairman. Any law, Federal law or Supreme Court or circuit court decision, I would be—have to follow and apply as a district court judge, and I would not have a problem.

Senator ASHCROFT. So you would consider yourself bound.

Judge WHITE. By precedent and stare decisis.

Senator ASHCROFT. Ms. Pooler, are there any rights that you think are in the Constitution which haven't yet been expressed which you await an opportunity, say, ruling as a judge to bring into existence, like the right to privacy? Or do you think that the rights that exist in the Constitution have been discovered and have been properly expressed?

Judge POOLER. I don't think there are any hidden rights. I think that we know what the Constitution says, and I don't think there are any rights waiting to pop out. I certainly have no intention of finding new rights.

Senator ASHCROFT. Well, the right to privacy sort of popped out.



Judge POOLER. It sort of evolved, perhaps.

Senator ASHCROFT. Do you believe that the Constitution is a document that is subject to evolution?

Judge POOLER. I think that we must look to the intent of the Framers. Facts change, but the words don't change. I think the words are there.

Senator ASHCROFT. Mr. Sack, is that your view of the Constitution?

Mr. SACK. Yes, it is, that the words of the Constitution are applied by the Court from generation to generation to different situations, but the words and the meaning of the Constitution remain the same.

Senator ASHCROFT. Do you mean that the words mean what they meant when they were brought into the Constitution?

Mr. SACK. It is possible—let me give you an example of why I am having trouble—

Senator ASHCROFT. This is a debate. There are only about two judges on the court right now who really mean that they mean what the words—

Mr. SACK. Yes, but may I give you an example? I, of course, have been involved with the press clause, and certainly when James Madison, who, I gather, wrote it, he was not thinking about the Internet or television.

Senator ASHCROFT. If he was, he was far-sighted.

Mr. SACK. Well, he was a great Framers, but he wasn't that far-sighted. And so to say the words change, I think that he probably—when he thought “the press,” he was literally thinking of printing presses. So in that sense, there is—I think it's perfectly legitimate, nonetheless, for a judge in 1998 to consider the press to include television.

Senator ASHCROFT. Judge White, I know more about you because we happen to come from the same State.

Judge WHITE. Same State.

Senator ASHCROFT. But you spent a number of years in the State legislature, and then you spent a number of years on the bench.

Judge WHITE. That's correct.

Senator ASHCROFT. How would you distinguish the different roles? How did the different roles manifest themselves differently in terms of public responsibility, the legislative role and the judicial role?

Judge WHITE. They're both distinctly different. The legislative role is where the legislators and representatives make laws. As a judicial officer, you interpret those laws. And you're not in a law-making position as a judge. You're supposed to interpret the laws as legislated.

Senator ASHCROFT. So it is your view that the legislature develops public policy?

Judge WHITE. That's correct.

Senator ASHCROFT. And that policy is not developed in the court, it is interpreted there?

Judge WHITE. It is interpreted there.

Senator ASHCROFT. Or applied there?

Judge WHITE. Interpreted and applied there.

Senator ASHCROFT. Mr. Roberts, what would be your understanding of the different role between State judges and Federal judges?

Mr. ROBERTS. Mr. Chairman, State judges often are sitting on benches of general jurisdiction with somewhat plenary authority. Federal judges sit in courts that are creatures of the Constitution with jurisdiction that is defined by Congress. Federal courts are, by design, courts of limited authority. I think that is one of the most important distinctions that I could raise between the roles of a Federal judge and that of a State judge.

Senator ASHCROFT. Ms. Roberts, do you agree with Mr. Roberts?

Ms. ROBERTS. Yes, I do, Senator Ashcroft.

Senator ASHCROFT. Judge White, could you distinguish between the roles of a Federal and State judge? Do you think there are—do you agree with that distinction?

Judge WHITE. I agree with what both nominees have said, Senator.

Senator ASHCROFT. Judge White, I would like to ask you about one case you heard while on the Missouri Supreme Court. It was the case of *Missouri v. Damask*. It was a January 1997 decision of the court, and you dissented.

As I understand it, the case involved a fourth amendment challenge to the use of random drug checkpoints to stop the flow of drugs into and through Missouri. Although the majority of the court found the stops compatible with the fourth amendment, you dissented. If you had persuaded your colleagues, your opinion would have led to the suppression of over 37 pounds of marijuana as evidence.

That decision is of some concern to me because I know from my experience as Governor the seriousness of the illegal drug problem. Here are the questions.

Do you recall whether any of your colleagues joined you in that dissent?

Judge WHITE. I don't believe they did, Senator.

Senator ASHCROFT. Do you recall the factors that led you to disagree with the other six judges on the court?

Judge WHITE. Vaguely. I do remember that I was concerned about the way the checkpoint was set up, that it hadn't been supervised by police personnel with supervisory powers, that it was basically two sheriffs in a county deciding that they were just going to set up a checkpoint without having anybody to oversee it to make sure that there were constitutional protections in place.

Senator ASHCROFT. So it was more the structure?

Judge WHITE. It was more the structure and not the fact that they had set it up. It's how you set it up according to the laws of the State.

Senator ASHCROFT. Well, did you feel like the structure had resulted in a deprivation of constitutional rights to any of those who had been involved in the stop, or you just felt that the structure was unduly reckless or—

Judge WHITE. I thought the structure was unduly reckless and not anything with regard to the individuals who were stopped.

Senator ASHCROFT. Would there be any difference in your approach to that as a Federal judge? Or would it be basically the same as it was?

Judge WHITE. I would be guided by the precedent in other decided cases in the Federal court system and in the district courts, as well as the U.S. Supreme Court, and look at that law and be guided.

Senator ASHCROFT. Ms. Roberts, what role do you think legislative history—by which I mean the various committee reports, hearing transcripts, and floor statements—should play in the interpretation of the text of a statute?

Ms. ROBERTS. Senator, I do believe that they have some role. However, I think that the legislative history should probably be among the last resorts.

I do believe that the plain language of the statute should be what is looked at first. I think that it is also important to take a look at judicial precedent interpreting the statute or the portion of the Constitution, whatever it is that is at issue. I think that it is also possible to look at analogous situations and find out what types of interpretations have been given to analogous statutes.

The legislative history often is disjointed and incomplete, and I don't know that it would necessarily allow a judge to know exactly what the full intent of the legislators was. But it could shed some light.

Senator ASHCROFT. I don't think I've ever written any legislative history, but I have voted a lot. And somebody writes that stuff up in the backroom, and I am glad you say it is the last resort, because I think that is where we should send it—to a resort somewhere. [Laughter.]

I see that the chairman has come back, and I hope that I was properly informed that you would not be offended were I to go ahead with some questions, Mr. Chairman.

The CHAIRMAN. No, no.

Senator ASHCROFT. I am glad to see you reappear, and I thank you.

The CHAIRMAN. Thank you, Senator Ashcroft.

I am sure Senator Ashcroft was asking many interesting questions. Let me just make a caution to you. As you know, we have had a very difficult time through the years, whoever has been in charge of this committee, putting judges through the committee and getting them confirmed. We consider this probably one of the most important functions of the whole Congress because you people, once you get on the bench, you are there for life and, frankly, without any real obligation to the taxpayers or anybody else, other than your own personal moral and ethical standards.

It is my opinion that the judiciary has been the branch of government more than any other that has saved the Constitution for these 200-plus years, and the reason they have is because they have literally upheld the Constitution for the most part, even though there are some notable examples that all of us could find fault with.

But this business of activism versus nonactivism is a very important issue to many of us here. I condemn activism, whether it comes from the left or from the right, or anywhere else. It is not right for judges to substitute their own policy preferences for what the law really is. It is not right for judges to ignore precedent of the higher courts. It is not right for judges to just act as super leg-



islators from the bench just because you have these lifetime appointments.

And if all judges did this, it wouldn't be long until the Constitution wouldn't be worth the paper it is written on. And the prime example of judicial activism in this country, in my opinion, is the Ninth Circuit Court of Appeals where we have judges who could not care less what the law says. Their own judgments are more important than the law.

Sometimes the laws are wrong. Sometimes Congress gets it wrong. But unless you have a really good constitutional reason for overturning that, the best way to write that opinion is we don't agree with the law that has been written but it is the law, and help us to know why you don't agree and maybe we will change it. But to just go and substitute your own ideas for the elected representatives of the country who have to stand for re-election have done is really immoral and it really diminishes the role of Federal judges.

Frankly, that is why the Ninth Circuit Court of Appeals is reversed virtually every time they decide a case. And there are notable conservative activist decisions that we could point out. I happen to think that the *Bourne* case is one of the most notable conservative activist decisions. It seems awfully odd to me that the first-mentioned freedom in the Bill of Rights, the freedom of religion, cannot rise to the dignity that the Religious Freedom Restoration Act said it should rise to. And, frankly, I will never quite understand that decision.

On the other hand, it still is applicable to Federal issues. But I think it should have been applicable across the board.

So I caution you, as you go on the bench—in fact, we are counting on you not being activists, not being people who are radical judges who ignore the law just because you feel you know more about it than Members of Congress. Maybe you do, but that is the way our system works. And I don't think in most cases you do. But even if you do, that is still our system. You are not to make the laws. You are to interpret the laws that are made by those of us who have to stand for re-election. And if we don't do it right, we are going to get thrown out, and we all know it.

So it is important for you to understand that, and if you don't do that, then you demean and undermine not only the Constitution but our courts. And then it makes it even more difficult to get people through this committee.

It has always been difficult, so don't think it has just suddenly happened since the Republicans have taken over. You should have seen what we went through when the Democrats controlled this committee.

To make a long story short, I am on the side of the judges. I really believe that the judiciary has saved this country and saved the Constitution, and I would challenge each of you to be part of that saving of the Constitution rather than undermining of the Constitution. I think it is very important for you.

I don't mean to lecture you, but I—yes, I did. I meant to lecture you for a few minutes. [Laughter.]

It may be the last time I will be able to lecture you, but you never know. Every once in a while I get invited over to the Su-

preme Court, and you ought to hear what I tell them. Of course, they tell me, too.

But I don't mince any words when around them. I have had a major role in eight of the nine of them, and I know them all very, very well. And I don't mince any words when I am near them, and I respect all nine of them very, very much. And you should, too.

Well, we are going to try to get you through as soon as we can. We know the second circuit in particular needs you both. We believe the other districts where you folks are going to have the opportunity need you as well. So we will do the very best to get you through. I personally will be devoted to that, as I think you have seen through the intervening years as I have been chairman, and I just want to compliment each of you. You are very good people and very nice people, and I appreciate having you here and being able to meet with you and being able to go through this very important process.

I haven't asked you many tough questions. But that is not the purpose, either. I think the purpose is to just get your commitment to really live up to the rule of judging and the moral and ethical positions that judges really ought to live up to as you take these very, very important positions. I think they are the closest positions to godhood in this life. And having come from Utah, where we had Willis Ritter, who thought he was God—and so did everybody else, as a matter of fact. [Laughter.]

Who literally was a very brilliant man, but a very poor judge because he allowed his own biases to come in all the time. And he was a friend of mine. I always did very well in his courtroom, and I always liked him. But the fact is he was a poor judge in the sense that he allowed his own personal predilections to always take precedent to whatever the law was. And sometimes his personal predilections were based upon bias, and you can't let that happen. No matter how much you might despise somebody, if they are right you have just got to swallow it and say the law helps them. And no matter how much you like somebody, if they are wrong you should not be upholding their position. You should be doing what is right. And if you do that, then this system of government will last another 200 years and it will be you people who will have helped to do that.

So I am going to do my best to get you all through, and with that, I think we will recess and hopefully have you all on the next markup, which should be next Thursday. So I want to thank each of you for being willing to serve. I know it is a sacrifice in many respects. On the other hand, it is a terrific opportunity to do an awful lot of good public service, and I am counting on each of you to be the best you could be.

Thanks so much.

Judge POOLER. Thank you, Mr. Chairman.

Mr. SACK. Thank you, Mr. Chairman.

Ms. ROBERTS. Thank you, Mr. Chairman.

Mr. ROBERTS. Thank you, Mr. Chairman.

Judge WHITE. Thank you, Mr. Chairman.

The CHAIRMAN. We will adjourn until further notice.

[Whereupon, at 3:53 p.m., the committee was adjourned.]

## SUBMISSIONS FOR THE RECORD

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### Senate Judiciary Committee Questionnaire

#### I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Rosemary Shankman Pooler  
Maiden Name: Rosemary Shankman

2. Address: List current place of residence and office address(es).

Current Residence:               Syracuse, New York

Office Address:               P.O. Box 7395  
100 South Clinton Street  
Syracuse, New York 13261-7395

3. Date and place of birth:       June 21, 1938  
Brooklyn, New York

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

William S. Pooler  
Professor of Sociology  
Maxwell School  
Syracuse University  
Syracuse, New York 13210

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

<u>NAME OF COLLEGE/ LAW SCHOOL</u>	<u>DATES ATTENDED</u>	<u>DEGREE</u>	<u>DATE OF DEGREE</u>
Brooklyn College	1955 - 1959	B.A.	5/59
University of Connecticut	1959 - 1961	M.A.	5/61
University of Michigan Law School	1962 - 1965	J.D.	5/65



<u>NAME OF COLLEGE</u> <u>LAW SCHOOL</u>	<u>DATES</u> <u>ATTENDED</u>	<u>DEGREE</u>	<u>DATE OF</u> <u>DEGREE</u>
Harvard University - Program for Senior Managers in Government	1978	None	
State University of New York at Albany	1984 - 1985	Graduate Certificate in Regulatory Economics	1985

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1) PAID EMPLOYMENT:

1960-1962	Research Associate, Survey Research Center, Institute of Social Research, Ann Arbor, MI
1966-1969	Associate Attorney, Crystal, Manes and Rifken (successor firm -- Rifken, Frankel & Greenman, P.C.), Syracuse, NY
1969- 1971	Associate Attorney, Michaels and Michaels, Syracuse, NY
1971-1973	Assistant Corporation Counsel and Director of City of Syracuse Consumer Affairs Unit, City of Syracuse, Corporation Counsel, Syracuse, NY
1974-1975	Common Councilor, City of Syracuse, Common Council, Syracuse, NY
1974-1975	Upstate Regional Coordinator, New York Public Interest Research Group, Syracuse, NY
1975-1980	Chair and Executive Director, State of New York, Consumer Protection Board, Albany, NY
1981-1986	Commissioner, New York State Public Service Commission, Albany, NY
1987	Staff-Director of Subcommittee on Structure and Management of Regulated Utilities, New York State Assembly, Committee on Corporations, Authorities and Commissions, Albany, NY

- 1987-1988 Visiting Professor of Law, Syracuse University College of Law,  
Syracuse, NY
- 1989-1990 Vice President for Legal Affairs, Atlantic States Legal Foundation,  
Syracuse, NY
- 1991-1994 Supreme Court Justice, Supreme Court of the State of New York,  
Syracuse, NY
- 1994 - present United States District Court Judge, United States District Court for the  
Northern District of New York, Syracuse, NY

2) NON-PAID ACTIVITIES:

- 1962-1964 Student Intern, Carpenter, Harrington & Douvan, Ann Arbor, MI
- 1971-1973 Board Member, Onondaga Neighborhood Legal Services, Syracuse, NY
- 1982-1991 Board Member, United Way of Central New York, Syracuse, NY
- 1982-1983 Assistant Vice President of Resource Development
- 1984-1985 Vice President of Resource Development
- 1988 Ex officio Board Member
- 1985-present Board Member, Loretto, Syracuse, NY
- 1989-present Executive Committee
- 1993-present Young Women's Christian Association, Syracuse, NY
- 1980-1996 Women's Executive Committee, New York State Fair, Syracuse, NY
- 1987-1995 Board Member, National Register of Health Service  
Providers in Psychology, Washington, D.C.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Women's Bar Association of the State of New York, Founders' Award, May 4, 1996

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Onondaga County Bar Association  
Member, 1965 - 1971 and 1990 - present

New York State Bar Association  
Member, 1993-1994

Women's Bar Association of the State of New York  
Member, 1990 - present

Central New York Women's Bar Association  
Member, 1990 - present  
Board of Trustees, June 1996 - present

Association of Supreme Court Justices of the State of New York  
Member, 1991 to present  
Secretary and Member of the Executive Committee, July 1993 - July 1994

National Association of Regulatory Utility Commissioners  
Member, 1981 - 1986  
First Chair of Energy Conservation Committee, 1985-1986

National Association of Consumer Agency Administrators  
Founding Member, 1977 - 1980

Onondaga Neighborhood Legal Services, Inc.  
Board Member, 1971 - 1973

Fifth Judicial District, Gender Bias Committee  
Member, 1994 - present

Council on Judicial Associations, New York State Bar Association  
Appointed by Chief Judge as District Court representative  
January 1997 - present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am a member of the Federal Judges Association, which includes in its by-laws a requirement that any action or position taken shall, if possible, be consistent with the



positions taken by the Judicial Conference. This Association primarily takes positions on those issues that affect the working life of judges.

Other Organizations: I am a member of the Loretto Board of Trustees (see Attachment I-1), the Young Women's Christian Association Board of Trustees, and the Sisterhood of Congregation Beth Shalom-Chevras Shas.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

New York State Courts (Second Department); February 1966

This admission allows me to practice before the Court of Appeals, each of the Appellate Divisions, and all trial level courts.

United States District Court, Northern District of New York; June 10, 1968

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

During my tenure as chair and executive director of the New York State Consumer Protection Board, the agency published many reports of interest to consumers. Although I was listed as head of the agency, the authors and researchers were always credited. Three reports achieved some popularity. The topics covered were 1) the coding on perishable grocery products; 2) rights and responsibilities under the New York State Lemon Law; and 3) planning for retirement. In addition to these reports, which were published for wide distribution, the agency issued reports on vocational schools in New York State, blood banks, and the cost of funerals. I was responsible for each publication of the agency. Copies of reports by the New York State Consumer Protection Board that I have retained from this period are annexed as Attachment I-2 and listed below:

- 1978-79 Annual Report (1980)
- Consumer Protection in New York State -- 1976-77 Report of the State Consumer Protection Board (1978)
- A Survey of Blood Fees Charged by Selected New York City Hospitals (June 1978)
- Rights Without Remedies: A Study of Complaint Handling Mechanisms in Professional Misconduct Cases in New York State (Jan. 26, 1977)

- A Report of the Activities of the Consumer Protection Board for April 1, 1975 - Mar. 31, 1976
- The Consumer Protection Board: Public Advocate, Program Highlights, 1978-79
- Home Improvements Without Headaches (1981)
- Blind Dates: How to Break the Codes on the Foods You Buy (1977)
- Blind Dates: How to Break the Codes on the Foods You Buy (pamphlet containing excerpts from June, 1977 booklet)
- The Lemon-Owner's Manual (1978)
- Wasted Dollars/Wasted Energy: The Need for Electric-Pricing Reform in New York State (1980)
- The Profits of Failure: The Proprietary Vocational School Industry in New York State (July 20, 1978)
- Check It Out: A Comparative Guide to New York State's Computer Schools (1979)

While I served as director of the local and state consumer agencies and served on the Public Service Commission, I contributed short writings to newspapers and journals of general and narrow distribution on issues related to those government agencies. The topics on which I wrote were generally those of current consumer interest such as utility rate requests. I have not retained copies of these pieces. The City of Syracuse Consumer office no longer exists. I am informed that the Public Service Commission has not retained non-official files for the period I served in that agency.

On November 8, 1993, I participated in a panel discussion entitled "The Road to the Judiciary: Navigating the Judicial Selection Process." The discussion was reported at 57 Alb. L. Rev. 973 (1994). See Attachment I- 3.

I have, in the past, especially when I was seeking elective office, given many speeches. I have accepted fewer speaking engagements since becoming a judge. I can recollect no speech specifically on constitutional law or legal policy. In any event, I have no copies of any speech. Primarily, I have spoken extemporaneously. As recently as May 15, 1997 in a talk entitled "Issues in Federal Court Today," given to the Syracuse Chapter of the League of Women Voters, I relied on our district's statistics on filings, types of cases and population. The material on which I relied is Attachment I-4.

I have not retained the files from the period when I sought elective office. I am informed that the local newspapers that covered the congressional elections of 1986 and 1988 do not have an indexed retrieval system for public use. To the best of my present recollection, I gave no speeches on constitutional law or legal policy.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent  
February 1997

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was elected a justice of the Supreme Court of the State of New York in November 1990, taking office on January 1, 1991, for a fourteen-year term. The Supreme Court is New York State's trial court of general jurisdiction. The New York State Supreme Court has jurisdiction over any matter that any other state trial court (except the Court of Claims) could hear and residual general jurisdiction. I served on the Supreme Court bench until my appointment to the district court in September of 1994.

I was appointed by President Clinton as a United States District Court Judge for the Northern District of New York, in September 1994. I entered on duty September 18, 1994. The United States District Court has criminal and civil jurisdiction as defined by Article III of the United States Constitution and implementing statutes.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

- (1) 1. Shenandoah v. United States Dep't of Interior, 1997 WL 214947 (N.D.N.Y. Apr. 14, 1997). See Attachment I-5.
2. Alteri v. General Motors Corp., 919 F. Supp. 92 (N.D.N.Y. 1996).
3. City of Utica v. Genesee Management, Inc., 934 F. Supp. 510 (N.D.N.Y. 1996).
4. J.G.B. Enterprises, Inc. v. United States, 921 F. Supp. 91 (N.D.N.Y. 1996).
5. Iron Workers Dist. Council of W.N.Y. and Vicinity Welfare and Pensions Funds v. Butler Fence Co., 919 F. Supp. 589 (N.D.N.Y. 1996).



6. Regenbogen v. Mustille, 908 F. Supp. 1101 (N.D.N.Y. 1995).
  7. United States v. Craig, 896 F. Supp. 85 (N.D.N.Y. 1995).
  8. McHale v. Westcott, 893 F. Supp. 143 (N.D.N.Y. 1995).
  9. Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405 (N.D.N.Y. 1995).
  10. Kompan A.S. v. Park Structures, Inc., 890 F. Supp. 1167 (N.D.N.Y. 1995).
- (2)(a) Sledge v. Guest, 107 F.3d 4 (Table), 1996 WL 779921 (Text) (2d Cir. Dec. 30, 1996). The Second Circuit vacated my dismissal on statute of limitations grounds of the prisoner plaintiff's civil rights lawsuit. The Court of Appeals held that although the plaintiff became aware of his injury more than three years prior to bringing the lawsuit, the record did not clearly establish that he knew the cause of his injury -- eating contaminated food -- more than three years prior to filing the lawsuit. See Attachment I-6.
- In re Megan-Racine Assoc., 102 F.3d 671 (2d Cir. 1996). In 1981, New York enacted Public Service Law § 66-c(1) ("six-cent law"). The six-cent law required publicly regulated utilities to purchase electricity from cogeneration facilities at a rate of six cents per kilowatt hour regardless of market factors. In 1992, the legislature repealed the six-cent law but grandfathered its subsidized rate for cogeneration facilities with existing contracts. I held that the grandfathered subsidized rate applied only to those cogeneration facilities that actually met federally mandated efficiency standards on the effective date of the six-cent law. In re Megan-Racine Assoc., 198 B.R. 650, 662 (N.D.N.Y. 1996). The Second Circuit reversed and remanded, holding that a cogeneration facility could qualify for grandfathering simply by demonstrating that its contract had been fully executed and filed with the commission on or before June 26, 1992.
- United States v. Sovie, \_\_\_ F.3d \_\_\_, 1997 WL 530772 (2d Cir. Aug. 18, 1997). The Second Circuit affirmed Sovie's conviction and all but one of my sentencing rulings. The Court, however, reversed on factual grounds an enhancement for evincing an intent to carry out a threat and remanded for resentencing. See Attachment I-7.
- Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, \_\_\_ F.3d \_\_\_, 1997 WL 625072 (2d Cir. Oct. 10, 1997). Four Hamilton College fraternities sued Hamilton College and its president alleging that Hamilton College's policy of

requiring students to both live on campus and take their meals on campus violated the Sherman Act, 15 U.S.C. § 2. I found that I lacked subject matter jurisdiction over the fraternities' complaint because Hamilton's new policy did not concern trade or commerce within the meaning of the Sherman Act and had no substantial effect on commerce. Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 1996 WL 172652, at \*7-9 (Apr. 12, 1996). See Attachment I-8. The Second Circuit reversed and remanded, finding that (1) the inquiry as to whether Hamilton College's policy was "trade or commerce" was not jurisdictional but rather a matter of the substantive reach of the Sherman Act; (2) allegations in the complaint indicating that Hamilton College's motive for promulgating the policy were financial rather than educational must be accepted as true for purposes of a Rule 12 analysis; (3) the complaint contained sufficient factual detail to show a nexus to interstate commerce; and (4) accepting the allegations as true, the complaint should not have been dismissed. Hamilton, 1997 WL 625072, at \*7-8. See Attachment I-8.

- (2)(b) The following decisions are reversals or modifications of New York State court orders or judgments. See Attachment I-9 for underlying written decisions. Decisions not included were oral.

Crossman v. Harding Indus. Tool, 222 A.D.2d 1081 (4th Dep't 1995). The Appellate Division, Fourth Department affirmed a judgment, entered by the Hon. Parker F. Stone, J.S.C., dismissing plaintiff's complaint. The court found that I should have dismissed the complaint on statute of limitations grounds when I addressed an earlier motion. I had denied defendant's motion to dismiss, finding that there were issues of fact as to when plaintiff discovered or should have discovered the injuries of which he complained.

Burke v. Crosson, 213 A.D.2d 963 (4th Dep't 1995). Plaintiffs, Onondaga County Court judges, challenged on Equal Protection grounds a differential between their salaries and the salaries of county court judges in other counties and the New York State Court of Claims judge based in Onondaga County. In a decision reported at 152 Misc. 2d 158 (N.Y. Sup. Ct. 1991), I dismissed plaintiffs' challenge to the extent it was based on (1) differences between salaries for Onondaga County judges and salaries for judges in Suffolk, Westchester and Nassau counties and (2) the higher salary paid to the local Court of Claims judge. However, I granted plaintiffs summary judgment on their claim that differentials between their salaries and those of judges in Albany, Erie and Monroe counties violated Equal Protection. The Fourth Department, finding that there was a rational basis for the salary differential between plaintiffs and the Albany County Supreme Court justices, modified by granting summary judgment to defendants on the claim related to Albany County and affirmed as modified.

Feldman v. Grant, 213 A.D.2d 340 (1st Dep't 1995). After a non-jury trial, I found for plaintiff on both his contractual and fraud causes of action. The Appellate Division, First Department 1) vacated the underlying loan agreement because defendant was not a corporation; 2) awarded plaintiff the principal of the loan plus statutory interest on an equitable basis; and 3) reversed the fraud determination.

Cedrone v. McCarthy Bros., 212 A.D.2d 979 (4th Dep't 1995). Plaintiff was injured when a wall collapsed and caused the scaffold on which he was standing to collapse. On plaintiff's summary judgment motion, I held that there were issues of fact as to whether plaintiff's accident was within the scope of N.Y. Labor Law § 240 (1). The Appellate Division, Fourth Department, reversed and granted plaintiff summary judgment on liability because the accident was gravity related.

Johnson v. Joda Realty, Inc., 212 A.D.2d 1055 (4th Dep't 1995). In this premises liability, personal injury action, plaintiff alleged that Joda Realty, Inc., the owner-out-of-possession, was contractually obligated to repair the roof of the building in which plaintiff fell and that a defect in the roof caused a leak that caused plaintiff's fall. I found that defendant had failed to eliminate all material issues of fact and therefore denied summary judgment. The Appellate Division, Fourth Department, found that there was no evidence that defendant created the defect that caused plaintiff's injury or had notice of it and therefore reversed and granted defendant's motion.

Sweeney v. Wegman's Food Market, Inc., 209 A.D.2d 972 (4th Dep't 1994). After a jury trial, I granted defendant's motion to set aside the verdict. I found that there was no evidence from which the jury reasonably could have concluded that 1) defendant had actual or constructive notice of the ice that caused plaintiff's fall and 2) there was no storm in progress at the time plaintiff fell. The Appellate Division, Fourth Department, reversed and reinstated the jury verdict. The court found that my decision to set aside the verdict was not warranted.

Krukowski v. Bill Scott Lincoln-Mercury, 207 A.D.2d 1012 (4th Dep't 1994). Plaintiff fell in an icy parking lot. I granted defendant's motion for summary judgment, finding that there were no issues of fact as to whether defendant had notice of the ice. The Appellate Division, Fourth Department reversed and denied defendant's motion, finding that there were issues of fact as to whether defendant's actions increased the hazard.

Gandino v. Pelion, Inc., 202 A.D.2d 964 (4th Dep't 1994). Plaintiff alleged that his former employer libeled him and breached a contract with him. A jury awarded plaintiff \$50,000 on his libel claim and \$3,000 on his contract claim. I denied defendant's motion to set aside the verdict but ordered a new trial on



damages unless plaintiff agreed to accept \$25,000 on his libel claim. The Appellate Division, Fourth Department, reversed my order as to that part of the verdict that concerned plaintiff's libel cause of action and granted defendant's motion but affirmed insofar as my order concerned plaintiff's contract cause of action. The Appellate Division found that there was insufficient evidence of the falsity and malice of defendant's statements.

Fulton v. Walton St. Assoc., 201 A.D.2d 921 (4th Dep't 1994). Plaintiff brought this lawsuit under N.Y. Labor Law § 240(1) after he fell from a scaffold. I denied plaintiff's motion for summary judgment, holding that there were material issues of fact as to whether plaintiff's foreman instructed him to stay off the scaffolding because it was not complete. The Appellate Division, Fourth Department, reversed and granted plaintiff's motion finding that he had not refused to use a safety device.

Cooper v. Cooper & Clement, Inc., 198 A.D.2d 812 (4th Dep't 1993). The Appellate Division affirmed granting of summary judgment as to the principal of several notes and reversed denial of summary judgment on interest. The court rejected defendant's contention that the notes were not interest bearing because it was based on incompetent evidence.

Bonide Chem. Co. v. Hartford Accident and Indem. Co., 197 A.D. 2d 883 (4th Dep't 1993). I granted summary judgment dismissing the complaint in favor of defendant Great American Insurance Company, holding that plaintiff had failed to provide timely notice to the insurer. On appeal, the Appellate Division, Fourth Department, affirmed my substantive holding, but modified to issue a declaratory judgment rather than an order dismissing the action.

Port Bay Assocs. v. Soundview Shopping Ctr., 197 A.D.2d 849 (4th Dep't 1993). Reversal of venue determination. The court found that the convenience of defendant's witnesses outweighed the inconvenience to plaintiff's witnesses of a change of venue.

Ehle v. Wallace, 195 A.D.2d 1086 (4th Dep't 1993). My decision, which is reported at 158 Misc. 2d 961 (N.Y. Sup. Ct. 1993), found that then newly enacted CPLR §§ 304 and 306-b(a) should be read with Election Law § 16-102(2) to provide that a proceeding challenging a caucus was timely commenced if filed within ten days of the certificate of nominations and served within 15 days thereafter. The Appellate Division, relying on Election Law § 16-116, held that both service and filing must take place within ten days of the filing of the certificate of nominations.

Burke v. Crosson, 191 A.D.2d 998 (4th Dep't 1993). I granted prevailing plaintiffs in a Section 1983 action attorney's fees. The Appellate Division, Fourth Department, reversed, finding a lack of clear explanation and adequate documentation.

(3) Decisions on significant federal or state constitutional questions

Shenandoah v. United States Dep't of Interior, 1997 WL 214947 (N.D.N.Y. Apr. 14, 1997). See Attachment I-5.

Bordeaux v. Lynch, \_\_\_\_ F. Supp. \_\_\_\_, 1997 WL 115287 (N.D.N.Y. Mar. 13, 1997). See Attachment I-10.

Justice v. Coughlin, 941 F. Supp. 1312 (N.D.N.Y. Oct. 15, 1996).

McDermott v. Pataki, 1996 WL 596570 (N.D.N.Y. 1996). See Attachment I-10.

Burke v. Crosson, 152 Misc. 2d 158 (N.Y. Sup. 1991), aff'd, 191 A.D.2d 997 (4th Dep't 1993), rev'd, 85 N.Y.2d 963 (4th Dep't 1995), aff'd as modified, 213 A.D.2d 963 (4th Dep't 1995).

McCarthy v. McCarthy, No. 90-M-1081, slip op. (N.Y. Sup. 1991). See Attachment I-10.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Public Offices Held:

Director, City of Syracuse Consumer Affairs Unit. I was appointed by the Mayor to head this unit of the corporation counsel's office in December, 1971. I held this office until December, 1973. I managed this consumer complaint agency and was the only lawyer on the staff.

District Councilor, Syracuse Common Council. I was elected to a two-year term in November 1973. I did not complete the full two-year term.

Chair and Executive Director, New York State Consumer Protection Board, 1975-1980. I was appointed by Governor Hugh Carey and confirmed by the State Senate.

Commissioner, New York State Public Service Commission. I was appointed by

Governor Hugh Carey in 1981 to a six-year term as a commissioner. This appointment also required state Senate confirmation. I resigned in 1986 to run for Congress.

Unsuccessful candidacies:

- 1970 Democratic nomination in a primary, New York State Assembly
- 1971 Onondaga County Legislature
- 1980 New York State Senate
- 1986 27th Congressional District of New York, United States Congress
- 1988 27th Congressional District of New York, United States Congress

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- 1966-1969 Crystal, Manes and Rifken (successor firm -- Rifken, Frankel & Greenman, P.C., 5789 Widewaters Parkway, Syracuse, New York, 13214; (315) 449-0737).

At this firm, I was an associate, assisting partners in their general practice work. We primarily represented individuals in personal injury and family matters. We also represented small businesses in contractual and commercial matters.

- 1969- 12/71 Michaels and Michaels, 902 State Tower Building, Syracuse, New York, 13202; (315) 474-7808.

At this firm, I was a part-time associate, working one-half to three-quarters time after the birth of my second child. The firm



specialized in representing plaintiffs in personal injury cases. I worked on those cases and also handled matrimonial and other civil matters as well as some criminal cases.

- 12/71-1973 City of Syracuse, Corporation Counsel, City Hall, 301 Montgomery Street, Syracuse, New York 13202; (315) 448-8400.

I was appointed by the Mayor as an assistant corporation counsel to direct the Consumer Affairs Unit, a consumer affairs agency. I directed a staff of five to ten people that (1) developed systems for the intake and resolution of consumer complaints, (2) enforced a consumer affairs ordinance on behalf of citizens, (3) because the consumer affairs ordinance provided no private right of action, sought necessary judicial redress for violations of the ordinance on behalf of consumers or the City, and (4) after repeal of the ordinance, helped consumers use the small claims court where appropriate.

- 1974-1975 City of Syracuse, Common Council, City Hall, Syracuse, New York 13202; (315) 448-8466.

In 1973 I was elected to the part-time job of district representative on the Syracuse Common Council. As a councilor, I drafted and approved legislation for the city, presided, with other council members at public hearings, and participated in the setting of legislative and municipal priorities.

New York Public Interest Research Group, 732 Crouse Avenue, Syracuse, New York 13210; (315) 476-8381.

During this period, I also worked part-time as the upstate regional coordinator for the New York Public Interest Research Group. I directed students' research and advocacy activities.

- 1975-1980 State of New York, Consumer Protection Board, 5 Empire State Plaza, Albany, NY 12223; (518) 474-8583.

In 1975 I was appointed by Governor Hugh Carey as chair and executive director of the Consumer Protection Board. I directed a staff of approximately twenty to thirty people. The office researched consumer issues, did quantitative research, and acted as a clearinghouse for consumer information for local consumer agencies. In addition, the board was the statutory intervenor in all

rate cases and most generic cases before the Public Service Commission. I directed an intervention staff consisting of attorneys, economists, and engineers that participated in every major utility rate case initiated by either the commission or a regulated utility. The rate cases were adversarial proceedings. We sponsored expert testimony, which the attorneys helped prepare. Our attorneys cross-examined opposing witnesses and briefed substantially all issues.

1981-1986 New York State Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350; (800) 342-3377.

I was appointed by Governor Hugh Carey and confirmed by the New York State Senate as one of seven commissioners. I presided at hearings, and participated with the other commissioners in deliberations on both rate cases and generic proceedings. This agency regulated rates and service of gas and electric providers, public water systems and, when I joined the Commission, all telephone companies. My years on the Commission included major deregulation initiatives in the telephone industry. To competently regulate during this period, I learned a little engineering, and went back to school to study economics and statistics, earning a Graduate Certificate in Regulatory Economics from the State University of New York at Albany in 1985.

1987 New York State Assembly, Committee on Corporations, Authorities and Commissions, Legislative Office Building, Room 422, Albany, New York 12248; (518) 455-5474.

During the 1987 legislative session, I served as the staff director of a sub-committee of this committee. The sub-committee examined the structure and management of regulated utilities.

1987-1988 Syracuse University College of Law, E.I. White Hall, Suite 230, Syracuse, New York 13244-1030; (315) 443-2524.

During the academic year 1987-1988, I was a visiting professor of law and taught legislation, banking law, a seminar in public utility regulation, and a year-long course with Professor Theodore Hagelin on regulated and deregulated industries.

1989-1990 Atlantic States Legal Foundation, 658 West Onondaga Street, Syracuse, New York 13204; (315) 475-1170.

I served as vice-president for legal affairs of this environmental foundation, supervising local counsel who brought Clean Water Act suits on behalf of Atlantic States Legal Foundation and its members.

1990-1994 Supreme Court of the State of New York, Onondaga County Courthouse, 401 Montgomery Street, Syracuse, NY 13202; (315) 435-2030, Supreme Court Justice. This is the court of general original jurisdiction in both civil and criminal matters.

1994 -present United States District Court for the Northern District of New York, P.O. Box 7395, 100 South Clinton Street, Syracuse, NY 13261-7395; (315) 448-0579, District Court Judge.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

As noted above, I was a general practitioner in the early years of my practice, 1966-1971. I was an associate in two small firms -- one that was primarily a general practice firm and one that specialized in personal injury law but also litigated matrimonial and other civil, as well as some criminal matters. My children were born in 1964 and 1969. I was not working full time in this time period. As the junior associate in both firms, I drafted pleadings, handled some motion practice, and tried small matters.

From 1971 to 1980, I managed government agencies, in which I did law work or supervised lawyers or law students. I researched or directed research on consumer issues, advocated for the general public, and, at the Consumer Protection Board, I directed the agency's work as the statutory intervenor on all rate cases before the Public Service Commission. At both consumer agencies, I drafted and commented on consumer legislation.

At the New York State Consumer Protection Board, I also supervised attorneys who helped prepare written direct expert testimony of accountants, engineers and economists, conducted cross-examination of other parties' witnesses, and briefed each issue that we had decided was relevant to our mission. I decided



which experts to hire after examining their credentials and participation in other cases. I decided on which issues in which cases we would appeal. I often testified at legislative hearings regarding pending legislation. In addition, as part of the executive branch, we researched, developed and proposed legislation for inclusion in the Governor's program. I worked closely with legislators in drafting bills as well.

From 1981 to 1986, I served as a commissioner of a regulatory agency, presiding over hearings and participating in commission analysis and decision making. This decision making required legal analysis buttressed by a knowledge of engineering, statistics and economics. For example, since all rate making is prospective, rates are set on the basis of projections of costs and revenue one to three years in the future. These projections were developed using econometric models. Often the company seeking rate relief would submit a model, and opponents would either submit an alternative model or question the assumptions that formed the basis for the choice of variables in the company's model. This technical analysis produced the facts to which the law of rate of return regulation was applied.

In addition to the rate cases, the Commission considered generic issues in separate proceedings. Some of the issues considered during my years on the Commission included how to account for conservation in projections; what alternative power sources, if any, should be included in long range planning; and deregulation of transmission and distribution facilities of gas and electric companies.

From 1987 to 1990, I taught law and returned to practicing law and supervising local counsel in their suits on behalf of an environmental foundation.

From 1990 to the present, I have served as a trial judge in New York state and, since September, 1994, as a federal district court judge.

As a state court trial judge, I heard matrimonial matters, applying an equitable distribution statute in the case of dissolution of marriage. I also presided over jury and bench tort claim trials, and our docket included some complex commercial matters.

As a district court judge, I hear both civil and criminal cases. Our docket in the Northern District of New York is diverse. Of the 721 civil cases assigned to me as of July 1, 1997, 382 were brought by prisoners, primarily pro se. The remaining 339 cases include discrimination, labor law, commercial, intellectual property, tort, statutory, and constitutional law claims. The caseload also includes bankruptcy appeals.

The Northern District of New York also has an extremely heavy criminal docket. For example, I recently tried a narcotics conspiracy case in which twenty-five defendants were indicted. Twelve elected to go to trial, and eleven remained in the trial until verdict. Currently, approximately seventy-four defendants are awaiting trial in my court. I presently am trying a five-defendant narcotics conspiracy case and have a similar case scheduled for January.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I specialized in consumer law and the economic regulation of business. In my early years, my typical clients were individuals. As head of both a local and state consumer office, my clients were consumers. At Atlantic States Legal Foundation, our clients were primarily those who were harmed by discharges into waterways.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

In the early days of my practice, I appeared regularly in court on motion practice and trials. As director of governmental agencies, I was represented in court by staff. As vice-president for legal affairs at Atlantic States Legal Foundation, I primarily supervised other attorneys but did litigate one matter. That case, a mandamus proceeding, was brought on behalf of five organizational petitioners and several elderly petitioners whose senior housing was near the proposed site for an incinerator. New York State's Environmental Conservation Law tracks the requirements of the NEPA. Petitioners claimed that the required environmental impact statement was inadequate and sought amendment of the statement before construction. Atlantic States Legal Foundation, Inc. v.

County of Onondaga, No. 89-1984 (N.Y.Sup.).

2. What percentage of these appearances was in:

- (a) Federal courts.

In 1989 and 1990, 100% of my supervisory work at Atlantic States Legal Foundation was in federal court.

- (b) State courts of record.

From 1966 to 1971, when I was a private practitioner, nearly 100% of my work was in state court. However, Seidenberg v. McSorley's Old Ale House, 308 F. Supp. 1253 (S.D.N.Y. 1969), described below at #18, was litigated in federal court.

From 1972 to 1981, when I directed first a local, then a state agency, whatever court appearances were required were in state court. The Consumer Protection Board was a statutory intervenor in Public Service Commission cases. The following citations are for those cases, during my tenure as Executive Director, in which the Consumer Protection Board appeared or brought suit after the Public Service Commission decision was issued.

Pooler v. Public Serv. Comm'n, 89 Misc. 2d 700 (N.Y. Sup. Ct. 1977).

Pooler v. Public Serv. Comm'n, 58 A.D.2d 940 (N.Y. App. Div.), aff'd, 43 N.Y.2d 750 (1977).

Rubin v. Harnett, 59 A.D.2d 698 (N.Y. App. Div. 1977), aff'd, 45 N.Y.2d 886 (1978).

Consumer Protection Bd. v. Public Serv. Comm'n, 78 A.D.2d 65 (N.Y. App. Div. 1980), appeal denied, 53 N.Y.2d 607 (1981).

New York Telephone Co. v. Public Serv. Comm'n, 53 N.Y.2d 838 (1981).

Consumer Protection Bd. of the State of N.Y. v. Public Serv. Comm'n of State of N.Y., 110 Misc. 2d 1 (N.Y. Sup. Ct. 1981).

Pooler v. Nyquist, 89 Misc. 2d 705 (N.Y. Sup. Ct.



1976), was brought under the New York Freedom of Information Act.

From 1981 to 1986, as one of seven Public Service commissioners, I was represented by staff in state court.

(c) other courts.

None.

3. What percentage of your litigation was:

(a) civil 95%

(b) criminal: 5%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I do not recall the number of cases tried to verdict or judgment as many years have passed. I estimate fewer than fifteen. Two cases, however, have reported appellate decisions:

Jacques v. Sears Roebuck & Co., 37 A.D.2d 121 (4th Dep't 1971).  
People v. Lancaster, 34 A.D.2d 727 (4th Dep't 1970).

5. What percentage of these trials were:

(a) jury: 50%

(b) non-jury: 50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969). Plaintiffs, who were attorneys and board members of the National Organization for Women, challenged a New York bar's 114-year-old practice of excluding women as patrons. On a motion to dismiss, Judge Charles Tenney held that the licensing authority of New York State was sufficient state involvement to constitute state action and that the complaint stated a cause of action for denial of equal protection. Judge Walter R. Mansfield later granted plaintiffs summary judgment establishing that McSorley's was not free to exclude women under the Equal Protection Clause of the Fourteenth Amendment, 317 F. Supp. 593 (S.D.N.Y. 1970). I participated in the briefing of both motions.

My co-counsel were Faith Seidenberg, Esq., 246 East Water Street, Syracuse, New York 13202, (315) 422-0144, and Bruce Ennis, Esq., formerly with the New York Civil Liberties Union in New York City. William F. Larkin, Esq., no current address known, represented defendant.

Jacques v. Sears Roebuck & Co., 37 A.D.2d 121 (4th Dep't 1971). I represented a customer detained by defendant Sears and accused of shoplifting. Plaintiff sued Sears and its employee for false arrest and imprisonment. A plaintiff's judgment in Syracuse City Court was reversed by County Court. The reversal was modified and affirmed in this reported decision. I do not recall, and the June 25, 1971, appellate decision does not report, the date of the City Court trial before Syracuse City Court Judge James J. Fahey (deceased) nor the appeal before Onondaga County Court Judge Ormond N. Gale (deceased).

Counsel for the defendant was Hancock, Estabrook, Ryan, Shove & Hust, William L. Allen, Jr., of counsel, P.O. Box 4976, Syracuse, New York 13221-4976; (315) 471-3151.

People v. Lancaster, 34 A.D.2d 727 (4th Dep't 1970). I represented the young defendant, Lancaster. The Fourth Department held that the trial court impermissibly denied my client a right to trial by jury when it required consent to a bench trial as a prerequisite to consideration for youthful offender status. I do not recall, and the April 9, 1970, appellate decision does not report, the date of the plea before Onondaga County Court Judge Ormond N. Gale.

The prosecuting attorneys in this matter were Frank A. Gualtieri, Esq. (deceased) and Jon K. Holcombe, Esq., RR #1 Box 26, Alexandria Bay, NY 13607; (315) 482-2110.

Please see my answer to 19 below as to the range of my legal experience.

Attorneys who have had recent contact with me include:

Brenda Sannes, Assistant United States Attorney, N.D.N.Y., P.O. Box 7198, 100 S. Clinton Street, Syracuse, NY 13261-7198; (315) 448-0672.

James Medcraf, Esq., 224 Harrison Street, Syracuse, NY 13202; (315) 478-3587.

Craig Schlanger, Esq., 823 University Building, Syracuse, NY 13202; (315) 472-2131.

A. Sheldon Gould, Esq., 447 E. Washington Street, Syracuse, NY 13202; (315) 478-3186.

George H. Lowe, Esq., Bond, Schoeneck & King, LLP, One Lincoln Center, Syracuse, NY 13202; (315) 422-0121.

George A. Reihner, Esq., Elliott, Reihner, Siedzikowski & Egan, P.C., Mellon Bank Building, Suite 300, 400 Spruce Street, Scranton, PA 18503; (717) 346-7569.

Jay B. Kasner, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP, 919 Third Avenue, New York, NY 10022; (212) 735-3000.

Michael E. Deutsch, Esq., Barbara J. Olshansky, Esq., Center for Constitutional Rights, 666 Broadway, Seventh Floor, New York, NY 10012; (212) 614-6464.

William W. Taylor, III, Esq., Thomas B. Mason, Esq., Zuckerman, Spaeder, Goldstein, Taylor & Kolker, 1201 Connecticut Avenue, N.W., Washington, D.C. 20036; (202) 778-1800.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Please see my answer to #18 above regarding significant litigation.

Most of my career has been in public service and much of it has involved skills pertinent to litigation. In 1975, I assumed the post of chair and executive director of the Consumer Protection Board for the State of New York after serving as head of the local consumer agency for the City of Syracuse from 1971 to 1973. As executive director, I authorized litigation for the consumers of the State of New York and, in particular, I directed the



utility program, which was a statutory intervenor in every major rate case and most generic cases before the New York State Public Service Commission.

When I was Chair and Executive Director of the Consumer Protection Board, I regularly attended the meetings of the Assembly and Senate Consumer Affairs committees. Our office, under my direction, took positions on legislation that affected consumers.

From 1981 to 1986, I acted as one of seven members of the Public Service Commission, heard complicated rate-setting cases involving both lay testimony and highly technical expert opinion, and issued opinions both in the majority and dissent.

Service on Bar or Court Committees:

**Fifth Judicial District, Gender Bias Committee:**

This committee is available to take complaints of gender bias from any part of the Fifth Judicial District, which is made up of six upstate New York counties and includes the cities of Syracuse, Utica, Oswego, Watertown and Rome. The Committee attempts to mediate the complaints but has no enforcement power. The Committee examined the issue of adequacy of support awards to women and collected data in response to a complaint made by several female defense attorneys that they were not regularly appointed in felony cases.

**Council on Judicial Associations, New York State Bar Association:**

I was appointed by the Chief Judge of the Second Circuit as District Court representative in January 1997. The Council represents district courts on issues of interest to judges of all jurisdictions. Last year the Council considered continuing legal education for both lawyers and judges, electronic court reporting, methods of jury selection, including several pilot projects in New York State Supreme Court, and computer assisted research.

**Central New York Women's Bar Association:**

The Central New York Women's Bar Association represents the interests of members within the legal community and the larger community. I have been a member since 1990 and am presently on the Board of Trustees. As a member of the board, I participate in setting the direction of the organization.

**Association of Supreme Court Justices of the State of New York:**

The Association of Supreme Court Justices represents the interests of the Supreme Court Justices of New York State. I was a member of the Executive Committee and Secretary from July 1993 to July 1994. In these capacities, I was able to participate in setting the direction of the organization.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I receive \$2,550 per month from my New York State pension.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In any case in which recusal is mandated, I would continue my current practice of recusing myself as soon as I became aware of a problem. See 28 U.S.C. § 455 (a) and (b). Being cognizant of the applicable rules, I review new cases immediately to determine potential conflicts. I am aware of my financial interests and those of my husband. If I conclude recusal is not mandated but that one or more parties might seek recusal if they were aware of certain facts, I promptly disclose those facts on the record, and invite submission from the parties.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

Please see attached Financial Disclosure Report, dated November 10, 1997, Attachment II-1.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

See Attachment II-2, Net Worth Statement, dated November 6, 1997.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not held a position in any campaign except my own. I volunteered in other local campaigns but never played a major role. In my early campaigns for local office, I played all roles, which included issue analysis and development, analysis of past electoral results, writing of campaign materials, scheduling, recruiting and training volunteers, campaign literature distribution, budgeting and raising money.

As noted in my response to question I-16, my earliest campaigns were for local offices. In 1970, I unsuccessfully sought the Democratic nomination to run for the state assembly. In 1971, I received the nomination and ran unsuccessfully for a county legislative seat. In 1973, I was elected to the Syracuse City Council. When I ran for seats on the county legislature and the Syracuse City Council, the small size of the districts allowed me to knock on every door in the district. Today, the average county legislator and district councilor represents about 30,000 citizens, with approximately half that number being registered voters. When I sought those offices in 1971 and 1973, the districts may have been slightly larger. Syracuse was then, and is today, a city of single family houses situated fairly close to each other. Campaigning consisted largely of knocking on each door, generally in the early evening during the week or on weekend days. Although I left pieces of campaign literature with voters or in the doors when no one was home, the real campaigning consisted of actually having a conversation with voters.

As the campaigns became more sophisticated or pertained to larger districts, my role, of necessity, changed. Because the size of the state senate and congressional districts did not allow the luxury of regularly standing on doorsteps, the campaigning became more event and media driven. My role as candidate was to meet voters and seek their support, usually in large group settings. I also attended fundraising events, but I no longer planned and scheduled them. In each campaign of mine, I was partially responsible for solicitation of donors.

I have never had a title or particular position in any other candidate's campaign. I distributed campaign literature as a member of my ward committee and I have done door-to-door campaigning with and for other local candidates.

I have not engaged in any of these activities since becoming a New York State Supreme Court Justice in 1991.



AO-10 (w)  
Rev. 8/96

COPY

FINANCIAL DISCLOSURE REPORT  
Nomination ReportReport Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Pooler, Rosemary S.		2. Court or Organization USDC-Northern District of NY	3. Date of Report 11/10/1997
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. Cir. Ct. Judge Nominee		5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date 11/06/1997 ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1996 to 11/06/1997
7. Chambers or Office Address P.O. Box 7395 100 South Clinton Street Syracuse, New York 13261-7395		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

## I. POSITIONS (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Member, Board of Directors	Loretto
2 Member, Board of Trustees	YWCA
3	

## II. AGREEMENTS (Reporting individual only; see pp. 14-17 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1	Member-New York State Employees Retirement System
2	
3	

## III. NON-INVESTMENT INCOME (Reporting individual and spouse; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1995	NYS Employees Retirement System-pension	\$ 30,600.00
2 1995	NYS Deferred Compensation Savings Plan	\$ 5,522.64
3 11/97	Syracuse University salary (S)	
4 11/97	NYS Employees Retirement Sys.-pension(\$30,600/yr)	\$ 58,650.00
5 11/97	NYS Deferred Compensation Savings Plan	\$ 12,990.77

ATTACHMENT II-1

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Pooler, Rosemary S.

Date of Report

11/10/1997

## IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	Exempt	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts)		
1	Exempt		
2			
3			
4			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	Fulton Savings Bank (J)	Mortgage, Syracuse, NY Property #1	J
2	Fulton Savings Bank (J)	Mortgage, Syracuse, NY Property #2	J
3			
4			
5			
6			
7			

\* VAL CODES: J = \$15,000 or less    K = \$15,001-\$50,000    L = \$50,001 to \$100,000    M = \$100,001-\$250,000    N = \$250,001-\$500,000  
 O = \$500,001-\$1,000,000    P1 = \$1,000,001-\$5,000,000    P2 = \$5,000,001-\$25,000,000    P3 = \$25,000,001-\$50,000,000    P4 = \$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Pooler, Rosemary S.Date of Report  
11/10/1997

## VII. Page 1 INVESTMENTS and TRUSTS

- income, value, transactions (includes those of spouse and dependent children - See pp 37-54 of Instructions.)

A Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(U)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(Q)" after each asset exempt from prior disclosure.</i>	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period					
	(1) Ann. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure	(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)										
1 Lakeview Rd., Westport, NY - land and trailer (S)	A	Rent	J	W	Exempt					
2 317 W. Fayette Partnership	A	Rent	J	T						
3 Onondaga County, Syracuse, NY (S)	A	Rent	L	W	Exempt					
4 Onondaga County, Syracuse, NY (S)	C	Rent	L	W	Exempt					
5 Onondaga County, Syracuse, NY (S)	B	Rent	L	W	Exempt					
6 Onondaga County, Syracuse, NY (S)	D	Rent	L	W	Exempt					
7 Onondaga County, Syracuse, NY (S)	C	Rent	L	W	Exempt					
8 IRA (Freedom Funds) - Tucker, Anthony	A	Intere	K	T						
9 TIAA/CRF Retirement (S)	B	Intere	D	T						
10 Strong Short Term Bond Fund (J)	E	Interest	M	T						
11 Fidelity Growth Opportunity Fund	A	None	J	T						
12 T. Rowe Price - Mid-cap Growth Fund (J)	A	None	J	T	Exempt					
13 T. Rowe Price-NY Tax Free Fund	B	Interest	L	T	Exempt					
1 Val/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000 or more	E=\$15,001-\$50,000 J=\$50,001-\$100,000	F=\$100,001-\$250,000 K=\$250,001-\$500,000	G=\$500,001-\$1,000,000 H=\$1,000,001-\$5,000,000	I=\$5,000,001 or more J=\$5,000,001 or more	K=\$5,000,001 or more L=\$5,000,001 or more	M=\$5,000,001 or more N=\$5,000,001 or more	O=\$5,000,001 or more P=\$5,000,001 or more
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more						
3 Val Mtd Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market							



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Pooler, Rosemary S.

Date of Report

11/10/1997

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☒ X

NONE (No additional information or explanations.)

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Pooler, Rosemary SDate of Report  
11/10/1997

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature Rosemary S. PoolerDate 11-10-97

**Note:** Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	9	770	Notes payable to banks—secured		
U.S. Government securities—add schedule			Notes payable to banks—unsecured		
Listed securities—add schedule ("A")	182	349	Notes payable to relatives		
Unlisted securities—add schedule ("B")	5	000	Notes payable to others		
Accounts and notes receivable:			Accounts and bills due	2	795
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—add schedule ("C")	158	813
Real estate owned—add schedule ("C")	495	000	Chattel mortgages and other liens payable		
Real estate mortgages receivable	10	660	Other debts—itemize:		
Autom and other personal property	65	000			
Cash value—life insurance					
Other assets—itemize: (Schedule "D")	630	083			
			Total Liabilities	161	608
			Net Worth	1,236	254
Total Assets	1,397	862	Total Liabilities and net worth	1,397	862
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor (Schedule "E")	13	191	Are any assets pledged? (Add schedule)	NO	
On leases or contracts			Are you defendant in any suits or legal actions? *	NO	
Legal Claims			Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax					
Other special debt					

\* None affecting net worth suits pending relate to official capacity matters only



SCHEDULE "A"

WILLIAM AND ROSEMARY POOLER

SCHEDULE OF LISTED SECURITIES

As of November 6, 1997

<u>SHARES</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
35	Freedom Cash Fund - Tucker Anthony	\$35
151.555	Fidelity Advisor Growth Opportunities - T Fund	6,617
374.445	T. Rowe Price Mid-Cap Growth Fund	10,548
4557.885	T. Rowe Price, NYS Tax Free Bond Fund	50,182
11,743.306	Strong Short Term Bond Fund	114,967
	<u>TOTAL</u>	<u>\$182,349</u>

SCHEDULE "B"

WILLIAM AND ROSEMARY POOLER

SCHEDULE OF UNLISTED SECURITIES

November 6, 1997

	<u>Cost</u>
317 West Fayette Partnership - real estate in downtown Syracuse, New York, at cost, fair market value unknown	<u>\$5,000</u>

SCHEDULE "C"

WILLIAM AND ROSEMARY POOLER

SCHEDULE OF REAL ESTATE OWNED

	Fair Market <u>Value</u>	Mortgage <u>Balance</u>
Personal:		
525 Bradford Parkway, Syracuse, New York	\$280,000	138,147
Home Equity Loan (Second Mortgage)	<u>          </u>	<u>15,590</u>
	\$280,000	\$153,737
Rental Properties:		
620 Euclid Avenue, Syracuse, New York	\$45,000	-0-
1010 Euclid Avenue, Syracuse, New York	\$42,500	\$2,538*
1020 Euclid Avenue, Syracuse, New York	\$42,500	-0-
953 Westcott Street, Syracuse, New York	\$42,500	-0-
341 Roosevelt Avenue, Syracuse, New York	<u>\$42,500</u>	<u>\$2,538*</u>
	\$215,000	\$5,076
 <u>TOTAL</u>	 <u>\$495,000</u>	 <u>\$158,813</u>

\*Both mortgages are held by Fulton Savings Banks, Fulton, New York



SCHEDULE "D"

WILLIAM AND ROSEMARY POOLER

SCHEDULE OF OTHER ASSETS

IRA (as of October 31, 1997:

<u>SHARES</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
573.941	Goldman Sachs Trust	\$16,162
200	JTS Corp.	113
375	Thornburg Mtg. Asset Corp.	7,664
302.690	Freedom Cash Management Fund	----303--
	SUBTOTAL	\$24,242
	NYS Retirement Pension Plan (a defined benefit plan - no current balance information available)	-0-
	TIAA/CREF Retirement Plan (as of September 30, 1997)	587,008
	NYS Deferred Compensation Plan	18,833
	<u>SUBTOTAL</u>	<u>\$605,841</u>
	<u>TOTAL</u>	<u>\$630,083</u>

SCHEDULE "E"

WILLIAM AND ROSEMARY POOLER

SCHEDULE OF CONTINGENT LIABILITIES

As of November 6, 1997

<u>GUARANTOR FOR</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
Michael Pooler (son)	Automobile loan	\$1,501
Michael Pooler (son)	Wells Fargo business loan	<u>11,690</u>
	<u>TOTAL</u>	<u>\$13,191</u>

### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I served as an officer and member of the Board of the United Way of Central New York from 1982 to 1991. I served as Assistant Vice President and then as Vice President for Resource Development. As the second title suggests, my portfolio entailed finding and encouraging new sources of revenue for this charitable organization. These years were very tough economically for upstate New York in general and Syracuse and Onondaga County in particular. Factories closed regularly and that had a doubly disastrous effect on the United Way. First, since the United Way relied on workplace solicitation, fewer workplaces resulted in fewer donations. Second, large scale unemployment created an even greater need for the services of the social service organizations to which the United Way distributed its funds. I persuaded many small businesses to join the United Way, partially remedying the shortfall caused by factory closings. However, the agency was unable to achieve the fundraising levels of prior years, and we spent uncounted hours trying to equitably allocate diminished resources among worthy agencies.

In my years on the United Way Board, and before that as a member of its fundraising arm (the United Way Campaign Cabinet), I participated in setting goals for fundraising, setting priorities for fund distribution, responding to community emergencies, and managing an ever diminishing endowment. I was appointed by the President of the Board to sit on a committee that tried fruitlessly to merge our recipient agencies with some local chapters of national health related organizations.

For the last twelve years, I have served on the board of a not-for-profit cluster of corporations that serve the elderly and particularly the elderly poor. Loretto was originally founded by the Roman Catholic Diocese. Part of our mission is taking care of people who have no one else to care for them. Because Loretto operates a skilled nursing facility, a residential health care facility, and independent and assisted living facilities, the Board has had to understand an ever more complicated regulatory framework to be able to intelligently guide this organization. I estimate that I average five hours a month devoted to Loretto, and I have contributed that amount of time for at least the last ten years.



From 1981 to 1986, I taught a clinical seminar in public utility regulation at the Syracuse University College of Law for which I received no compensation. Through my active participation in the Women's Bar Association, I have mentored several young women attorneys.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I belong to no such organization and I have never belonged to any such organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for a nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

In 1993-1994, I appeared before a screening committee that Senator Daniel P. Moynihan appointed. The committee recommended my nomination as a district court judge. I completed a confidential candidate's questionnaire for the Senator's screening committee and appeared before the committee for a personal interview. It is my understanding that many attorneys in the Fifth Judicial District in which I sat were canvassed for their opinions on my judicial service by the screening committee.

In early 1997 I was contacted by the White House Office of Counsel and informed that I was under consideration for appointment to the United States Court of Appeals, Second Circuit. I completed a questionnaire and waived certain of my rights of confidentiality to allow the Federal Bureau of Investigation and the American Bar Association to examine and report on my fitness and qualification for appointment. I also consented to the F.B.I. providing the information that it developed in its investigation to the White House. In addition, I was interviewed by the F.B.I., the American Bar Association, and the Office of Counsel to the President.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such a case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving “judicial activism.”

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this “judicial activism” have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

As a district court judge, I understand that the court has a constitutional obligation to address only real live controversies between actually injured parties. In addition, federal courts are courts of limited jurisdiction and those limits must be honored. The United States Constitution also requires deference to (1) the acts of the Executive and Legislative branches, taken within their sphere of authority, and (2) the actions of states acting within their constitutionally reserved powers. Finally, the rule of *stare decisis* requires that I follow the precedents of the Supreme Court and the circuit in which I sit. By scrupulously honoring the rule of *stare decisis*, judges can ensure that their decisions do not incorporate the tendencies described in this question.

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

Robert David Sack

2. **Address: List current place of residence and office address(es).**

Residence: New York, New York.

Office: Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York 10166.

3. **Date and place of birth.**

October 4, 1939; Philadelphia, Pennsylvania.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married to Anne Katherine Hilker  
Lawyer  
Partner, Dewey Ballantine  
1301 Avenue of the Americas  
New York, New York 10019

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Columbia University School of Law, September 1960 - June 1963; LL.B. degree, June 1963.

University of Rochester, September 1956 - June 1960; B.A. degree, June 1960.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.****Paid**

May 1986 - date, Gibson, Dunn & Crutcher LLP, Partner, 200 Park Avenue, New York, New York 10166-0193, 212/351-4000.

September 1964 - January 1974; August 1974 - April 1986, Patterson, Belknap, Webb & Tyler and predecessor firm, Partner (1970 - 1974; 1974 - 1986), Associate (1964-1970), 1133 Avenue of the Americas, New York, New York 10036; 212/336-2000.

January 1974 - August 1974, United States House of Representatives, Committee on the Judiciary, Impeachment Inquiry Staff, Associate Special Counsel/Senior Associate Special Counsel, Rayburn House Office Building, Room 2138, Washington, D.C. 20515, 202/225-3951.

September 1963 - August 1964; Law Clerk, Hon. Arthur S. Lane, United States District Court for the District of New Jersey.

1978 - present, Secretary, Ottaway Newspapers, Inc. (wholly owned subsidiary of Dow Jones & Company, Inc.).

#### Unpaid

1989 - present, vice president and *de facto* director of the William F. Kerby and Robert S. Potter Fund, which supports legal defense of impecunious journalists abroad. (Mr. Kerby was Chairman of the Board of Dow Jones & Company, Inc. Mr. Potter was my law partner and a member of the Board of Directors of Dow Jones.)

1996 - present, Member, Board of Directors, New York Lawyers for the Public Interest.

c. 1979 - c. 1990, Member, Board of Trustees, Columbia University Seminars on Media and Society.

c. 1975 - 1983, Member of the Board of Directors, National Council on Crime & Delinquency (Chairman, 1981 - 1983).

1993 - 1996, Member, Board of Managers, 45 E. 80th Street (President, 1994-1996). (This is the governing body of the apartment building in which my wife and I live.)

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Listed, Steven Naifeh and Gregory White Smith, BEST LAWYERS IN AMERICA (current and previous editions).



Listed, 100 Best Lawyers in New York (*New York Magazine* 1995).

Listed, WHO'S WHO IN AMERICA (current and previous editions).

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association (Member, Forum Committee on Communications Law: Governing Committee, c. 1981 - 1986; Member, Program Planning Committee, 1996, 1997; Co-chair of programs in Washington D.C., one on the twentieth anniversary of *New York Times Co. v. Sullivan*, April 1984, and two on commercial speech, one in November 1985 and one in the late 1970's or early 1980's).

New York State Bar Association (Member, Committee on Media Law, c. 1989 - present).

Association of the Bar of the City of New York (Member, Communications Law Committee, c. 1977 - c. 1983, 1986 - 1989; Chair 1986 - 89) (Member, Ethics Committee, c. 1971 - 1974)).

Columbia University Seminars on Media and Society (Member, Board of Trustees, c. 1979 - c. 1990)

Media Law Reporter (BNA) (Member, Advisory Board, c. 1978 - present).

American Bar Association, Forum on Communications Law, *The Communications Lawyer* (Member, Editorial Board, c. 1992 - present).

- 10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any lobbying organization, except insofar as partners of my firm, Gibson, Dunn & Crutcher, act as lobbyists for the National Soft Drink Association, ITT Educational Services, Career College Associates, and the California Association of Post-Secondary Schools. I have not personally participated in any lobbying activity.

In addition to organizations listed in sections 6 and 9, above, I belong to the Century Association, 7 West 43d Street, New York, N.Y. and the Columbia Law School Association, Inc.

My wife and I are "patrons" of The New York Philharmonic orchestra.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court, December 17, 1973.

United States Court of Appeals for the Fifth Circuit, October 22, 1993.

United States Court of Appeals for the Sixth Circuit, December 15, 1987.

United States Court of Appeals for the Second Circuit, February 22, 1971.

United States District Court, Northern District of New York, May 12, 1995.

United States District Court, District of Columbia, 1968.

United States District Court, Eastern District of New York, June 2, 1967.

United States District Court, Southern District of New York, May 4, 1967.

Courts of the State of New York, December 1963.

Membership in the bar of the United States District Court for the District of Columbia was obtained in connection with a single case in 1968, was not exercised, and has lapsed.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

**A. Treatises:**

*Libel, Slander, and Related Problems* (R. Sack and S. Baron Second Edition, Practising Law Institute, 1994). Copy submitted herewith.

*Libel, Slander, and Related Problems*, Second Edition, 1995, 1996, and 1997 Cumulative Supplements (Practising Law Institute). 1997 Cumulative Supplement includes contents of 1995 and 1996 Supplements. Copy submitted herewith.

*Libel, Slander, and Related Problems*, Michie CD-ROM edition (1995, supplemented) (contains material in print edition and 1997 supplement to print edition). No copy submitted herewith.

*Libel, Slander, and Related Problems* (Practising Law Institute, 1980) (predecessor to Second Edition). Copy submitted herewith.

Co-author with D. Jarrett Arp, chapter on "Factual Misstatements" in Stuckey, *Internet and Online Law* (Law Journal Seminars Press 1996). Copy submitted herewith.

Co-author with P. Cameron DeVore, *The Law of Advertising and Commercial Speech* (Practising Law Institute, scheduled for publication in 1998). Being drafted.

## B. Articles:

A copy of each of the following articles and book reviews is contained in Volume I of the material submitted with this questionnaire.

*Commercial Speech and the Law of Defamation*, Libel Defense Resource Center (N.Y. 1997) (co-author with Preeta D. Bansal).

Report of the New York State Bar Association Committee on Media Law, '*60 Minutes' and the Law: Can Journalists be Liable for Tortious Interference with Contract*,' July/August 1996 NEW YORK STATE BAR JOURNAL 24 (co-author with various members of subcommittee).

*Goodwin v. United Kingdom*, 16 TOLLEY'S JOURNAL OF MEDIA LAW AND PRACTICE [U.K.] (1995).

*Free Business Week*, THE WALL STREET JOURNAL ("Rule of Law" Column, September 27, 1995).

*Privacy and the Cyberpaper: Thoughts on Invasion of Privacy by Electronically Published Newspapers*, FIRST AMENDMENT & MEDIA LITIGATION NEWSLETTER (1994).

*Hearing Myself Think: Some Thoughts on Legal Prose*, 4 THE SCRIBES JOURNAL OF LEGAL WRITING 93 (1993).

*Is There Any Fault with Hepps -- Observations on the Recent Supreme Court Libel Decision*, 4 COMMUNICATIONS LAWYER No. 3, p. 8 (Summer 1986).

*First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICKINSON LAW REVIEW No. 3, p. 609 (Spring 1986) (co-author with Richard J. Tofel).

*Introduction to a Symposium [on New York Times Co. v. Sullivan]*, 2 COMMUNICATIONS LAWYER No. 3, p. 4 (Summer 1984).

*Legal Issues in Electronic Publishing; Commercial Speech*, 36 FEDERAL COMMUNICATIONS LAW JOURNAL, p. 217 (1984).

*When Is An Arrest Not an Arrest*, BULLETIN OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS (September 1983).

*Advertising and Commercial Speech*, 3 LEGAL NOTES & VIEWPOINTS QUARTERLY NO. 3 (Practising Law Institute, May 1983) (co-author with P. Cameron DeVore).

*Thinking of an Ethics Code?*, BULLETIN OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS (Dec./Jan. 1983).

*Commercial Speech - An Emerging Legal Concept*, PROCEEDINGS OF FEDERAL BAR COUNCIL 1982 BENCH AND BAR CONFERENCE (co-author with P. Cameron DeVore).

*Introduction*, LDRC 50-STATE SURVEY 1982.

*Discovery Problems in Media Cases*, 6 LITIGATION (Journal of the Section of Litigation; ABA) No. 4, p. 21 (Summer 1980).

*Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA LAW REVIEW 629 (1979).

*The 'Times' Free Press-Fair Trial Case*, NEW YORK LAW JOURNAL, August 7, 1978, p. 1, col. 3.

*Principle and Nebraska Press Association v. Stuart*, 29 STANFORD L. REV. 411 (1977).

#### C. Book Reviews:

David Rudenstine, *The Day the Presses Stopped*, NEW YORK LAW JOURNAL, July 26, 1996.

Anthony Lewis, *Make No Law*, NEW YORK TIMES, September 21, 1991, Section C; Page 16; Column 3.

#### D. Lectures And Other Oral Presentations:

Since 1973, I have been continually involved in lecturing and teaching practitioners, law and journalism students, and others, on media-law topics. I have not routinely kept records of such lectures and have not routinely saved the manuscript or notes from which they were given. I submit herewith copies of those contained in my files. Many of these lectures and other oral presentations were accompanied by outlines. Because the outlines were, in large measure, published, I have copies of most or all of them, which I submit herewith.

NOTE: I have not listed or included in any information or material supplied herein or herewith information or material relating to talks I have given to clients or to lawyers within this firm.



1. PRACTISING LAW INSTITUTE. I have delivered lectures, or contributed as a panelist, at all of the annual Practising Law Institute (PLI) programs on communications law since their inception in 1973. The subjects have been the law of commercial speech (advertising) and of libel. In connection with nearly all of them, I have prepared or been co-author of one or more outlines that were published in course handbooks by PLI.

(a) Outlines: Although the PLI outlines (other than those listed as "recent developments" below) are cumulative, and therefore highly repetitive, all of those that I have been able to obtain, through a search of my library, that of my co-author, and requests made of PLI, are submitted herewith in Volumes II through VII as follows.

Communications Law Explosion; Advertising (1973)

Media Liability For Advertising (1975)

Recent Developments Relating to Advertising and Commercial Speech (1976)

Recent Developments Relating to Advertising and Commercial Speech (1977)

Advertising and Commercial Speech (1980)

Advertising and Commercial Speech (1981)

Pleading and Motion Practice in Libel and Privacy Cases (1981)

Advertising and Commercial Speech (1982)

Advertising and Commercial Speech (1983)

Common Law Libel and the Press -- A Primer (1983)

Advertising and Commercial Speech (1984)

Common Law Libel and the Press -- A Primer (1984)

Advertising and Commercial Speech (1985)

Common Law Libel and the Press -- A Primer (1985)

Advertising and Commercial Speech (1986)

Common Law Libel and the Press -- A Primer (1986)

Advertising and Commercial Speech (1987)

Common Law Libel and the Press: A Primer (1987)

Advertising and Commercial Speech (1988)

Common Law Libel and the Press: A Primer (1988)  
 Advertising and Commercial Speech (1989)  
 Common Law Libel and the Press: A Primer (1989)  
 Advertising and Commercial Speech (1990)  
 Common Law Libel and the Press: A Primer (1990)  
 Advertising and Commercial Speech (1991)  
 Common Law Libel and the Press: A Primer (1991)  
 Constitutional Privilege in Libel Law (1991)  
 Advertising and Commercial Speech (1992)  
 Common Law Libel and the Press: A Primer (1992)  
 Constitutional Privilege in Libel Law (1992)  
 The Law of Defamation: Recent Developments 1992  
 Advertising and Commercial Speech (1993)  
 Common Law Libel and the Press: A Primer (1993)  
 Constitutional Privilege in Libel Law (1993)  
 The Law of Defamation: Recent Developments in 1993  
 Advertising and Commercial Speech (1994)  
 Advertising and Commercial Speech (1994)  
 Constitutional Privilege in Libel Law (1994)  
 Defamation: Recent Developments -- 1994  
 Advertising and Commercial Speech (1995)  
 Constitutional Privilege in Libel Law (1995)  
 1995 Developments in Defamation Law  
 Advertising and Commercial Speech (1996)  
 Constitutional Privilege in Libel Law (1996)

## Recent Developments in the Law of Defamation (1996)

(b) Manuscripts and Notes: In reviewing my files, I have found and submit herewith in Volume VII manuscripts or notes (as opposed to outlines listed above) for PLI lectures as follows:

Recent Developments in Defamation Law, November 1996

Recent Developments in Defamation Law, November 1995

Recent Developments in Defamation Law, November 1993

Recent Developments in Defamation Law, November 1991

Common Law Libel and the Press, November 1983

PLI informs me that they neither create nor maintain audio or video recordings of these proceedings.

(c) Television: The 1993 lecture on recent developments in libel law was later broadcast on CourtTV. I do not recall seeing nor do I have access to the videotape.

(d) Press Reports: Editor & Publisher reported on comments I made at the 1994 annual PLI seminar. It is submitted herewith in Volume VII, at Tab 6.

The Bureau of National Affairs distributes with its Media Law Reporter, which consists of recent media law cases in full text, a publication called "Law Notes." Law Notes typically reports, in a paragraph or two, on PLI media law seminar presentations, including mine. Neither I nor my firm retain these publications. The Bureau of National Affairs keeps them for only three or four years. Submitted herewith are the extant reports, for December 3, 1996, November 26, 1995, September 12, 1995, November 22, 1994, and November 30, 1983, which have been supplied to me by BNA. (All five are submitted herewith in Volume VII, at Tab 7)

2. COLUMBIA JOURNALISM SCHOOL. Since about 1982, I have lectured annually (except for occasional years in which scheduling conflicts prevented it) to the Columbia Journalism School class of Professor Vincent Blasi and columnist Anthony Lewis, and a predecessor class taught by Fred Friendly, on law affecting journalists. No written material was prepared therefor.

On October 31, 1997, I spoke on corporate lawsuits against the media, at a Columbia Journalism School symposium entitled "Business & The Press -- Strange Bedfellows." Notes for that presentation are submitted herewith in Volume VII, at Tab 8.

3. OTHER LECTURES AND ORAL PRESENTATIONS. I have spoken from time to time at programs and classes sponsored by, among others, the American Bar Association, Eighth Circuit Judicial Conference, National Association of Broadcasters,

National Newspaper Association, Libel Defense Resource Center, American Society of Managing Editors, Associated Press Managing Editors, Federal Bar Council, state and city bar associations, at various colleges and universities, including Brown, Columbia, Georgetown, Harvard, Michigan State University, Southern Oregon State College and Yale, and for other organizations. I have participated in many panel discussions relating to media law, including more than a dozen "Fred Friendly forums" across the country, and have been interviewed and quoted by print and broadcast news media on media-law topics.

(a) List of Recent Lectures: I have not kept a list of all such presentations. For the information of the Committee, however, the following is a list of such lectures and presentations (other than those at PLI or the Columbia Journalism School reported above) since 1991, prepared on the basis of yearly reports of my activities submitted by me to my law firm's management. I believe it to be complete or substantially complete.

Funeral Mass for Judge Arthur S. Lane, Princeton, New Jersey, October 27, 1997, eulogy. (Volume VII, Tab 11)

American Bar Association Forum Committee on Media Law, January 1996, introductory remarks for panel, of which I was moderator, on pre-trial and trial publicity in the United States and abroad. (Volume VII, Tab 12)

American Legal Seminars, Inc., October 1995, speech on business defamation and commercial disparagement. (Volume VII, Tab 13)

Association for Education in Journalism and Mass Communication, August 1995, talk on media law in Singapore.

Practising Law Institute, July 1995, telephone conference seminar on libel in cyberspace.

National Newspaper Association/National Association of Broadcasters/Libel Defense Resource Center program, September 1995, panel discussion of which I was moderator on a comparison between American and British libel law and procedure. (Volume VII, Tab 14)

John F. Kennedy School, Harvard, November 1994, course on "The Press and the Political Process," guest lecturer on general media law principles. (Volume VII, Tab 15)

American Bar Association, 1994, videotaped preface to ABA program on legal writing. (I do not have and have not seen videotape.)

American Bar Association/American Society of Newspaper Editors, October, 1994, session on privacy implications of "Newspapers in Cyberspace." (Volume VII, Tab 16)

Annual convention of the American City Business Journals, September 1994, talk on general legal matters. (The American City Business Journals are a group of local newspapers or magazines devoted to local business news.)



New York Book Publishing Lawyer's Group, 1994, talk on comparisons between book and newspaper counseling. (The Book Publishing Lawyer's Group is an informal association of lawyers representing book publishers.)

University of London, April 1994, panelist in program on 20th Anniversary of "Watergate."

New York State Bar Association, April 1994, panelist in program on bench, bar and press relations.

New York State Bar Association, January 1994, panelist in program on privacy law.

American Bar Association Section of Legal Education and Admissions to the Bar and the Standing Committee on Lawyer Competence, August 1993, speech on legal writing. (Volume VII, Tab 17. *See also* Volume I, Tab 6)

Mead Data Systems at New York University Law School, c. March 1993, panelist on program assessing performance of law schools.

Louisiana State Bar Association, April 1992, panelist on media law topics.

Columbia Journalism School foreign exchange program, 1992, talk on American media law.

National Newspaper Association/National Association of Broadcasters/Libel Defense Resource Center program, September 1991, talk on libel law topics.

American Bar Association convention, August 1991, panelist on Fred Friendly forum on First Amendment topics.

Annual convention of the American City Business Journals, June 1991, talk on general legal matters. (Volume VII, Tab 18.)

Class at The New School, April 1991, panelist on press law topics.

Brown University, March 1991, panelist on Fred Friendly forum on First Amendment topics.

New York State Bar Association, Executive Committee and House of Delegates, February 1991, presented position of Association's Media Law Committee on public access to filed civil-court documents.

(b) Outlines:

American Legal Seminars, Inc., October 1995, Business Defamation and Commercial Disparagement (co-author with Michael M. Conway). A copy thereof is submitted herewith in Volume VII, at Tab 9.

American Bar Association/American Society of Newspaper Editors, October 1994, outline for talk on privacy implications of "Newspapers in Cyberspace." A copy thereof is submitted herewith in Volume VII, at Tab 10.

(c) Additional manuscripts and notes: In reviewing my files, I have found, and submit herewith in Volume VII, manuscripts or notes for lectures other than at PLI or the Columbia Journalism School, and other than those listed in subsection (a) above, as follows:

National newspaper ombudsmen's organization, Minneapolis, June 1985, on media law, generally.

Association of the Bar of the City of New York, June 1985, on the law governing liability for "docudramas."

American Newspaper Publisher's Association, May 1984, on recent developments in press law.

Associated Press Managing Editors, 1983, on countersuing plaintiffs for groundless defamation suits.

American Society of Newspaper Editors, May 1982, on recent developments in libel law.

Michigan State University and The State Bar of Michigan, program on "The First Amendment, the Media, and the Courts," December 1981, presentation on "Summary Judgment in Libel Cases."

American Bar Association, Litigation Section, August 1979, on advertising and commercial speech.

(d) Television: Impromptu comments I made as member of a panel for the American Society of Managing Editors in May 1984 were broadcast on CSPAN. I neither have nor have access to videotapes of the broadcast.

In May, 1990, I gave a lecture at Southern Oregon State College, Ashland, Oregon. The subject was "The New Censorship; First Amendment Problems in the 1990's." It was delivered from a prepared text, which I did not retain. (See newspaper report, Volume VII, Tab 30). It was broadcast on a local television station. I do not have or have access to a tape of the broadcast. Neither the college (now Southern Oregon University), The Medford Mail Tribune, co-sponsor of the talk, or the television station have retained a copy.

I have, on an estimated eight to ten occasions, served as a guest commentator on media related-cases or questions for CourtTV. While they were each videotaped, I have preserved only one, about a libel trial in Texas in or about September 1996. A copy of the videotape is submitted herewith.

(e) Press Reports:

The following reports on speeches or other oral presentations I made are submitted herewith in Volume VII:

U.S. News & World Report, August 16, 1993, reported on my presentation to the American Bar Association Section of Legal Education and Admissions to the Bar and the Standing Committee on Lawyer Competence.

The *ABA Journal*, October 1993, reported on the same presentation.

(According to my notes, an article in USA Today reported on the same session. I have not retained in my files, and could not retrieve using NEXIS, a copy of the article.)

*The New York Law Journal*, on January 28, 1991, reported comments I made during the presentation of the position of the New York State Bar Association Media Law Committee on public access to filed civil-court documents to the Association's Executive Committee and House of Delegates.

*The Wall Street Journal* "Viewpoint" op-ed column, for Thursday, June 7, 1990, quoted from my speech at Southern Oregon State College.

The *Medford Mail Tribune*, May 8, 1990, reported on my speech at Southern Oregon State College.

*Editor & Publisher*, August 7, 1982, quoted from my presentation to the American Newspaper Publisher's Association, May 1982, on recent developments in press law.

*Business Week*, June 14, 1982, reported comments I made during the same presentation.

E. CONGRESSIONAL TESTIMONY:

On April 3, 1987, on my own behalf, I testified before the United States House of Representatives Subcommittee on Commerce and Energy with respect to bans on tobacco advertising. A copy of my submission (or a draft thereof) is submitted herewithin Volume VII, at Tab 33.

On April 23, 1986, on behalf of Dow Jones & Company, Inc., I testified before the United States Senate Rules Committee with respect to computerization of campaign contribution records. A copy of my submission (or a draft thereof) is submitted herewith in Volume VII at Tab 34).

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. Physical examinations in December 1996 and January 1997 (two sessions).

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Commissioner, New York City Commission on Public Information and Communication 1995 - date. (Unpaid; Mayoral appointment.) I have never been a candidate for public office.

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk, Hon. Arthur S. Lane, United States District Court for the District of New Jersey, September 1963 - August 1964. I was Judge Lane's only law clerk during this year, assisting him in research and writing.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

September 1964 - January 1974; August 1974 - April 1986, Patterson, Belknap, Webb & Tyler and predecessor firm, Associate, 1964-1970;



Partner, 1970 - 1974; 1974 - 1986, 1133 Avenue of the Americas, New York, New York 10036; 212/336-2000. During the first six years at Patterson, Belknap, I was engaged as an associate attorney in the general practice of law, executing both corporate and litigation assignments. I became a partner on November 1, 1970, continuing both corporate and litigation work. I left the firm for employment by the United States House of Representatives in January 1974 and returned to the firm as a partner in August of the same year. After my return, I specialized increasingly in litigation and media law.

January 1974 - August 1974, United States House of Representatives, Committee on the Judiciary, Impeachment Inquiry Staff, Associate Special Counsel/Senior Associate Special Counsel, Rayburn House Office Building, Room 2138, Washington, D.C. 20515, 202/225-3951. I was in charge of a task force of approximately ten lawyers reviewing the interaction between the White House and various government agencies.

September 1978 - present; Secretary, Ottaway Newspapers, Inc. (wholly owned subsidiary of Dow Jones & Company, Inc.); Post Office Box 401, Campbell Hall, New York; 914/294-8181. This is an administrative position involving attendance at meetings, taking minutes and giving occasional, miscellaneous legal advice.

May 1986 - date, Gibson, Dunn & Crutcher LLP, Partner, 200 Park Avenue, New York, New York 10166-0193, 212/351-4000. I have continued my practice focusing largely on litigation and media matters.

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

See answer to subsection 2, below.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

1964 - 1974: During this period, my practice was largely corporate, although I also dealt with defamation and related litigation and publication advice for Dow Jones publications, including *The Wall Street Journal*, *Barron's National Business and Financial Weekly*. My corporate practice included routine corporate management (minutes, resolutions, etc.), mergers and acquisitions, and the negotiation and drafting of a variety of business agreements. I was also intensively involved from 1964 through 1973, as junior counsel for my firm's client Chemical Bank, in the settlement among a large number of financial and other institutions of American Express Company's alleged \$135 million liability in connection

with the notorious "Tino DeAngelis salad oil swindle." (In the early 1960's, Mr. DeAngelis used phony warehouse receipts as collateral for loans for over \$100 million dollars from numerous institutions.) Early during this period, I began to work for Dow Jones, assisting the company in its corporate transactions, including corporate acquisitions, vetting material prior to publication, and representing the company in a variety of libel, breach of contract, and similar lawsuits in various parts of the country.

1974 - 1989: I became principal outside counsel for Dow Jones & Company, Inc., publisher of, *inter alia*, *The Wall Street Journal* and *Barron's National Business and Financial Weekly*, and was named Dow Jones's General Counsel in 1982. Although I did not work exclusively for Dow Jones, throughout this period I carried day-to-day responsibility for Dow Jones's litigation matters throughout the world, including defamation, antitrust, intellectual property and similar cases, supervising and participating in all such litigation. On a daily basis, I advised the editors and reporters of Dow Jones publications on all legal matters including performing pre-publication review of articles and providing advice on the legal implications of reporting efforts. On Dow Jones's behalf, I dealt with all threats of actions, and challenges to newsgathering activities and published articles, including allegations of libel, invasion of privacy and related torts; allegations of securities violations, including insider trading by reporters; access by reporters to proceedings and records of courts and public agencies; and protection of journalists' sources, source material and unpublished information in the course of responding to civil and criminal subpoenas.

It was during this period that I began writing, speaking, and teaching widely on press-law topics. (See answers to question 12 above.)

1989 - date: Employing lawyers whom I had trained at Gibson, Dunn & Crutcher, Dow Jones began in 1989 to bring the day-to-day supervision of litigation and counseling functions in-house. I therefore traded my title of "General Counsel" of Dow Jones for "Principal Outside Counsel," which I retain today, and broadened the base of my practice. I have, since 1989, also represented *Newsday* (Times Mirror Co.), Time Inc. and its publications, *The New York Daily News*, *The New York Times*, *The Washington Post*, *USA Today*, *CNN*, Canadian Broadcasting Corporation, *The Louisville Courier-Journal*, Random House, *The National Law Journal*, *Crain's New York Business*, and others in a wide variety of cases, and counseled them, frequently in crisis, on the legal implications of the gathering and dissemination of news.

I have continued to represent Dow Jones, as principal outside counsel, on a daily basis, world-wide. For example, I was responsible for the *Crinkley*

litigation referred to in paragraph 18. (c) 9, below I have assisted in overseeing foreign legal matters referred to in paragraph 19, below I frequently and regularly consult with editors and inside legal counsel on editorial and legal issues. I have been in charge of all libel litigation against the company in the courts of New York. In March 1997, a Houston, Texas jury rendered a \$222 million verdict in a libel case against *The Wall Street Journal*, the largest such verdict in history. Thereafter, I began, at the request of Dow Jones management, to oversee the group of lawyers from New York, Washington D.C. and Texas assigned to pursue post-trial motions and appeals, and to assess for the company the factors that led to the verdict.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

My appearance in court has varied widely depending on the exigencies of my practice. I have been involved throughout various trials, as described in subparagraph 17. c. 4, below. I have appeared in trial courts from time to time on a variety of motions related to ongoing litigation -- motions for summary judgment, for example -- and in connection with subpoenas for the testimony of journalists or their source documents, or in seeking journalists' access to documents in court or in government agencies. I have handled a variety of appeals in federal and state courts of the sort detailed in my response to question 18. (c), below. I have attended and assisted in court proceedings in many places here and abroad in which I have not myself appeared formally, particularly in connection with my responsibilities as lawyer in charge of litigation for Dow Jones.

2. **What percentage of these appearances was in:**

- (a) **federal courts;**

Approximately 65%.

- (b) **state courts of record;**

Approximately 35%.

- (c) **other courts.**

None, except for the occasional appearance in foreign courts referred to in the response to question 19, below.

3. What percentage of your litigation was:

(a) civil;

95%.

(b) criminal.

5%.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

One; associate counsel (*Calabrian Co. v. Bangkok Bank, Ltd.* (S.D.N.Y. 1978) (international contract litigation) (bench trial)). Although *Calabrian* was the only significant litigation in which I personally examined and cross-examined witnesses, there have been other cases in which I was present throughout, engaged in pre-trial, trial and post-trial proceedings. In *English v. Dow Jones* (N.D. Tex. 1972), a libel case, I assisted in discovery, preparing witnesses and briefs, readying the case for trial, and assisted trial counsel at trial. In *Kolling v. Dow Jones* (Cal. Super. Ct. 1977), an antitrust case, I engaged in the discovery process, prepared briefs, argued motions, prepared witnesses, assisted at trial, and prepared substantive documents on appeal. In *Chicago Board of Trade v. Dow Jones* (Ill. Cir. Ct. 1982), referred to in paragraph 18. (c) 10, below, I was engaged in all aspects of the case, advising the client prior to litigation, drafting pleadings, conducting discovery, preparing witnesses for trial, and attending and advising at trial. I prepared the briefs in and argued the subsequent appeals both in the Appellate Court and Supreme Court of Illinois. In *Rudin v. Dow Jones* (S.D.N.Y. 1983), a defamation suit, I similarly assisted in pleading and discovery, was responsible for the motion practice, engaged in preparation for trial, and attended and assisted trial counsel during the trial. In *Crinkley v. Dow Jones* (Ill. Cir. Ct. 1991), referred to in paragraph 18. (c) 9, below, I was engaged from beginning to end in pleading, discovery, motion practice, assisting in preparation for trial, assisting at trial, being personally responsible for the trial motion and subsequent appellate practice that resulted in overturning of the jury's multimillion dollar award, and participated in the subsequent negotiations that led to eventual settlement.

Libel and other media cases, which have represented a large proportion of my litigation work, typically hinge on issues of law rather than issues of fact. They are, therefore, ordinarily prepared for, but disposed of prior to, trial. In connection with my representation of clients, I have thus



frequently either supervised or conducted the preparation of cases that were won on motion, settled (typically for non-monetary consideration), or discontinued, but not ultimately tried. I have also frequently been involved in motions and appeals relating to journalists' access to courts, agencies and records, motions to quash subpoenas, and similar proceedings, and preparation of *amicus curiae* submissions in press-law cases.

**5. What percentage of these trials was:**

**(a) jury;**

Of the cases listed above, 66 2/3% were jury cases.

**(b) non-jury.**

Of the cases listed above, 33 1/3% were non-jury cases.

**18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

**(a) the date of representation;**

**(b) the name of the court and the name of the judge or judges before whom the case was litigated; and**

**(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

1. 1993 - 1997. *Millus v. Newsday, Inc.*, 89 N.Y.2d 840, 675 N.E.2d 461, 652 N.Y.S.2d 726 (1996) (*per curiam*), *cert. denied*, 117 S.Ct. 1313 (1997).

Defendants reported in an editorial, allegedly falsely, that plaintiff, a candidate for public office, "admits he doesn't expect to win and is relieved by the prospect." The New York Court of Appeals held the statement to be protected opinion under New York constitutional law and, if a misquotation, also protected by the United States Constitution because it was not made with "actual malice." The decision preserved broad opinion protection in New York and protection for inadvertent misquotation under United States Supreme Court decisions in *Masson v. New Yorker Magazine, Inc.* and *New York Times Co. v. Sullivan*. I represented defendants *Newsday* and the author throughout discovery, led the briefing effort on summary judgment in the Supreme Court and the Appellate Division, briefed to the Appellate Division a successful motion for a discretionary appeal to the Court of Appeals, and briefed and argued the appeal to the Court of Appeals.

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2. 1990 - 1996. *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868 (N.D.N.Y. 1995) (Munson, J.), *aff'd mem.*, 1996 U.S. App. LEXIS 26083 (2d Cir. 1996) (Winter, J.).

Based on an investigation made by inside and outside counsel, the general counsel of Anheuser-Busch publicly announced that three employees of an upstate New York brewery were primarily responsible for environmental-law violations by the company. One of the employees brought suit against the company and its general counsel for libel. Summary judgment was granted for the defendants. Under New York law developed in the context of suits against the media, a plaintiff cannot ordinarily recover for libel without first proving that the defendant was grossly irresponsible. The District Court held, *inter alia*, that the standard applied to nonmedia defendants and that the statements by the general counsel were not, as a matter of law, grossly irresponsible because they were based on the investigation. I represented defendants throughout the litigation, from pleading through extensive discovery to the successful motion for summary judgment and appeal, which I briefed and argued.

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3. 1994 - 1996. *Bryks v. Canadian Broadcasting Corp.*, 928 F. Supp. 381 (S.D.N.Y. 1996) (Mukasey, J.); *Bryks v. Canadian Broadcasting Corp.*, 906 F. Supp. 381 (S.D.N.Y. 1995) (Mukasey, J.).

Cable News Network rebroadcast a small portion of a program previously broadcast by the Canadian Broadcasting Company about charges of misbehavior made against the plaintiff in Manitoba. Plaintiff brought a libel suit in federal court in New York against both broadcasters. The questions presented on summary judgment were (i) whether CNN was protected from liability by the fact that it had merely rebroadcast what it had received from the CBC, and (ii) whether the United States District Court for the Southern District of New York had jurisdiction over the CBC for purposes of this litigation. *Held*, on motions for summary judgment: (i) the so-called "wire-service" defense, which protects newspapers from liability for defamation when they republish material from news services such as the Associated Press or Reuters, protects a television rebroadcast of material supplied by another network, and (ii) under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605, foreign-government owned broadcasters are immune from defamation suits in United States courts despite language of the Act that allows liability for commercial activity of a foreign state that has a "direct effect" in the United States. The case was important both in establishing the applicability of the "wire service" defense in the context of television broadcasting and in analyzing the extent to

which foreign-government owned broadcasters are subject to suit in the United States. I led briefing of motion on the first point and supervised briefing of the motion on the second point. (The motions were decided without oral argument.)

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4. 1995 - 1996. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (Opinion by Merritt, C.J.).

Procter & Gamble Co. had brought suit against Bankers Trust Co. in U.S. District Court in Cincinnati alleging fraud in connection with the sale of derivative securities to Procter & Gamble. When *Business Week* magazine was given documents about the lawsuit that were subject to a protective order, the U.S. District Judge presiding over the case enjoined *Business Week* from publishing an article containing information from the documents. *Business Week* appealed to the United States Court of Appeals for the Sixth Circuit, claiming that the injunction was a prior restraint prohibited by the First Amendment. I prepared briefs and argued before the Sixth Circuit on behalf of Dow Jones, *The Cincinnati Enquirer*, *The Los Angeles Times*, *Newsday*, and The American Society of Newspaper Editors as *amici curiae* supporting *Business Week*. The Sixth Circuit held that the district court was prohibited by the First Amendment from issuing the injunction. The Court of Appeals underscored the absoluteness of the rule that injunctions against non-parties cannot be used to insure court-ordered confidentiality. It thereby made clear that a journalist who obtains such information and then seeks comment on it from a litigant prior to publication may do so without risking a judicial restraint on publication.



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5. 1994 - 1995. *Maddox v. Williams*, 23 Media L. Rep. (BNA) 2118 (Ky. Cir. Ct., Jefferson Co., 1995) (Wine, J.).

*Maddox v. Williams* was brought in Kentucky state court by a Louisville law firm representing Brown & Williamson Tobacco Corp. against a paraprofessional formerly employed by the firm. The firm and Brown & Williamson, an intervenor, alleged that the paraprofessional had disseminated to the press and others confidential Brown & Williamson documents relating to smoking and health. In the course of the litigation, Brown & Williamson subpoenaed several newspapers, including *The Louisville Courier-Journal* (in Kentucky), *USA Today* (in Virginia), and *The Washington Post*, *The New York Times*, and *The National Law Journal* (in the District of Columbia), seeking their production of the leaked documents in order to confirm that the defendant had, in fact, supplied them. On behalf of the newspapers, I briefed and argued the Virginia and Kentucky motions. The courts held that the United States Constitution, Virginia common law, and a Kentucky statute prohibited such compelled disclosure. The District of Columbia subpoenas were eventually withdrawn. The cases established (i) a qualified privilege for the identity of confidential news sources during the course of civil litigation apparently for the first time in Virginia, and (ii) the availability of the Kentucky statute's protection in the face of an argument that the newspaper, as a witness to criminal or tortious behavior, was not entitled to protection. These motions were part of broader Brown & Williamson discovery efforts that included subpoenas to members of the House of Representatives (see *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995)) and an action against The University of California, San Francisco (see "California: Tobacco Papers Stay Open," *National Law Journal*, p. A-8 col. 1, June 5, 1995, and *Brown & Williamson Tobacco Corp. v. Regents*, 1995 Cal. LEXIS 4289 (Cal. Supreme Ct. 1995)).

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6. 1992 - 1994. *Wilson v. Belin*, 21 Media L. Rep. (BNA) 2028 (N.D. Tex. 1993) (Buchmeyer, J.), *aff'd*, 20 F.3d 644 (5th Cir.) (Jolly, J.), *cert. denied*, 513 U.S. 930 (1994).

The defendant David Belin, a lawyer, was on the staff of the Warren Commission, which investigated and reported on the assassination of President John F. Kennedy. A newspaper reporter from Dallas, Texas telephoned the defendant in Des Moines, Iowa, where the defendant lived and worked, and questioned him about a theory held by the plaintiff, a Pennsylvania resident, related to the assassination. Statements purportedly made by the defendant were included in an article in the reporter's Dallas newspaper. On the basis of the article, the plaintiff brought suit in Texas against the defendant for libel. The United States District Court for the Northern District of Texas held, affirmed by the Fifth Circuit, that it did not have jurisdiction over the defendant. The defendant had not, by answering the telephone and the reporter's questions, "purposefully availed himself of the benefits and protections" of Texas law, and the assertion of jurisdiction over him offended "traditional notions of fair play and substantial justice," rendering jurisdiction impermissible under the due process clause. The case thus recognized, apparently for the first time in this context, the freedom of persons from being haled into courts in distant states because of statements made to inquiring journalists in those states. I represented Mr. Belin, briefing his motion to dismiss in the trial court and on appeal. (The Fifth Circuit decided the appeal without hearing oral argument.)

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7. 1995 - 1996. *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) (Minor, J.); *United States v. Amodeo*, 44 F.3d 1044 (2d Cir. 1995) (Winter, J.).

*Newsday*, a Long Island, New York-based daily newspaper, sought to gain access to documents filed in the federal district court with respect to a court-monitored investigation. The documents sought by *Newsday* related to a White House employee. The Second Circuit held on the first appeal that the document was a court document subject to the presumption of access. On the second appeal, the Second Circuit set forth in detail the weight to be given to the presumption and the factors to be balanced against disclosure, remanding the case to the district court for such a determination. (The district court ultimately decided not to release the documents on privacy grounds.) The two decisions represent the Circuit's most careful and detailed examination to date of the rights of the press to access to court documents. As partner in charge of the matter, I supervised the briefing and argument of the first appeal, drafted and supervised the preparation of the draft of the briefs in the second appeal, and argued the second appeal.

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8. 1994 - 1996. *United Kingdom v. Goodwin*, (1996) 22 EHRR 123.

Article 10 of the European Convention on Human Rights provides that "Everyone has the right to freedom of expression. This right shall include freedom . . . to receive and impart information and ideas without interference by public authority."

William Goodwin, an English reporter, had been held in contempt by the U.K. courts, affirmed by the House of Lords, for failing to disclose the source of confidential business information that had been supplied to him for publication. The European Commission on Human Rights and the European Court of Human Rights held that the U.K. courts' decisions were contrary to the Convention's free speech provisions because those provisions imply protection for the identity of confidential news sources. The Court's actions are binding, and therefore establish the journalist's right to protect his or her confidential sources, in 23 countries. I was part of the defense team for the purpose of presenting the equivalent of *amicus curiae* arguments explaining the development of a similar privilege under American constitutional principles and urging its importation into European law under Article 10.

Associate Counsel:

Leslie E. Moore Esq.  
Gibson, Dunn & Crutcher LLP  
200 Park Avenue  
New York, N.Y. 10166  
212/351-4000

Theodore J. Boutrous, Jr., Esq.  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
202/955-8688

Other Counsel for Mr. Goodwin:

Geoffrey Robertson, Q.C.  
Doughty Street Chambers  
11 Doughty Street  
London, England WC1N 2PG  
011-44-171-404-1313

Geoffrey Bindman, Esq.  
Bindman & Partners  
One Euston Road, Kings Cross  
London, England NW1 2SA  
011-44-171-833-4433

Counsel for the United Kingdom:

Michael Baker, Q.C.  
 Fountain Court Chambers  
 Temple  
 London England EC4  
 011-44-171-583-3335

Mr. Ian Christie  
 Foreign & Commonwealth Office  
 London, England SW1A 2AH  
 011-44-171-270-2576.

9. 1977 - 1996. *Crinkley v. Dow Jones & Co.*, Circuit Court, Cook County, Illinois, No. 84L2588, Howard M. Miller, J. (trial: May 8 - May 22, 1991).

The defendant Dow Jones had published an article in *The Wall Street Journal* about the dismissal of the plaintiff by Searle Co., the pharmaceutical company, incorrectly reporting that the dismissal resulted from plaintiff's involvement in improper payments abroad. The jury awarded the plaintiff approximately \$2.2 million in damages. On defendant's motion, however, the court granted defendant a new trial on damages, which plaintiff unsuccessfully appealed to the Illinois Appellate Court and the Supreme Court of Illinois. The case was eventually settled for something less than twenty percent of the verdict. The case presented a classic problem for business journalism, where the jury is wrongly persuaded that the economic losses suffered by a plaintiff subsequent to an article were, in fact, caused by the article. The judge apparently agreed with Dow Jones's argument that the jury's finding of causation was unsupported by the evidence. I attended and assisted trial counsel at trial by consulting on trial litigation strategy and determining appropriate legal arguments, participated in discovery, helped prepare fact and expert witnesses, analyzed testimony, prepared counsel for cross-examination, prepared the damages portion of the briefs in the Circuit Court, the Appellate Court and the Illinois Supreme Court, and successfully argued that portion of the motion for a new trial in the Circuit Court.

Co-counsel:

Michael M. Conway, Esq.  
 Hopkins & Sutter  
 Three First National Plaza  
 Chicago, Illinois 60602  
 302/588-6742



Opposing Counsel:

Joseph M. O'Callaghan, Esq.  
 230 West Monroe Street, Suite 2040  
 Chicago, Illinois 60606-4802  
 312/332-1600.

10. 1982 - 1983. *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 456 N.E.2d 84, 74 Ill. Dec. 582 (1983) (Goldenhersh, J.), *affirming* 108 Ill. App. 3d 681, 439 N.E.2d 526, 64 Ill. Dec. 275 (1982) (Stamos, P.J.) (trial: c. May 10 - May 20, 1982).

The Board of Trade of the City of Chicago, seeking to initiate futures trading based on the Dow Jones Averages stock indices, brought a declaratory judgment suit against Dow Jones in an attempt to establish its right to trade on the indices without Dow Jones's permission. The Circuit Court held, after trial, against Dow Jones. The Appellate Court and, on further appeal, the Supreme Court of Illinois reversed the trial court, holding that Dow Jones had a property right in the Dow Jones indices sufficient to enable the company to prevent the Chicago Board of Trade from using them for trading purposes. The decision was important to members of the financial press in establishing their ability to control, and to license for significant fees if they wished, financial indices that they created and maintained. Indeed, on June 5 of this year, Dow Jones announced that it had entered into multimillion dollar agreements with the Chicago Board of Trade and two other exchanges licensing the use of the Dow Jones Averages for trading purposes. I participated in discovery, defending depositions of several Dow Jones witnesses, assisted at trial by preparing fact and expert witnesses for their testimony, and briefed and argued the successful appeals to the Appellate Court and the Supreme Court of Illinois.

Associate Counsel:

Thomas C. Morrison, Esq.  
 Robert P. LoBue, Esq.  
 Patterson, Belknap, Webb & Tyler  
 1133 Avenue of the Americas  
 New York, New York 10036  
 212/336-2000

Donald Baer, Esq.  
 Penn, Schoen & Berland  
 805 15th Street, N.W.  
 Tenth Floor  
 Washington, D.C., 20005

(Mr. Baer was an associate at  
 Patterson, Belknap, Webb & Tyler  
 at the time of this litigation.)

Opposing counsel:

James M. Amend, Esq.  
 Kirkland & Ellis  
 200 East Randolph Dr.  
 Chicago, Illinois 60601  
 312/861-2000.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

As described in the response to question 17. a. 3, above, early in my career I frequently represented clients in corporate transactions. My previous firm represented U.S. Industries, Inc., a publicly held conglomerate, and I was the lead outside lawyer in connection with that client's purchase or sale of a number of companies or their assets during the late 1960's and early 1970's. I, with more senior counsel, represented Dow Jones in 1970 in its acquisition of Ottaway Newspapers, Inc., a group of community newspapers, and of several individual community newspapers thereafter. On behalf of Chemical Bank, as disbursing agent, I helped oversee the execution of a complex, \$135 million agreement settling claims against the American Express Company by many financial institutions and commodities companies that had lost money in the "Tino DeAngelis salad oil swindle" uncovered in 1963. I negotiated and drafted many agreements between Dow Jones and a variety of individuals and corporations with whom it dealt including, for example, the joint-venture agreement establishing the AP-Dow Jones News Service, which remains active today.

As described in answer to question 17. b. 2 above, for many years I carried day-to-day responsibility for litigation matters for Dow Jones & Company, Inc., publisher of *The Wall Street Journal*, *Barron's National Business & Financial Weekly*, and other publications throughout the world, including defamation, antitrust, intellectual property and similar cases, supervising or participating in all such litigation. I ran frequent seminars for

employees with respect to the law affecting newspaper distribution, reporting and editorial issues. On a daily basis, I advised the editors and reporters of Dow Jones publications on all legal matters. I performed pre-publication legal review of articles and gave advice as to the legal implications of reporting efforts. I dealt on Dow Jones's behalf with all legal actions and threats of actions and challenges to newsgathering activities and published articles, including allegations of libel, invasion of privacy and related torts, allegations of securities violations such as insider trading by reporters, access by reporters to proceedings and records of courts and public agencies, and protection of journalists' sources, source material and unpublished information in the course of responding to civil and criminal subpoenas. Also as set forth in answer to question 17. b. 2 above, during the past eight years, as more of the day-to-day legal services at Dow Jones have been furnished by inside counsel, I have continued to represent the company and other companies in a wide variety of cases, and counseled them, frequently in crisis, on the legal implications of the gathering and dissemination of news.

Some of the cases in which I have participated have, of course, resulted in settlement. In the late 1970's, for example, I negotiated the settlement of a California antitrust suit brought by a *Wall Street Journal* distributor against the company after extensive discovery, which I had conducted. In the mid-1980's, I had a leading role in settling two significant libel suits against the *Journal*, the litigation of which I had participated in and had supervisory responsibility for. Two years ago, I took a substantial role in developing the facts for and eventually settling a lawsuit in England brought by a newly rich Russian banker about an op-ed column published in *The Wall Street Journal/Europe*.

Beginning in 1983, I represented Dow Jones in the course of the criminal prosecution of Foster Winans, a *Journal* reporter who had traded on his knowledge of articles scheduled for publication in the *Journal*. I represented the company in connection with its dealings with the Securities and Exchange Commission, federal prosecutors and the grand jury, and the subsequent trial of, and appeals to the Second Circuit and United States Supreme Court by, Mr. Winans. The case presented complex issues of criminal, property and First Amendment law.

For approximately the past 15 years, I have had significant involvement in Dow Jones matters abroad. I was responsible for the assessment of the antitrust and press law aspects of doing business in Belgium in anticipation of Dow Jones basing its European edition in Brussels. I oversaw successful challenges to the use without permission of the Dow Jones Averages stock indices for trading purposes in Canada and wagering purposes in the United Kingdom. I was responsible for litigation challenging the expulsion of reporters from Malaysia, contempt proceedings against reporters and publications in Hong Kong and Malaysia, threatened contempt proceedings against the *Journal* in the U.K., actions by a U.K. bank against the *Wall Street Journal* seeking recovery, and to prevent distribution of, information it claimed had been misappropriated, legal challenges to the restriction of circulation of Dow Jones publications in Singapore, libel suits in Belgium, Canada, Hong Kong, Ireland, Malaysia, Singapore and the U.K., and threatened antitrust action by an English news organization against the Dow Jones News Services.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I expect to withdraw my capital from my firm and be fully paid my portion of the firm's profits shortly after withdrawing from the partnership. Pursuant to the pension arrangements contained in the firm's partnership agreement, I will receive \$6,000 per month thereafter. I expect to receive or continue to receive modest royalties from the libel and advertising law books of which I am the author or co-author.

I have contractual relationships with the Practising Law Institute and Michie Butterworth pursuant to which I receive modest royalties for publication of the cumulative supplements to *Libel, Slander, and Related Problems*, and the CD-ROM version thereof.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

A. Personal potential conflicts of interest. I foresee possible conflicts of interest relating to prior clients and matters in which members of my or my spouse's law firm represent a party. I expect to consider recusing myself from matters pertaining to clients I previously represented personally. I expect to consider recusing myself from matters in which partners or associates of Gibson, Dunn & Crutcher or Dewey Ballantine, my wife's current firm, appear. I expect to consider recusing myself from matters in which partners or associates of my former firm, Patterson, Belknap, Webb & Tyler, are involved where such matters concern clients I personally represented. I expect to make decisions with respect to my recusal consistent with the proscriptions of the applicable sections of governing codes of judicial conduct and of 28 United States Code, in consultation with the Chief Judge of the Second Circuit.

B. Financial potential conflicts of interest. I will follow the proscriptions of the applicable sections of governing codes of judicial conduct and of 28 United States Code, in consultation with the Chief Judge of the Second Circuit.



- 3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

I had been planning, with two Columbia University Law School Professors, a seminar at the law school on the interaction between the Constitution and the institutional press. I have not decided whether, subject to the approval of the Chief Judge of the Second Circuit, to pursue that project should I be confirmed. I hope, subject to the approval of the Chief Judge, to continue to update *Libel, Slander and Related Problems*, Second Edition (R. Sack and S. Baron, Practising Law Institute, 1994), to prepare a third edition when appropriate, and to complete co-authorship of a book on advertising law for publication by the Practising Law Institute. I expect the compensation for each of these authorships to be modest.

- 4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).**

Please see Form AO-10.

- 5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)**
- 6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No, except for occasional, modest campaign contributions.

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings), all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	-JOINT-	LIABILITIES	-JOINT-
Cash on hand and in banks	\$ 60,000	Notes payable to banks—secured	—
U.S. Government securities—add schedule	—	Notes payable to banks—unsecured	
Listed securities—add schedule	84,250	Notes payable to relatives	—
Unlisted securities—add schedule	—	Notes payable to others	—
Accounts and notes receivable:		Accounts and bills due	—
Due from relatives and friends	8,000	Unpaid income tax	—
Due from others (Firm Insurance Reserve Fund)	52,000	Other unpaid tax and interest	—
Doubtful	10,000	Real estate mortgages payable—add schedule	\$ 997,000 580,000 163,000
Real estate owned—add schedule	1,500,000 900,000 200,000	Chattel mortgages and other liens payable	—
Real estate mortgages received	—	Other debts—itemize:	
Autos and other personal property	75,000	Credit cards (spouse)	9,000
Cash value—life insurance	Nominal		
Other assets—itemize:			
IRA's	40,000		
Capital - GD&C	483,000		
Capital - Dewey Ballantine	30,000		
401K (subject to tax)	710,000	Total liabilities	1,749,000
Spouse 401K (subject to tax)	260,000	Net worth	2,663,250
Total assets	\$4,412,250	Total liabilities and net worth	\$4,412,250
CONTINGENT LIABILITIES	None	GENERAL INFORMATION	
As endorser, comaker or guarantor	—	Are any assets pledged? (Add schedule.)	No

On leases or contracts	—	Are you a defendant in any suits or legal actions?	Yes *
Legal claims	—	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			
		* Spouse, as partner in former law firm; summary judgment granted	

Schedule I -- Listed Securities

Boeing Co.	270 shares
Van Kampen American Capital Tr. for Investment Grade New York Municipals	173.409 shares
Oppenheimer New York Municipal Fund Class A	3,209.864 shares
Oppenheimer U.S. Gov't Trust Class A	298.35
New York City General Obligation Series B	25,000

<u>Schedule II -- Real Estate Owned/Mortgage Payable</u>	<u>Value</u>	<u>Mortgage</u>
Condominium (principal residence) New York, N.Y. 10021 (joint)	\$1,500,000	\$997,000
House (vacation residence) Colchester, VT 05446 (joint)	900,000	580,000
Condominium (spouse's former residence) New York, N.Y. 10019 (spouse)	200,000	163,000

### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Vice president and *de facto* director of the William F. Kerby and Robert S. Potter Fund, which supports legal defense of impecunious journalists abroad. (Approximately 30 hours per year, since 1989)

Throughout my career, I have represented authors who cannot afford the full cost of legal representation with respect to their projected publications either at significantly reduced rates or entirely *pro bono*. This includes vetting copy prior to publication, assisting in obtaining insurance, dealing with potential publishers and their editors and attorneys, rendering guidance on newsgathering questions, and the like. (Approximately 50 hours per year)

With California counsel, I represented through the New York court system, a California prisoner seeking exculpatory evidence from the Nassau County Medical Examiner's Office (*Diaz v. Lukash*, 82 N.Y.2d 211, 624 N.E.2d 156, 604 N.E.2d 28 (1993)). (50 - 100 hours)

I assisted the Committee to Protect Journalists with respect to threatened libel litigation against it. (1994, 20 hours)

Throughout my career, I have supervised associates at my firms in matters in which they wished to participate *pro bono*. I am now, for example, responsible for overseeing the defense of a libel suit by a well-financed Suffolk county executive against an opponent on the basis of charges made by the opponent during a recent election campaign. I oversaw litigation designed to obtain reinstatement and compensation for a teacher dismissed because of certain of her classroom assignments. (10 to 20 hours per year)

Taught class on media law for Edgemont High School, Greenburgh, New York. (c. 1982; 30 hours)

Taught Sunday school class on primitive religion at Congregation Beth Elohim, Brooklyn. (c. 1970; 30 hours.)

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates — through either formal membership requirements or the practical implementation of**



**membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

No. I have been the member of two clubs. The Century Association does not so discriminate. The City Midday Club, of which I was a member from approximately 1971 until approximately 1980, did not so discriminate at least as of 1974 when I reviewed its constitution and also received its express assurance in that regard.

- 3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There is no selection commission with respect to judicial nomination to the Second Circuit.

In mid-April 1997, I received a telephone call from the Office of the Counsel to the President, asking whether I was interested in pursuing a possible nomination. I said that I was.

On April 22, 1997, I sent a draft of the American Bar Association Personal Data Questionnaire to the Office of the Counsel to the President.

On April 25, 1997, I was interviewed by representatives of the Office of the Counsel to the President and the Department of Justice for about 90 minutes in the Old Executive Office Building.

On May 31, 1997, I was informed by the Office of the Counsel to the President that the President had instructed the Counsel's Office to submit my name, with appropriate documentation, to the American Bar Association Standing Committee on the Judiciary, and to the Federal Bureau of Investigation, for review.

On June 6, 1997, I sent to the Office of the Counsel to the President Form SF86, with attachments, waivers and fingerprint cards for forwarding to the FBI to facilitate their review.

On June 24, 1997, I sent my completed ABA Personal Data Questionnaire to Mr. Judah Best and Ms. Patricia M. Hynes of the Standing Committee.

On July 8, 1997, I was interviewed by Mr. Thomas Tolan, an FBI Special Investigator. On July 17, 1997, I was interviewed by Ms. Hynes of the ABA Standing Committee.

On November 6, 1997, I was informed by persons in the Office of the Counsel to the President that I had been nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.**

**Some of the characteristics of this "judicial activism" have been said to include:**

- a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**
- e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

I believe that engaging in judicial activism would be contrary to my oath of office, because I believe that judicial activism contemplates the use of judicial office to attempt to effect personal political or social views rather than to apply and enforce the Constitution and laws of the United States, as interpreted by the Supreme Court of the United States and prior opinions of the Second Circuit. Article III of the Constitution establishes that federal courts are courts of limited jurisdiction and defined powers. Article III provides, among other things, that federal courts may only render decisions in cases or controversies between litigants. The power to resolve disputes is the essence of the judicial role in the constitutional scheme. Consistent with Article III, I do not believe that federal courts can or should seek to use the judicial process to make social policy or to decide

the rights of non-parties, but should decide the cases and controversies before them pursuant to the law.

I have spent my career in private practice representing persons and business entities with diverse views, counseling and advising them as to their acts, and defending actual, or preparing to defend possible, litigation. I have no political or social agenda, explicit or otherwise, that I could or would use a judicial office to promote. As a federal judge, I would seek to resolve specific cases before me with reference to statutory and case precedent, without seeking to reach issues and parties not before me.

Victoria Ann Roberts

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Victoria Ann Roberts

2. Address: List current place of residence and office address(es)

Residence: Detroit, Michigan 48226

Business: Goodman, Eden, Millender & Bedrosian  
3000 Cadillac Tower  
Detroit, Michigan 48226

3. Date and place of birth.

November 25, 1951; Detroit, Michigan.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es)

Divorced.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Michigan, Ann Arbor, Michigan. August, 1969 to May, 1973. I received a Bachelor of Arts degree in Journalism and Sociology in May, 1973.

Northeastern University School of Law, Boston, Massachusetts. September, 1973 to May, 1976. I received a Juris Doctorate degree in May, 1976.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Goodman, Eden, Millender & Bedrosian  
Detroit, Michigan  
Associate, August, 1988 to January, 1993  
Partner, January 1, 1993 to present  
Managing Partner, October, 1995 to present



Victoria Ann Roberts

Mayor-Elect Dennis W. Archer Transition Team  
 Detroit, Michigan  
 General Counsel, November 1993 to January 1, 1994

United States Department of Justice  
 United States Attorney's Office for the  
 Eastern District of Michigan  
 Detroit, Michigan  
 November, 1985 to July, 1988  
 Assistant U.S. Attorney (AUSA)

American Motors Corporation (AMC)  
 (American Motors Corporation has since been bought by:)  
 Chrysler Corporation  
 Auburn Hills, Michigan  
 September, 1983 to November, 1985  
 Senior Litigation Attorney

Lewis, White, Clay & Graves, P.C. (subsequently, Lewis,  
 White & Clay, P.C.)  
 presently: Lewis, Clay & Munday, P.C.  
 Detroit, Michigan  
 Associate, May, 1977 to May, 1980  
 Shareholder, May, 1980 to September, 1983

Detroit College of Law at Michigan State University  
 Detroit, Michigan  
 January, 1977 to May, 1978  
 Legal Research and Writing Teaching Fellow

Michigan Court of Appeals  
 Detroit, Michigan  
 March, 1976 to May, 1977  
 Research Attorney

United Auto Workers  
 Detroit, Michigan  
 December, 1975 to February, 1976  
 Research and writing  
 Law Clerk

Northeastern University School of Law - Law Library  
 Boston, Massachusetts  
 September, 1975 to December 1975  
 March, 1975 to April, 1975  
 Library Clerk

Victoria Ann Roberts

Michigan Legal Services  
 Detroit, Michigan  
 June, 1975 to September, 1975  
 Research and writing  
 Law Clerk

Roxbury Defenders Committee  
 Boston, Massachusetts  
 September, 1974 to February, 1975  
 Research and writing  
 Law Clerk

Northeastern University School of Law  
 Boston, Massachusetts  
 June, 1974 to September, 1974  
 Research and writing for Professor Frederick Brown, now  
 Judge Frederick Brown

Massachusetts Department of Welfare  
 Boston, Massachusetts  
 June, 1974 to September, 1974  
 Research and writing  
 Law Clerk

National Bank of Detroit  
 Detroit, Michigan  
 May, 1973 to August, 1973  
 May, 1971 to August, 1971  
 May, 1970 to August, 1970  
 January, 1969 to August, 1969  
 Clerk

Michigan Chronicle  
 Detroit, Michigan  
 June, 1973 to August, 1973  
 Reporter

Non-Profit Boards and Other Organizations

State Bar of Michigan  
 306 Townsend St.  
 Lansing, Michigan 48933  
 Member: 1976 to Present  
 Officer: 1989 to Present

Wolverine Bar Association  
 645 Griswold, Suite 1747  
 Detroit, Michigan 48226  
 Member: 1976 to Present  
 Officer: 1985 to 1988

Victoria Ann Roberts

Women Lawyers Association of Michigan, Wayne Region  
 400 Renaissance Center, 35th Region  
 Detroit, Michigan 48243  
 Member: 1976 to Present  
 Officer: 1983 to 1985

American Bar Association  
 541 North Fairbanks Court  
 Chicago, Illinois 60611  
 Member: 1989 to Present  
 Officer: 1990 to Present

Maurice Sugar Foundation  
 2915 Cadillac Tower  
 Detroit, Michigan 48226  
 Member: 1990 and 1991  
 Officer: 1990 and 1991

Fair Housing Center of Metropolitan Detroit  
 1249 Washington Blvd.  
 Detroit, Michigan 48226  
 Member: 1985 to Present  
 Officer: 1985 to 1991

Big Brothers/Big Sisters  
 23077 Greenfield  
 Southfield, Michigan 48034  
 Member: 1987 to Present  
 Officer: 1987 to 1991  
 Advisory Board Member: 1995 to Present

Girl Scouts of America  
 28 West Adams  
 Detroit, Michigan 48226  
 Officer: 1984 to 1986

Black Law Student Association  
 Northeastern University School of Law  
 Member: 1973 to 1976  
 Officer: 1974-1975

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

Victoria Ann Roberts

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.
- D. Augustus Straker Bar Association  
Trailblazer Award, August 26, 1996
  - Detroit College of Law at Michigan State University Wolverine Student Bar Association  
Trailblazer Award, September 7, 1996
  - Fair Housing Center of Metropolitan Detroit  
Distinguished Service Award 1987 and 1994
  - Jackson County Fair Housing Center  
Thurgood Marshall Award 1997
  - Lansing Black Lawyers Association  
Recognition of contributions to the practice of law 1994
  - Michigan Court of Appeals  
Distinguished Service as Law Clerk to the Michigan Court of Appeals, May 22, 1977
  - National Bar Association  
Member of the Year Award, Region VI 1990-1991
  - State Bar of Michigan Young Lawyers Section  
Recognition as First African American Female President of the State Bar of Michigan 1996
  - State of Michigan  
Senate Special Tribute, October 22, 1996
  - United States Department of Justice  
Commendation Award, November 15, 1986  
Commendation Award, March 15, 1987
  - University of Detroit Mercy Black Law Students Association  
Distinguished Service Award 1996
  - University of Michigan  
Regents Alumni Scholarship Award Recipient, 1969-1973
  - Wolverine Bar Association  
Damon J. Keith Community Spirit Award 1997  
Outstanding Member of the Year 1986  
Trailblazer Award 1991



Victoria Ann Roberts

Women Lawyers Association, Wayne Region  
First In Leadership Award 1987

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such group.

State Bar of Michigan

Member since 1976  
62nd President, 1996-September 19, 1997  
President Elect, 1995-1996  
Vice-President, 1994-1995  
Treasurer, 1993-1994  
Commissioner, Board of Commissioners, 1989-Present  
Member, Underrepresented Committee, 1988-1996  
Member, Fiscal Committee, 1990-Present  
Member, Local Bar Liaison Committee, 1990-1992  
Member, Nominating Committee, 1990-1994  
Chair, Scope and Correlation, 1995-1996  
Chair, Special Commissioner Committee Re: Recommendations Of Supreme Court Task Forces On Gender/Race Issues In The Courts, 1991-1996  
Chair, Task Force on Delivery of Legal Services To Those In Need, 1995-1996  
Negligence Section Council

Wolverine Bar Association

Member since 1976  
President, 1987-1988  
President-Elect, 1986-1987  
Treasurer, 1985-1986  
Continuing Legal Education Co-Chair, 1984-1985  
Membership Committee Chair, 1985-1987  
Nominating Committee, 1989-1990; Chair, 1989  
Newsletter Editor, 1988-1991  
Community Outreach Committee, 1987-1989  
Presidential Dinner Committee Chair, 1990-1991

Women Lawyers Association of Michigan

Member since 1976  
Vice-President, Wayne Region, 1984-1985  
Treasurer, Wayne Region, 1983-1984  
Membership Committee Chair, 1984-1985

Victoria Ann Roberts**American Bar Association**

Member since 1989

Elected by the State Bar of Michigan, 1990 and 1992, to 2 year terms in the House of

Delegates. I will serve as a member of

The House of Delegates in 1996 and 1997 by

virtue of being President of the State Bar of Michigan.

**National Bar Association**

Member since 1979

**Maurice Sugar Foundation**

Board of Directors, 1990 and 1991

**Attorney Discipline Board Hearing Panelist**

April 21, 1982 to present. However, I am on inactive status during my term as President of the State Bar of Michigan.

**Michigan Trial Lawyers Association**

Member since 1989

**National Lawyers Guild**

Member since 1988

**American Trial Lawyers Association**

Member since 1993. My membership lapsed October, 1995 and was reinstated in May, 1996.

**American Arbitration Association**

Member 1987-1989

**Mediator, Wayne County Mediation Tribunal**

January, 1992 to present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The organizations I belong to which are active in lobbying are the State Bar of Michigan, the American Bar Association, and the Michigan Trial Lawyers Association.

**Other memberships:****Fair Housing Association of Metropolitan Detroit**

Board of Directors, 1985-1991

Chairperson of the Board, 1986-1989

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Big Brother Big Sisters of Michigan  
Member, Board of Directors, 1987-1991  
Secretary, 1988-1990  
Vice President 1990-1991  
Advisory Board 1995-present

North Rosedale Park Civic Association  
Member 1978 to present

Museum of African American History

Detroit Institute of Arts Founders Society

NAACP - life member

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse in membership. Give the same information for administrative bodies which require special admission to practice.

State of Michigan, November 10, 1976

United States District Court for the Eastern District of Michigan, December 1, 1976

12. Published Writings: List all titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

(A) Published Books:

The Institute of Continuing Legal Education

1. Premises Liability, Chapter 11, Torts, Michigan Law and Practice, with supplements. 1994, 1995, 1996 and 1997

(B) Continuing Legal Education Presentations

2. Enhancing Our Image As Lawyers, Michigan Trial Lawyers Association, May 2, 1997 (no materials available)

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3. Collectible Defendants and Remedies, pp. 6-3 to 6-16; Institute of Continuing Legal Education; Course: Recovered Memory: Sexual Abuse Allegations, April 28, 1995
4. Sexual Harassment, State Bar of Michigan Negligence Council Presentation, May 5, 1994
5. Fundamentals of Michigan Practice 1993, Institute of Continuing Legal Education, Course: Pre-trial Discovery, January, 1993 (no material available)
6. Closing Argument: The Focal Point, August 20, 1993
7. Representing the Severely Injured Minority Client, ATLA 1993, San Francisco, May 4, 1993
8. Li v Feldt: and the Changes in the Law Regarding Nuisance and Public Building Exceptions to Governmental Immunity, pp. 4-1 to 4-26, Institute of Continuing Legal Education; Course: Developing Law and Trial Tactics for the 90's and Beyond, October 15-16, 1992
9. Roberts on Immunity: Review, Overview, and Oh, What a Nuisance, pp. 2-1 to 2-27, Institute of Continuing Legal Education; Course: Tort Law Update III, March 19, 1992 and March 26, 1992
10. Immunity is the Rule, Not the Exception, March 24, 1992
11. Statutes of Limitation; Governmental Immunity, pp. 19-41, Institute of Continuing Legal Education; Course: 2d Annual Tort Law Update, March 14, 1991
12. Professionalism and Civility in the Context of Race, Ethnicity, and Gender in the Practice of Law, pp. 151-163, Institute of Continuing Legal Education; Course: Mandatory Continuing Legal Education Course 1: The Professionalism Obligations of the Lawyer: To the Justice System, to Adversaries, to Other Counsel, to the Public, September, 1990
13. Immunity, Governmental and Otherwise, and the Recreational Use Statute, pp. 83-123, Institute of Continuing Legal Education; Course: Tort Law Update, April, 1990



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(C) Housing Law Presentations

14. Fair Housing Center of Metropolitan Detroit Cooperating Attorneys Seminar, December 8, 1994. Presenter: "Review of Key Fair Housing Laws"
15. Fair Housing Center of Metropolitan Detroit Cooperating Attorneys Seminar, September 15, 1992. Presenter: "Litigation Orientation Seminar."
16. Fair Housing Center of Metropolitan Detroit Cooperating Attorneys Seminar, December 8, 1989. Presenter: "Discovery and Settlement." (no material available)
17. Fair Housing 20 Years Later: The Legal Struggle To Achieve Equal Housing Opportunities, April 13, 1988. Presenter.
18. National Association of Human Rights Workers, May 20, 1988
19. The Prima Facie Case: Coverage of Fair Housing Laws; Standing, 1983

(D) Michigan Bar Journal Articles:

20. July, 1997 "Striking A Balance," p. 656
21. June, 1997 "Misrepresentations In News Gathering: An Open Letter," p. 524
22. May, 1997 "The Law and the Media: Do We Have Internal Barometers? p. 384
23. March, 1997 "Equal Justice for All: How Do We Achieve it?" p. 256
24. February, 1997 "The Great Race Divide and Diversity in the Workplace," p. 136
25. January, 1997 "Leading the Way on Campaign Reform, Improving Lawyer Image," p. 8

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- 26. December, 1996 "And To Think - I Could Have Been Touring Toledo," p. 1248
- 27. November, 1996 "An Open Letter to Mr. Bob Eaton, Chairman and CEO of Chrysler Corporation," p. 1130
- 28. October, 1996 "Pride, Service and Activism," p. 1008
- 29. March, 1994 "With A Handshake And A Smile: The Fight To Eliminate Housing Discrimination," p. 276
- 30. December, 1990 "Speaking Out - Can Rules Eliminate Invidious Discrimination?," p. 1280

## (E) Bar Association Presentations

- 31. Remarks Given at Sipes v McGhee Milestone Dedication, August 12, 1997
- 32. ABA LEADS Women Rainmakers Program -- "Marketing Master Class: Profiles In Excellence, Marketing And Business Development Strategies, August 4, 1997
- 33. Remarks at Ernie Goodman Memorial Service, Wayne State University, June 24, 1997
- 34. Remarks Soujourner Truth Dedication, May 29, 1997
- 35. Damon J. Keith Spirit of Community Award, May 21, 1997
- 36. Image Survey Results, April 11, 1997
- 37. Remarks to Monroe County Bar Association, March 19, 1997
- 38. Remarks to Midland County Bar Association, March 11, 1997
- 39. Remarks to the Macomb County Bar Association, February 12, 1997
- 40. Remarks to the Muskegon County Bar Association, January 23, 1997

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41. Remarks Given to the Kalamazoo County Bar Association, January 16, 1997
42. A Message from the President, Suburban Bar Association, January 8, 1996
43. A Message from the President, Women Lawyers Association of Michigan - Washtenaw, November 20, 1996
44. The Great Race Divide and Diversity in the Workplace, November, 20, 1996
45. Remarks to the Armenian-American Bar Association, November 12, 1996
46. Washtenaw County Bar Association/Vanzetti Hamilton Bar Remarks - Honoring Ernie Goodman and Joseph Dulin, October 24, 1996
47. Panel on Court Reform, Grand Rapids, Michigan, October 23, 1996
48. A Message from the President, Grand Rapids Bar Association, October 16, 1996
49. Swearing in Remarks, September 20, 1996
50. Remarks to the Representative Assembly, September 19, 1996
51. Italian American Bar Association, September 10, 1996
52. Remarks in Accepting the Fourth Annual Trailblazer Award, D. Augustus Straker Bar Association, August 26, 1996
53. Strategies for Leadership Success, National Bar Association, Chicago, August 8, 1996
54. Statement of Goals for 1996-1997, June 7, 1996
55. Legislative Changes - Court Report/Tort Reform, Opening Doors Conference, May 18, 1996, panelist (no materials available)
56. Invocation for State Bar Annual Meeting Lunch, September 22, 1995

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57. State Bar of Michigan Board of Commissioners Resolution in Honor of Otis M. Smith, July 22, 1994
  58. Special Commissioners Committee Re: Recommendations of Supreme Court Task Forces on Gender and Race/Ethnic Issues In The Courts, Opening Doors Conference, April 16, 1994
  59. Report and Recommendations of the Special Commissioners Committee Re: Minority Hiring and Retention at Law Firms, July 13, 1993
  60. Volunteerism: How to Get It All Done In a Shrinking Volunteer Market, State Bar of Michigan, President Elects' Conference, June, 1991
  61. "How to Mainstream New Attorneys, Specifically Women and Minorities", State Bar of Michigan, President Elects' Conference, June 2, 1990
  62. Detroit Bar Association Past Presidents' Reception Honoring Damon Keith, March 24, 1988
  63. "Black Lawyers, Law Practice, and Bar Associations - 1844 to 1970: A Michigan History" - Where Do We Go Now?, February 23, 1988
  64. Wolverine Student Bar Association Black History Day, Remarks, February 12, 1988
  65. Lateral Hiring of Minorities: How Minority Bar Associations Can Be Beneficial, January 21, 1988
  66. Women Lawyers Association of Michigan Newsletter Maximizing Psychological Injuries, June, 1990
- (F) Wolverine Bar Association Newsletters
67. President's Page, June, 1987 to June, 1988
  68. September, 1988 to June, 1991 (edited these only)
- (G) Press Releases
69. State Bar President Calls On Supreme Court To Reconsider Attorney Grievance Administrator's Offer To Step Aside Pending Resolution Of Sexual Harassment Charges, August 20, 1997



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70. Michigan Attorneys Needed For "Justice For All Hotline", August 19, 1997
71. State Bar Outlines Strategies For Lawyer Image Campaign At President-Elect's Conference, June 18, 1997
72. State Bar President To Visit Kalamazoo Wednesday, April 9, April 7, 1997
73. "Justice For All" Is Theme For 1997 State Bar Annual Convention, April 1, 1997
74. State Bar President Praises The Life And Commitment of Detroit Lawyer Ernest Goodman, March 27, 1997
75. Victoria Roberts Addresses Midland County Bar, March 21, 1997
76. State Bar Board Votes Unanimously To Support ABA Position Condemning Threatened Use Of Federal Impeachment Proceedings, March 18, 1997
77. Bar Leaders Hold First-Ever Conference On Improving Lawyer Image, March 5, 1997
78. State Bar President Urges Prompt Action To Investigate Alleged Racial Ethnic Slurs by Judge Ferrara, February 20, 1997
79. State Bar President Hails Proposal To Build Hall Of Justice, February 7, 1997
80. State Bar To Conduct Survey On Public View About Lawyers, January 7, 1997
81. State Bar President Victoria Roberts Congratulates New Chief Justice Conrad Mallett, Jr., January 3, 1997
82. State Bar of Michigan President Announces New Race, Ethnic and Gender Issue Task Force, November 21, 1996
83. State Bar President Initiates Program To Address Members' Concerns About Lawyer Image, November 21, 1996
84. State Bar of Michigan President Calls For Support of Ballot Proposal B, October 10, 1996

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85. State Bar of Michigan President Calls Dole's Debate Comments "Misguided", October 7, 1996
  86. New State Bar Of Michigan President Calls Upon Lawyers To Continue Tradition Of Service, September 19, 1996
- (H) Editorial Board Meetings; Press Coverage of Speeches and Press Releases
87. The Times (Grand Rapids), April 25 - May 1, 1997  
NBPW Honors Community Leaders
  88. Detroit Legal News, March 28, 1997  
State Bar President Praises Ernest Goodman's Career
  89. Midland Daily News, March 12, 1997  
State Bar Leader: Court Is For Everyone
  90. Crains Detroit Business, February 24, 1997  
State Bar Ass'n Seeks Better PR For Lawyers
  91. Detroit Legal News, February 24, 1997  
Roberts: JTC Should Investigate Alleged Racial Slurs By Ferrara
  92. Michigan Lawyers Weekly, February 17, 1997  
Bar President Applauds Hall of Justice Plan
  93. Macomb Daily, February 16, 1997  
State Bar Leader Fights For Equal Access To Justice
  94. Macomb County Legal News, February 14, 1997  
State Bar Chief Agrees With Both O.J. Verdicts
  95. Crain's Detroit Business, October 28, 1996  
Proposal B in the Best Interest of Judicial System
  96. Detroit Legal News, October 21, 1996  
Michigan Lawyers Weekly, October 21, 1996  
The Legal Advertiser, October 10, 1996  
An Open Letter to Chrysler's Chairman
  97. Detroit Legal News, September 25, 1996  
Roberts Sets Ambitious Goals for State Bar  
(remarks at my swearing in as 62nd President of the State Bar of Michigan)

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## (I) Op Ed Articles

98. Detroit Free Press, April 3, 1997  
We Expect More Of State's Judges
99. Detroit News, March 3, 1997  
Legal Aid Cutbacks Reach Crisis Stage
100. The Oakland Press, February 9, 1997  
Campaign Fund-Raising Not Just An Issue For State Bar

## (J) Radio and Television Interviews (State Bar matters)

101. Telephone radio interview with Art Lewis, WSGW, Saginaw, July 15, 1997 (no transcript available)
102. Taping of television show "Black Perspectives, "Grand Rapids, May 29, 1997 (no transcript available)
103. Taping of television interview with Shelley Smith, WXYZ TV, Channel 7, Detroit, May 15, 1997 (no transcript available)
104. Taping of radio interview "Street Talk" with Sabrina West, WWBR, Ann Arbor, May 21, 1997 (no transcript available)
105. Taping of radio interview of "Monitor Detroit" with Dave Lockhart, WNIC, Dearborn, May 1, 1997 (no transcript available)
106. Radio interview of "Morning Show" with Phil Kernen, WAAM, Ann Arbor, May 1, 1997 (no transcript available)
107. Radio interview of "Live Shots" with Bob Munday, WWJ, Detroit, April 29, 1997 (no transcript available)
108. Taping of "Let's Talk" with Ben Marks, Southwestern Oakland Cable Commission, TV 12, April 23, 1997 (no transcript available)
109. Radio interview of "The Morning Show", with Paul Smith, WJR, February 21, 1997
110. Taping of Oakland County Bar Association's cable television show "Lawyers Round Table", December 19, 1996 (no transcript available)

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111. Taping of Ask the Lawyer, WNMU, Marquette, September 16, 1996 (no transcript available)

(K) Miscellaneous

112. "Don't Sneeze" Commencement Address, St. Martin De Porres High School, May 23, 1997

113. Testimony before the State of Michigan Legislature on Funding for Legal Services, May 6, 1997 (no transcript available)

114. Alternative for Girls, "The Modern Day Emancipation Proclamation", April 24, 1997

115. Remarks to Negro Businesses and Professional Women, April 19, 1997

116. Sugar Speech, April 17, 1997

116. Introduction of Saul A. Green as United States Attorney for the Eastern District of Michigan, June 1, 1994

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent, May 30, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed are not officially reported, please provide copies of the opinions.

N/A.



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16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. Whether you practiced alone, and if so, the address and dates;

No.

3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Goodman, Eden, Millender & Bedrosian  
3000 Cadillac Tower  
Detroit, Michigan, 48226  
Associate, August, 1988 to January, 1993  
Partner, January 1, 1993 to present  
Managing Partner, October, 1995 to present

Mayor-Elect Dennis W. Archer Transition Team  
c/o PVS Chemicals, Inc.  
10900 Harper Avenue  
Detroit, Michigan 48213  
General Counsel, November 1993 to January 1, 1994

United States Department of Justice  
United States Attorney's Office for the  
Eastern District of Michigan  
211 West Fort Street  
Suite 2300  
Detroit, Michigan 48226  
November, 1985 to July, 1988  
Assistant U.S. Attorney (AUSA)

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American Motors Corporation (AMC)  
 (American Motors Corporation has since been bought  
 by:)

Chrysler Corporation  
 1000 Chrysler Drive  
 Auburn Hills, Michigan 48326  
 September, 1983 to November, 1985  
 Senior Litigation Attorney

Lewis, White, Clay & Graves, P.C. (subsequently,  
 Lewis, White & Clay, P.C).  
 presently: Lewis, Clay & Munday, P.C.  
 1300 First National Building  
 Detroit, Michigan  
 Associate, May, 1977 to May, 1980  
 Shareholder, May, 1980 to September, 1983

Detroit College of Law at Michigan State University  
 130 East Elizabeth  
 Detroit, Michigan 48201  
 January, 1977 to May, 1978  
 Legal Research and Writing Instructor

Michigan Court of Appeals  
 900 First Federal Building  
 Detroit, Michigan 48226  
 March, 1976 to May, 1977  
 Research Attorney

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have practiced law since 1976. My practice has been diverse. I have represented both Plaintiffs and Defendants, and have engaged in trial work as well as a non-litigation practice. I have represented local, state and federal agencies and units of government, private corporations and institutions, as well as individuals.

In 1977, I joined the firm of Lewis, White, Clay & Graves. I handled insurance defense matters. I also developed expertise in commercial and industrial development, municipal law, construction law, municipal and industrial development financing and real estate law. I represented several Plaintiffs in housing discrimination matters.

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My defense practice continued when I departed Lewis, White & Clay in 1983 for American Motors, where I remained until 1985. As an attorney with AMC, I defended product liability cases nationwide. These cases involved complex technical allegations and generally involved catastrophic injuries. My role in these cases was to work singularly or with outside attorneys. My involvement extended through all phases of litigation, including: fact investigations; consulting with outside experts; preparing company witnesses for depositions; scene and vehicle inspections; consulting with company engineers and participating in trials and settlements.

Joining the United States Attorney's office in 1985 opened the door for my representation of the United States, both as Plaintiff and Defendant. As an AUSA in the civil division, I represented the United States' interest in areas such as medical malpractice, constitutional torts, employment discrimination, forfeitures, prisoner suits, social security, commercial litigation, taxes, and judgment enforcement. Responsibility for these cases often began at pretrial stages and remained through trial and appeal.

I began developing a plaintiffs' practice when I joined Goodman, Eden, Millender & Bedrosian in 1988. Our firm specializes in personal injury litigation. I handle all aspects of these matters, many involving catastrophic occurrences. My caseload includes medical malpractice, product liability, housing discrimination, sexual harassment, employment discrimination, and general negligence cases.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Presently, my clients are individuals, although I periodically represent institutional clients. These individuals have suffered personal injuries, are often disabled from working, and are undergoing medical treatment.

Over the years, my clients have been the United States, the State of Michigan, the Detroit Building Authority, the Economic Development Corporation for the City of Detroit, American Motors Corporation,

Victoria Ann Roberts

individuals through insurance companies, and individual plaintiffs.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

On average, I have appeared in court on a regular basis. From 1977-1983, I spent most of my time on municipal bond and finance matters, although I did handle insurance defense matters. These were mostly in state court and I appeared regularly on motions.

When I went to AMC, I supervised litigation in other parts of the country, as well as in Michigan. These cases were mainly in federal courts.

At the United States Attorney's office, my appearance in court became more regular, and in federal court exclusively. Now, at Goodman, Eden, Millender & Bedrosian, I have matters in both state and federal courts, and I appear regularly.

2. What percentage of these appearances was in:  
(a) federal courts;

20%

- (b) state courts of record;

80%

- (c) other courts.

n/a

3. What percentage of your litigation was:

- (a) civil

100%

- (b) criminal

None.



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4. State the number of cases in courts of record you tried to verdict or judgement (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried eight cases to verdict. I have been sole counsel on five cases, chief counsel on two and associate counsel on one.

5. What percentage of these trials was:

(a) jury;

75%

(b) non-jury

25%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- 1) United State of America and Roy Joseph Conover, et al vs Parkwoods Apartments, et al, C.A. No. 95-72598 United States District Court, Eastern District of Michigan. filed June 27, 1995. Consent Order entered on September 26, 1996. I represented the family of Roy Conover and six other families.

Trial Judge:

Honorable Barbara K. Hackett

Victoria Ann Roberts

Co-Plaintiff's Counsel: Timothy J. Moran, Housing and  
Civil Enforcement Section,  
Civil Rights Division  
P. O. Box 65998  
Washington, DC 20035-5998  
(202) 514-3510

Pamela Thompson  
Assistant United States Attorney  
211 West Fort Street  
Suite 2300  
Detroit, Michigan 48226  
(313) 226-9770

Defense Counsel: Marilyn A. Peters/  
Joseph H. Hickey  
DYKEMA GOSSETT PLLC  
Attorneys for Defendants  
1577 North Woodward Avenue  
Suite 300  
Bloomfield Hills, MI 48304  
(248) 540-0768/(248) 258-0555

Disposition: \$475,000 Settlement; far-  
reaching Consent Order  
governing defendants' rental  
practices.

This case of race and familial housing discrimination received national attention when it settled for a record \$475,000.00 in September, 1996. \$362,500.00 was paid to the seven families whom I represented; the balance was paid in civil penalties to the government and to a fund for then unidentified victims.

The significance of this case is that it has already had national ramifications in the rental housing market. Property owners have made inquiries in an effort to change their rental practices and train staff, thereby avoiding similar allegations against them.

I intervened in this matter which was originally filed by the United States. After vigorous discovery, the parties agreed to private mediation. Through that process, we achieved the reported disposition.

Victoria Ann Roberts

- 2) Jeannine Proha v George Auch Company, C.A. No. 90-007356-NO. State of Michigan, Wayne County Circuit Court. Filed on March 22, 1990. I represented Jeannine Proha.

Trial Judge: Honorable Charles Kaufman

Defense counsel: Thomas Rockwell  
Vandever Garzia  
333 West Fort Street  
Suite 1600  
Detroit, Michigan 48226  
(313) 961-4880

Disposition: Jury verdict for \$765,000.00.  
Trial period: September 23 to  
October 1, 1991.

This was my first major trial representing a Plaintiff. When Jeannine Proha and her partner, Glen Polt, went to the second floor of this construction project to run temporary electrical wiring from the second level to a transformer below, they encountered the opening covered with a tarp and a wooden pallet. There was no vertical barricade in place. Those items obscured the opening's dimensions. While attempting to run the wire, Ms. Proha lost her balance. This accidental displacement by Jeannine Proha caused the tarp as well as Jeannine Proha to fall through the opening.

Because of the fall, Ms. Proha ruptured three discs in her back and suffered severe physical and psychological injuries, including the loss of her career as a construction electrician.

My client was one of the few female journeyman electricians in the State of Michigan. I was lead counsel. The case had previously mediated for \$300,000.00.

- 3) Jane Doe v Carlos Lauchu, M.D., et al, C.A. No. 92-007685-NH. State of Michigan, Washtenaw County Circuit Court. Filed July 1, 1992 in Wayne County Circuit Court. Judgment entered on September 6, 1994. I represented Jane Doe.

Trial Judge: Honorable Melinda Morris

Victoria Ann Roberts

Co-Counsel for Plaintiff:	Barbara A. Patek (formerly with Goodman, Eden, Millender & Bedrosian 1500 Buhl Building Detroit, Michigan 48226 (313) 964-6900
Counsel for Carlos Lauchu:	David D. Patton David D. Patton & Associates, P.C. 100 Bloomfield Hills Parkway Suite 110 Bloomfield Hills, Michigan 48304 (248) 258-6020
Co-Counsel for Carlos Lauchu:	Jack VanderMale 333 West Fort Street 12th Floor Detroit, Michigan 48226 (313) 964-3070
Dr. Lauchu's Personal Atty:	Craig L. Nemier Still, Nemier, Tolari & Landy, P.C. 37000 Grand River Avenue Suite 300 Farmington Hills, Michigan 48335 (248) 476-6900
Counsel for Sisters of Mercy Health Corp.:	William Tanoury Willmarth & Tanoury, PLLC 535 Griswold Suite 1730 Detroit, Michigan 48226 (313) 964-6300
Disposition:	Dr. Lauchu tendered his insurance policy of One Million Dollars (\$1,000,000); declaratory judgment action is now pending. Sisters of Mercy paid \$400,000.00. (Barbara Patek continues the representation of Jane Doe.)

The particular significance of this case is that it made it abundantly clear to me that people in positions of trust and authority have an obligation to maintain proper boundaries, or they risk causing irreparable harm to vulnerable people under their control and direction. Our



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client was severely mentally ill when she began psychiatric treatment with Dr. Lauchu. Shortly after treatment began, Dr. Lauchu inappropriately conducted therapy which resulted in inappropriate sexual conduct between Jane Doe and Dr. Lauchu. This sent Jane Doe into a decline of multiple suicide attempts and hospital admissions. With the able assistance of Judge Morris, the parties were finally able to achieve a settlement with the doctor tendering his rights under his insurance policy to the Plaintiffs. Dr. Lauchu lost his license to practice medicine in the State of Michigan as a direct result of this breach of his ethical obligation.

This case came into our office through Ms. Patek, who handled it initially. Over time, we eventually became co-counsel and settled the case as trial was scheduled to begin.

- 4) Tamara Vinson and Roderick Rucker v Grayhaven Lenox Limited, et al, C.A. #: 95-532216-NO, Wayne County Circuit Court, filed on: November 1, 1995. Order of Dismissal was entered on May 8, 1997. I represented Tamara Vinson and Roderick Rucker.

Trial Judge: Honorable Amy Hathaway

Co-Counsel for Plaintiffs: George J. Bedrosian  
Goodman, Eden, Millender  
& Bedrosian  
3000 Cadillac Tower  
Detroit, Michigan 48226  
(313) 965-0050

Defense Counsel: Craig Nemier  
Still, Nemier, Tolari & Landry, P.C.  
37000 Grand River, Suite 300  
Farmington Hills, Michigan 48335  
(248) 476-6900

Disposition: \$425,000.00 settlement.

This was a premises liability case. Several men trespassed onto the premises of my client's apartment complex late at night. When my client and her boyfriend arrived, the men emerged from a carport, assaulted my clients, and abducted and raped Ms. Vinson. Our claim was that the assailants would not have been able to enter the complex had promised security measures, such as a surveillance camera, been in place.

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We had gotten as far as enpanelling a jury when the case settled on March 26, 1997. I had primary responsibility for this matter until trial preparation began and my partner, George Bedrosian, provided assistance.

- 5) Reverend Carolyn Corey v United States of America, C.A. No. 84-3563. United States District Court, Eastern District of Michigan. Date filed: July 31, 1984. Judgment entered on September 22, 1986.

Trial Judge: Honorable Charles W. Joiner

Plaintiff's Counsel: Chui Karega  
19771 James Couzens Highway  
Detroit, Michigan 48235  
(313) 864-0663

Disposition: No cause of action.  
Trial Period: September 8, 1986 to  
September 22, 1986

Plaintiff Carolyn Corey claimed that a reduction in force (RIF) was conducted in a manner discriminatory to women and minorities and, particularly as to her, because of her religion. Our defense was that she was removed from employment for refusing to accept an offer of directed reassignment in accordance with a lawful RIF.

Judgment was entered in favor of the United States on all counts of Plaintiff's complaint on September 22, 1986.

- 6) Donald and Edwina Harwell v Dortha Reynolds, et al, C.A. #: 90-CV-72560-DT, Eastern District of Michigan, Southern Division. Date filed: August 23, 1990. Order of Judgment entered on November 14, 1991.

Trial Judge: Honorable Horace Gilmore

Defense Counsel: Julie Nicholson-Guibord  
Potter, Carniak, Anderson &  
DeAgostino  
Attorney for Defendant Reynolds  
2701 University Drive, Suite 223  
Auburn Hills, Michigan 48326  
(248) 377-1700

Victoria Ann Roberts

David Lee  
Booth & Patterson, P.C.  
Attorney for The Property Shoppe,  
Inc.- Better Homes & Gardens,  
Shoemaker and Harries  
1090 West Huron  
Waterford, Michigan 48328  
(248) 681-1200

Disposition: Verdict for the Harwell Plaintiffs  
in the amount of \$22,000.00 against  
Defendant Shoemaker and The Property  
Shoppe.  
No cause of action against Defendant  
Dortha Reynolds.  
Trial Period: October 28-30, 1991.

This was the first "sales" case that I brought to trial.  
My clients sought to purchase a home in an upscale  
neighborhood in Pontiac, Michigan. The race of my  
clients was disclosed by the realtor's agent to the  
seller while presenting their offer. The offer was not  
accepted and the house was taken off the market. After  
the withdrawal from the market, the house was shown to  
prospective buyers and an offer was accepted from a white  
couple.

The jury found that the realty company violated fair  
housing laws by disclosing the race of my clients to the  
property sellers.

- 7) Constance and Daniel Zimmer v United States of America,  
C.A. No: 85-CV-60445. United States District Court for  
the Eastern District of Michigan. Case filed on  
October 16, 1995. Order of Dismissal entered December  
21, 1987.

Trial Judge: Honorable George LaPlata (retired)

Plaintiff's Counsel: Michael D. Nelson  
Nelson, Petruska & Allen, P.C.  
990 South Wisconsin  
Gaylord, Michigan 49735  
(616) 732-2491

Disposition: \$55,400.00 Verdict.  
Trial period May 12, 1987 to May 21,  
1987

Victoria Ann Roberts

Plaintiff's decedent was admitted as a psychiatric patient to the Veteran's Administration Hospital in Ann Arbor on December 31, 1983. Against medical advice, he left the hospital and was struck and killed by an automobile several hours later.

Although this was a claim for medical malpractice (failure to properly supervise, to take a proper history, to prescribe proper medication, etc.), the court found no malpractice. Rather, it held that the hospital was negligent for permitting Mr. Zimmer to leave the hospital without notifying a family member or police agency.

The damages awarded by the court were quite low (\$55,400), inasmuch as this was a wrongful death claim of a young man with a family.

- 8) Susan Loftus v CSX Transportation, Inc., C.A. #: 91-116637, Wayne County Circuit Court. Case filed on June 25, 1991. Case was dismissed on September 22, 1994.

Trial Judge: Judge Edward Thomas

Plaintiff's William H. Goodman  
Co-Counsel: Goodman, Eden, Millender & Bedrosian  
3000 Cadillac Tower  
Detroit, Michigan 48226  
(313) 965-0050

Defense Counsel: Gene Davis/Mary O'Donnell  
Hopkins & Sutter  
1333 Brewery Park Blvd., Suite 101  
Detroit, Michigan 48207  
(313) 396-6600/396-6552

Disposition: Verdict for Defendant.  
Trial Period: January 24, 1994  
to February 18, 1994

In this case, we alleged numerous violations at a railroad crossing, including failure to properly guard and malfunctioning signals. At this particular crossing, the signals always indicated a train was approaching and motorists invariably would cross despite the warning signal. On the day Ms. Loftus was injured, a train was indeed approaching; she did not see it and her car was struck as she attempted to cross. The jury found in favor of the railroad.



Victoria Ann Roberts

I tried this case as co-counsel with my very seasoned partner, William H. Goodman. It was a complicated negligence case and the longest trial I ever engaged in, and perhaps the most difficult.

- 9) Doris Birch v St. Mary's of Redford and The Archdiocese of Detroit, Case No: 86-628033-NO. Wayne County Circuit Court. Case filed on September 30, 1986. Date of Dismissal: July 26, 1989.

Trial Judge: Honorable Charles Farmer (retired)

Defense Counsel: Robert M. Spence  
(formerly with Bodman, Longley & Dahling LLP)  
The Budd Co.  
3155 West Big Beaver  
P.O. Box 2601  
Troy, Michigan 48007  
(248) 643-3555

Disposition: Jury Verdict for the Defendant.  
Trial period: June 6, 1989 to June 13, 1989

My client slipped and fell as she entered a school where her son attended. Our claim was that the archdiocese had had sufficient notice of the icy conditions and should have taken more precautions to guard against injuries. The jury found that the school had exercised reasonable care under the circumstances.

- 10) Parks v Grayton Park Associates, C.A. #: 81-70526, United States District Court, Eastern District of Michigan. Date filed February 18, 1981. Opinion Denying Plaintiff's Motion for a Judgment Not Withstanding The Verdict or, in the Alternative New Trial entered January 8, 1982.

Trial Judge: Judge John Feikens

Defense Counsel: Michael Hathaway  
Vandeveer Garzia  
333 West Fort Street  
Suite 1600  
Detroit, Michigan 48226  
(313) 961-4880

Victoria Ann Roberts

Disposition: No Cause of Action.  
Trial period: September 16, 1981 to  
September 24, 1981

Reported at: 531 F Supp 77 (1982)

My clients, a young black couple, were told that this complex in the City of Detroit had no vacancies. A temporary restraining order and preliminary injunction were issued against the Defendant complex, on the basis of testing evidence which indicated white testers were given more favorable information about availability than black testers.

At trial, however, the jury found in favor of Defendant.

This was the first housing discrimination case which I tried to verdict. I was sole counsel. The reported decision addressed the propriety of awarding attorney fees if a party prevails in obtaining injunctive relief but loses the case on the merits.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I was honored in November, 1993, when Mayor-Elect Dennis Archer selected me to serve as General Counsel to his Transition Team. In addition to providing legal advice to Transition Team members, I coordinated and supervised the volunteer legal services of twelve leading firms in the State of Michigan, all of which agreed to perform legal research and develop position papers on legal matters facing this transition government.

I devoted full time and attention to this pursuit from November, 1993 until Mayor Archer's inauguration in January, 1994.

I have also engaged in a housing discrimination practice, first representing individuals, then fair housing centers, and, most recently, intervening plaintiffs in cases filed by the United States.

Victoria Ann Roberts

My service to the bar, now as its President, has given me an opportunity that few have, and it has increased my devotion to the legal profession and to our system of justice. We have, during this past year, managed to heighten our profession's commitment to access to justice and to make an even stronger case that so much of lawyering, is service to the public.

I have found particulately satisfying, the mediation/arbitration work that I have engaged in. To the extent that resources of courts are preserved, and parties are able to reach resolutions without trials, our legal system is benefited.

I believe that continuing education by lawyers should be engaged in routinely. I have found my teaching contributions to be particularly rewarding.

Victoria A. Roberts**AFFIDAVIT**

I, VICTORIA ANN ROBERTS, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

August 20, 1997  
Date

Victoria A. Roberts  
Name  
Linda Vertine  
Notary

LINDA VERTINE  
Notary Public, Macomb County, MI  
My Commission Expires Oct. 17, 1998



Victoria Ann Roberts

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Goodman, Eden, Millender & Bedrosian, a Michigan law practice:

A: Keogh Plan - Held by Smith Barney, no control.

B. Partnership - The partnership agreement details how the partnership interest will be paid on withdrawal. Upon withdrawal from the partnership, I will be paid whatever balance is in my capital account after deducting my percentage interest (16%) of costs advanced. I will also be entitled to my percentage interest of net profits at the date of my withdrawal. Finally, a voluntary withdrawal benefit will be paid, based on the number of months I have been a partner by the date of withdrawal.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

For an appropriate period of time, I would recuse myself from cases involving my former law firm.

I cannot think of categories of litigation and financial arrangement likely to present conflicts of interest. In all instances, however, I would abide by the Judicial Code of Conduct governing recusal.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None.

Victoria Ann Roberts

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**I have attached a copy of the Financial Disclosure Report.**

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

**I have attached a copy of the Financial Net Worth Statement.**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

**No.**

AQ-1C (W)  
Rev. 9/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) <b>ROBERTS, VICTORIA A.</b>		2. Court or Organization <b>U.S. DIST CT-EAST. DIST. OF MI</b>	3. Date of Report <b>08/04/1997</b>
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) <b>U.S. DISTRICT JUDGE-NOMINEE</b>		5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date <b>/ /</b> ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1996 to 06/30/1997
7. Chambers or Office Address <b>16787 EDINBOROUGH DETROIT, MI 48219</b>		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1. <b>MANAGING PARTNER</b>	<b>GOODMAN, EDEN, MILLENDER AND BEDROSIAN, LAW</b>
2. <b>PARTNER</b>	<b>SIMONE ROAD, LLC</b>
3. <b>PARTNER</b>	<b>JUDY CIRCLE, LLC</b>

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1. <b>1996</b>	<b>GOODMAN, EDEN, MILLENDER &amp; BEDROSIAN RETIREMENT</b>
2. <b>1996</b>	<b>GOODMAN, EDEN, MILLENDER &amp; BEDROSIAN,</b>
3.	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1. <b>1996</b>	<b>GOODMAN, EDEN, MILLENDER &amp; BEDROSIAN/LAW PRACTICE-</b>	<b>\$ 176,200.00</b>
2. <b>1995</b>	<b>GOODMAN, EDEN, MILLENDER &amp; BEDROSIAN/LAW PRACTICE</b>	<b>\$ 151,562.00</b>
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	ROBERTS, VICTORIA A.	08/04/1997

### V. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements or gifts)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

### V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts)		
1	EXEMPT		
2			
3			
4			

### VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities)		
1	GOODMAN, EDEN, MILLENDER & BED	PARTNER ADVANCE DRAWS	J
2	MBNA	CREDIT CARD	K
3	NATIONAL BANK OF DETROIT	CREDIT CARD	J
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P=\$1,000,001-\$2,500,000    Q=\$2,500,001-\$5,000,000    R=\$5,000,001-\$10,000,000    S=\$10,000,001 or more



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
ROBERTS, VICTORIA A.

08/04/1997

- income, value, transactions (includes those of spouse and dependent children. See pp 37-54 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS

[illegible]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	
	ROBERTS, VICTORIA A.	08/04/1997

## III. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☐ NONE (No additional information or explanations.)

SECTION 1: NAME OF ENTITY, CONT... PARTNERSHIP

SECTION 2: PARTIES AND TERMS, CONT... PLAN, NO CONTROL

SECTION 2: PARTIES AND TERMS, CONT... LAW FIRM, PARTNER AGREEMENT

SECTION 3: PARTIES AND TERMS, CONT... INCOME IS ESTIMATED SINCE 1996 PARTNERSHIP RETURN IS ON EXTENSION

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting ROBERTS, VICTORIA A.	08/04/1997
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SECTION HEADING. (Indicate part of report.)

SECTION 1. POSITIONS (cont'd.)

U. Position	Name of Organization/Entity
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4 PARTNER	FAIRVIEW DRIVE, LLC
5 PARTNER	DOVER ROAD, LLC
6 PARTNER	BURGER ROAD, LLC
7 PARTNER	DEARBORN HEIGHTS, LLC
8 PRESIDENT	STATE BAR OF MICHIGAN
9 PARTNER	PALMER ROAD, LLC

Name of Person Reporting

FINANCIAL DISCLOSURE REPORT

ROBERTS, VICTORIA A.

08/04/1997

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

Victoria A. Roberts

Date

8/4/97

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544



## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	6 500	Notes payable to banks—secured	
U.S. Government securities—add schedule	2 000	Notes payable to banks—unsecured	
10 shares common, Chrysler Corp.	320	Notes payable to relatives	18 000
Listed securities—add schedule		Notes payable to others Goodman Eden	13 000
Unlisted securities—add schedule		Accounts and bills due	
Accounts and notes receivable:		Unpaid income tax	
Due from relatives and friends		Other unpaid tax and interest	
Due from others		Residence: Standard Federal	17 800
Doubtful		Real estate mortgages payable—add schedule Michael Gehrls	8 000
Real estate owned—add schedule Residence, 16767 Edinborough Detroit, MI	150 000	Charrel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autom and other personal property	38 000		
Cash value—life insurance			
Other assets—itemize: Partnerships, attached	227 700		
Goodman, Eden, Millender & Bedrosian			
Keogh Plan Smith Barney	131 142		
Individual retirement accounts:			
AIM Constellation	36 361	Total Liabilities	56 800
Standard Federal Bank	26 410		
Janus Fund	62 000	Net Worth	623 633
Total Assets	680 433	Total Liabilities and net worth	680 433
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	-0-	Are any assets pledged? (Add schedule.)	No
On leases or contracts	-0-	Are you defendant in any suits or legal actions?	No
Legal Claims	-0-	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	-0-		
Other special debt	-0-		

VICTORIA ROBERTS  
FINANCIAL STATEMENT  
NET WORTH  
ATTACHMENTS

August 13, 1997

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	<u>Fair Market Value</u>
Other assets:	
Partnerships:	
Goodman, Eden, Millender & Bedrosian, 13%	
General partner, law practice	\$ 62,674
Simone Road, L.L.C., 33%	
General partner, real estate	32,142
Palmer Road, L.L.C., 25%	
General partner, real estate	20,375
Judy Circle, L.L.C., 33%	
General partner, real estate	24,486
Fairview Circle, L.L.C., 33%	
General partner, real estate	29,469
Dover Road, L.L.C., 25%	
General partner, real estate	11,300
Burger Road, L.L.C., 34%	
General partner, real estate	26,554
Dearborn Heights, L.L.C., 33%	
General partner, real estate	<u>20,700</u>
	<u>\$227,700</u>

Victoria Ann Roberts \_\_\_\_\_

### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged.": Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have a child who has Down's Syndrome. Planning for the financial future for people who have disabilities is often something that is avoided by parents. In the 1980's I presented seminars on several occasions through the Detroit Public Schools, on financial planning for children who are developmentally disabled. I did the same through the National Association for Parents of Visually Impaired in November, 1989, and through the Michigan Commission for The Blind in October, 1990. Periodically, I now give such financial advice to parents on a pro-bono, individual basis.

I served as a board member for Big Brothers Big Sisters of Michigan from 1987 - 1991 and as its secretary from 1988 to 1990. During that time, Big Brothers Big Sisters was undergoing a major restructuring and I chaired a committee which made restructuring recommendations. Over several months, this committee met on a regular basis, sometimes weekly. In addition, I had the commitment to Big Brothers Big Sisters as a member of the Board, attending monthly meetings. In between meetings, I made myself available to handle legal matters and questions which arose. Today, I continue on Big Brothers Big Sisters' advisory board, and continue to make myself available to handle legal questions as they arise.

From 1985 until 1991 I served on the Board of Directors of the Fair Housing Center of Metropolitan Detroit, a nonprofit corporation established to provide housing information and to assist in the struggle against housing discrimination. I served in various officer positions, and chaired the Board of Directors for five years. We met on a monthly basis. In between meetings, I handled the legal matters of the organization which arose. Additionally, the Fair Housing Center of Metropolitan Detroit provided training to various other groups which resulted in the establishment of fair housing centers in other parts of the state. Most notably, I have been a presenter at the following conferences:

Fair Housing Center of Metropolitan Detroit Cooperating Attorneys Seminar, December 8, 1994. Presenter: "Review of Key Fair Housing Laws".

Victoria Ann Roberts

Fair Housing Center of Metropolitan Detroit Cooperating Attorneys Seminar, December 8, 1989. Presenter: "Discovery and Settlement." (no material available)

Fair Housing 20 Years Later: The Legal Struggle To Achieve Equal Housing Opportunities, April 13, 1988. Presenter.

The Prima Facie Case; Coverage of Fair Housing Laws; Standing, 1983.

I have also found the time to present in other areas of legal education as well. Some examples include:

Faculty Member, United States District Court for the Eastern District of Michigan Trial Advocacy Workshop, 1988, 1989 (no materials available)

Michigan Conference to Promote Minority Involvement In The Legal Profession, University of Detroit School of Law, October 28, 1988. (no materials available)

21st National Conference on Women And The Law, March 22-25, 1990. Presenter: "Representing a Female Client in Tort Cases: How to Get Fair Damage Awards." (no materials available)

Institute of Continuing Legal Education: Tort Law Update, April, 1990. Presenter: "Immunity, Governmental and Otherwise, and the Recreational Use Statute."

State Bar of Michigan President Elects' Conference, June 1-3, 1990. Faculty: "Mainstreaming Women and Minority Attorneys."

State Bar of Michigan 55th Annual Meeting, September 12, 1990. Moderator, "Involving Minority Attorneys In The Profession."

State Bar of Michigan, Mandatory Continuing Legal Education Program, 1990-1991. Faculty: "The Professional Obligations of the Lawyer: To The Justice System, To Adversaries, To Clients, To Other Counsel, To The Public."

Institute of Continuing Legal Education: Autumn Trial Advocacy Skills Workshop, October 30-31, 1990. (no course materials)



Victoria Ann Roberts

Institute of Continuing Legal Education: Concentrated Trial Skills Advocacy Workshop, October, 1990, May, 1992. Member of the Faculty. (no course materials)

President-Elects Conference, State Bar of Michigan, May 31, 1991. Presenter: "The Shrinking Volunteer Market."

Fundamentals of Michigan Practice 1993, Institute of Continuing Legal Education, Course: Pre-trial Discovery, January, 1993 (no material available)

Michigan Trial Lawyers Association Basic Advocacy Seminar "Closing Argument", August 21, 1993.

I do believe that continuing education for lawyers should be mandatory, and, as State Bar President, have advocated that position to our Supreme Court.

As I moved into the chairs of the State Bar, my pro-bono activities outside of the bar have diminished, out of necessity. Since September, 1996, I have spent an average of 20 hours per week on bar activities. Prior to that, and at least since 1990, I have spent 10-20 hours per week on bar activities.

For the last two years, first as Chair of a committee and now as bar president, I have been a strong advocate for delivery of legal services to the poor. I have spoken of it, written of it and testified before our state legislature concerning funding for legal services programs.

I have established a Task Force on race and gender matters in our profession. A full report is expected September, 1997.

Over the years, I have been an outspoken proponent for access in our profession. I was instrumental in crafting a Statement of Hiring Goals (voluntary) which 34 law firms have now signed. In achieving this, I travelled throughout the state, meeting with managing partners. We have developed a similar voluntary statement of goals for corporations.

In the early 1990s, a state bar committee with which I was active examined the mediation selection process and found it to not be inclusive of women and minorities. Our work resulted in a complete restructuring of mediation selection rules in Wayne County, Michigan, and an examination of the rules statewide. In October, 1997, a new Michigan Supreme Court rule, approved by our Justices, goes into effect which is designed to insure diversity in our mediation panels throughout the state.

Victoria Ann Roberts

That same committee advocated that the state bar sponsor an "Opening Doors" Conference for women and minorities. I assisted in the design and presentation of the first conference held April 16, 1994. This has now become an annual state bar event.

I have found the time to spend in my childrens' classrooms helping when I could, accompanying the classes on field trips as a chaperone, attending track meets, basketball games, dance recitals, parent teacher conferences and school board meetings. For several years, I was the "Cookie Mom" for my daughter's Brownie Troop.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discrimination on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I was a Girl Scout in the 1960s. I was 10-12 years old and didn't consider that the policy was discriminatory. I was a member of the Board of Directors of the Girl Scouts in 1984-1986.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. A 40-member Merit Selection Committee was appointed by United States Senator Carl Levin. The committee membership included lawyers, business executives, elected public officials, union representatives, law enforcement personnel, educators, and community leaders.

There were 77 applicants for three vacancies in the Eastern District of Michigan. We all completed detailed questionnaires requesting personal, professional, legal and public service information, and any information which might reflect either positively or negatively on our applications. We also submitted copies of briefs and other writings.

Victoria Ann Roberts

All applicants were interviewed. Based on those interviews, a final list of nine candidates, all rated outstanding, was submitted to Senator Levin. I was one of three persons selected by Senator Levin and recommended to the President for appointment.

The Merit Selection Committee was very thoughtful in its approach during its interview of me, as was Senator Levin. They asked questions concerning my judicial philosophy; my ability to follow laws which I disagreed with; the characteristics I believed a good judge should possess; what I believed my own strengths and weaknesses to be; whether I had an opinion concerning sentencing guidelines; whether I could sentence someone to the death penalty; what I believed some of the worst and best decisions of the Supreme Court to be. I was asked detailed questions concerning my service to the bar and to my community, and about my legal background. While much of what I was asked was also asked on the questionnaire, the interview gave Senator Levin and the committee members the opportunity to see me up close and to make their own assessments concerning my personality, temperament, ability to get along with others and the sincerity of my application.

Since then, I have been investigated by the ABA and rated "well qualified" by a substantial majority of its Standing Committee on the Judiciary. The FBI has extensively investigated me. I have been interviewed by the Department of Justice attorneys and have spoken to White House Counsel.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss you views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Victoria Ann Roberts

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institution in the manner of an administrator with continuing oversight responsibilities.

It is important that all branches of government maintain the independence and coequal status that the drafters of the Constitution intended. With such independence, however, the judiciary must remain accountable. Judges remain accountable by appreciating the limited role the Constitution does assign to them, and by disposing of every case assigned, whether well-founded or frivolous, relying only on precedent and the rules of law. Every case must be considered on its own merit, and judges must be mindful to reach decisions applicable only to the parties to the litigation.



## I. BIOGRAPHICAL INFORMATION (PUBLIC)

## 1. Full name (include any former names used.)

Richard Warren Roberts.

## 2. Address: List current place of residence and office address(es).

Place of residence:  
Washington, D.C.

Office address:  
U.S. Department of Justice  
Civil Rights Division  
Criminal Section  
601 D Street, N.W. - Room 5802  
P.O. Box 66018  
Washington, D.C. 20035-6018.

## 3. Date and place of birth.

June 21, 1953. New York, N.Y.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married.

Spouse:

Ambassador Vonya B. McCann  
U.S. Coordinator for International Communications and  
Information Policy  
Principal Deputy Assistant Secretary of State  
Bureau of Economic and Business Affairs  
U.S. Department of State  
2201 C Street, N.W.  
Washington, D.C.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

College: Vassar College, Poughkeepsie, NY.

Dates of attendance: Fall 1970 to Spring 1973, Fall 1973 to June 1974.

Degree: A.B. cum laude. June 1974.

College: Princeton University, Princeton, NJ.

Dates of attendance: Spring 1973.

Degree: Not applicable (semester exchange program only).

Graduate School: School for International Training,  
Brattleboro, VT.

Dates of attendance: September 1974 to June 1975.

Degree: Master of International Administration. March  
1978.

Law School: Columbia Law School, New York, NY.

Dates of attendance: August 1975 to May 1978.

Degree: J.D. May 1978.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

#### EMPLOYMENT

Employer: I.B.M., Poughkeepsie, NY.

Position: Summer programmer.

Dates: June to August 1974.

Employer: Employment Rights Project, Columbia Law School,  
New York, NY.

Position: Legal research assistant.

Dates: May to August 1976.

Employer: Steptoe & Johnson, Washington, DC.

Position: Summer associate.

Dates: May to August 1977.

Employer: U.S. Department of Justice, Washington, DC.

Position: Trial Attorney, Civil Rights Division, Criminal  
Section.

Dates: September 1978 to October 1982.

Employer: Covington & Burling, Washington, DC.

Position: Associate.

Dates: November 1982 to February 1986.

Employer: Georgetown University Law Center, Washington, DC.

Position: Adjunct Professor (Trial Practice).

Dates: Fall 1983, Fall 1984.

Employer: United States Attorney's Office for the Southern  
District of New York, New York, NY.

Position: Assistant United States Attorney.

Dates: March 1986 to December 1988.

Employer: United States Attorney's Office for the District of Columbia, Washington, DC.  
Position: Assistant United States Attorney.  
Dates: December 1988 to October 1993.  
Position: Principal Assistant United States Attorney.  
Dates: October 1993 to June 1995.

Employer: U.S. Department of Justice.  
Position: Chief, Criminal Section, Civil Rights Division.  
Dates: June 1995 to present.

#### OTHER AFFILIATIONS

Entity: Capital Investment Club, Washington, DC.  
Position: Partner.  
Dates: Approximately September 1982 to December 1985.

Entity: Alumnae and Alumni of Vassar College, Poughkeepsie, NY.  
Position: Member, Board of Directors.  
Dates: June 1986 to May 1990; June 1995 to May 1999.

Entity: Vassar College, Poughkeepsie, NY.  
Position: Member, Board of Trustees.  
Dates: October 1995 to May 1999.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

#### College:

Undergraduate degree received cum laude.  
 General Motors Scholar.  
 New York State Regents Scholarship and Scholar Incentive Award.  
 National Association of College Women Scholarship.

#### Graduate School:

American Political Science Association Graduate Fellowship.

Law School:

Moot Court Best Speaker.  
 Charles Evans Hughes Fellow.  
 Council on Legal Education Opportunity Fellowship.  
 Vassar Graduate Fellowship.

Department of Justice:

Special Commendation Letters from Attorney General William French Smith (1981), Assistant Attorneys General Drew S. Days III (1980), and Wm. Bradford Reynolds (1982).  
 Special Achievement Award and Cash Bonus (1981, 1990, 1993).  
 Special Commendations from General Services Administration (1986), Bureau of Alcohol, Tobacco and Firearms (1988), Internal Revenue Service (1989), and Federal Bureau of Investigation (1990).  
 Certificate of Appreciation, Law Enforcement Coordinating Committee, U.S. Attorney's Office, District of Columbia (1995).  
 Senior Executive Service Performance Award (1996, 1997).

Other:

Department of Justice Association of Black Attorneys, Letter of Appreciation (1996).

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member, National Black Prosecutors Association.

Member, D.C. Bar Drug Task Force.

Member, D.C. Bar Committee on Professionalism and Public Understanding About the Law.

Member, Department of Justice Association of Black Attorneys.

Member, Department of Justice Association of Hispanic Employees for Advancement and Development.

Member, Washington Bar Association.

Member/Barrister, Edward Bennett Williams Inn of Court, Washington, D.C. Executive Committee Member (1995).



Member, D.C. Circuit Judicial Conference Arrangements Committee.

Member, D.C. Judicial Conference; Planning Committee Member (1992, 1994).

Former Member, ABA Criminal Justice Section Committees on Continuing Legal Education, and Race and Racism in the Criminal Justice System.

Former Member, National Conference of Black Lawyers.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying organizations

I am a life member of the NAACP, and of the Washington, D.C. chapter of TransAfrica. I have not participated in the lobbying activities of either organization.

Other organizations

Member, Board of Trustees, Vassar College.

Member, Board of Directors, Alumnae and Alumni of Vassar College.

Member, African American Alumni of Vassar College.

Member, Vassar Club of Washington, D.C.

Member, D.C. Coalition Against Drugs and Violence.

Member, Sigma Pi Phi Fraternity, Epsilon Boulé.

Member, Concerned Black Men, Inc., Washington, D.C. Chapter.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Appellate Division, Second Judicial Department, Supreme Court of the State of New York. February 1979. (All New York state courts.)

District of Columbia Court of Appeals. June 1983.

United States District Court for the District of Columbia.  
July 1983.

United States Court of Appeals for the District of Columbia  
Circuit. July 1984.

United States Supreme Court. December 1985.

United States District Court for the Southern District of  
New York. April 1986.

United States Court of Appeals for the Second Circuit.  
September 1986.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

#### Speeches

National Black Prosecutors Association, Annual Conference, New York, N.Y. Panelist, Prosecuting Police Brutality Cases. July 1987.

National Black Prosecutors Association, Annual Convention, Chicago, IL. Panelist, Prosecuting Hate Crimes. August 1991.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Federal Practice Seminar, Clearwater, FL. Lecturer, Criminal Discovery, Brady and Jencks. May 1993.

National Black Prosecutors Association, Annual Convention, Washington, D.C. Panelist, Race and Jury Selection. August 1993. (I am unable thus far to locate these notes, but will try to find a videotape.)

American Bar Association, Litigation Section, Annual Meeting, Washington, D.C. Panelist, Civil Rights Advocacy in the Clinton Era. October 1993. (I am unable thus far to locate these notes, but will try to find a videotape.)

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Evidence Seminar, Washington, D.C. Panelist and instructor on federal evidence rules. March 1994. (Remarks not written.)

U.S. State Department and the Federal Judicial Center, Washington, D.C. Lecturer, Legal Seminar on the Jury System for Russian Judges and Legal Officials. September 1994. (I am unable thus far to locate these notes.)

Bar Association of the District of Columbia, Forum. Panelist, Perspectives on Police Misconduct. June 1995.

U.S. Department of Justice and the Federal Bar Association, Summer Law Clerk Orientation. Panelist on federal practice. June 1995, June 1996, June 1997.

National Fair Housing Alliance, National Conference, Arlington, VA. Panelist, Ethnic Intimidation and Its Effects on Housing Choices. June 1995.

Federal Judicial Center, Federal Criminal Procedure Seminar for Federal Judges, Portland, OR. Lecturer on uncharged misconduct evidence. August 1995, August 1996.

National Black Prosecutors Association, Annual Conference, St. Thomas, Virgin Islands. Panelist, Hate Crimes, and Office Management. August 1995.

Superior Court of the District of Columbia, Law Clerks' Speakers Forum. Speaker on legal careers. September 1995.

Congressional Black Caucus Foundation, 25th Annual Legislative Conference Braintrust. Panelist, Criminal Justice Issues. September 1995.

United States Courthouse, Washington, D.C. Law Clerks Speakers Program. Speaker on legal careers. January 1996.

National Association of Attorneys General, Civil Rights Conferences. Panelist, Police Misconduct. Washington, D.C., March 1996; Ft. Lauderdale, FL., March 1997.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Criminal Chiefs Conference, Arlington, VA. Speaker, Criminal Civil Rights. March 1996.

National Bar Association, Annual Mid-Year Conference. Washington, D.C. Panelist, Hate Crimes Panel. March 1996. (Videotape provided.)

Department of Justice Association of Black Attorneys, Panel discussion. Panelist, Should Race Matter in the American Criminal Justice System? July 1996.

U.S. Department of Justice, National Institutes of Justice, National Symposium on Police Integrity. Speaker on police misconduct. July 1996.

Central District Baptist Association, 127<sup>th</sup> Annual Session, Church Fire Awareness Forum, Louisville, KY. Speaker on church arsons. July 1996.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Criminal Civil Rights Seminar, St. Louis, MO. Speaker, Case Intake and Procedure, and National Church Arson Task Force. September 1996.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Law Enforcement Victim-Witness Coordinator Conference, Panama City, FL. Speaker, Hate Crimes/Church Burnings workshop. October 1996.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Criminal Federal Practice Seminar, Washington, D.C. Lecturer, Criminal Civil Rights. February 1997, April 1997.

U.S. Attorney's Office for the Eastern District of Pennsylvania, Philadelphia, PA. Keynote speaker, Black History Month program. February 1997.

District of Columbia Bar, Mid-Winter Convention, Washington, D.C. Panelist, Jury Nullification. February 1997. (Remarks not written.)

Washington Area Lawyers for the Arts, Special screening of theater production "Voir Dire," Washington, D.C. Panelist, "The Jury in America — Justice Served or Justice Denied?" March 1997. (Remarks not written. Press report provided.)

Fred Friendly Seminar, Liberty and Its Limits: The Federalist Papers. Panelist, Whose Law; Whose Order? Philadelphia, PA. PBS broadcast April 1997 (taped December 1996) (videotape provided).



National Association of Police Organizations, Legal and Legislative Rights Seminar. Panelist, Civil Rights Cases and Law Enforcement. April 1997.

U.S. Department of Justice, Crisis Management Coordinators' Conference. Panelist, Terrorist Groups and the Laws to Combat Terrorist Violence in the United States. June 1997.

National Association for the Advancement of Colored People, National Convention, Pittsburgh, PA. Panelist, Building Our Community, Protecting Our Community. July 1997.

Department of Justice Association of Black Attorneys, Career Day. Keynote Speaker. September 1997. (Same as text of June 1995 DOJ/FBA summer law clerk orientation.)

Congressional Black Caucus Foundation, 27th Annual Legislative Conference Braintrust. Panelist, African Americans and Police Misconduct. September 1997.

U.S. Department of Justice, Executive Office for U.S. Attorneys, Office of Legal Education, Criminal Chiefs Conference, Arlington, VA. Panelist, Prior Approvals. November 1997.

#### Published and unpublished material

Letter to the Editor, The Washington Post, November 14, 1979.

Letter to the Editor/Op Ed article, March 28, 1983, unpublished.

I edited portions of a Department of Justice internal monograph entitled Civil Rights published in September of 1995 by the Office of Legal Education ("OLE"), Executive Office for United States Attorneys. I am providing a copy of only the cover page of the monograph, as OLE considers the contents of the monograph confidential, exempt from public release, and privileged as attorney work product.

13. Health: What is the present state of your health? List the date of your last physical examination.

I enjoy very good health. My last physical examination was on January 15, 1998.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Other than my employment with the Department of Justice, I have not held public office. I have never been a candidate for elective public office.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;  
  
I did not clerk for a judge.
  2. whether you practiced alone, and if so, the addresses and dates;  
  
I have never practiced alone.
  3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

September 1978 to October 1982:

U.S. Department of Justice, Civil Rights Division, Criminal Section. Address at the time: 9<sup>th</sup> and Pennsylvania Avenue, N.W., Washington, D.C. 20530. (Current address: 601 D Street, N.W. - 5<sup>th</sup> Floor, Washington, D.C. 20530.) Position: Trial Attorney.

November 1982 to February 1986:

Covington & Burling, 1201 Pennsylvania Avenue,  
N.W., P.O. Box 7566, Washington, D.C. 20044-7566.  
Position: Associate.

Fall 1983, Fall 1984:

Georgetown Law School, 600 New Jersey Avenue,  
N.W., Washington, D.C. Adjunct Professor (Trial  
Practice).

March 1986 to December 1988:

United States Attorney's Office, Southern District  
of New York, One St. Andrew's Plaza, New York, NY  
10007. Position: Assistant United States  
Attorney.

December 1988 to June 1995:

United States Attorney's Office, District of  
Columbia, 555 4<sup>th</sup> Street, N.W., Washington, D.C.  
20001. Positions: Assistant United States  
Attorney and Principal Assistant United States  
Attorney.

June 1995 to present:

U.S. Department of Justice, Civil Rights Division,  
Criminal Section, 601 D Street, N.W. - 5th Floor,  
Washington, D.C. 20530. Position: Section Chief.

- b. 1. What has been the general character of your law  
practice, dividing it into periods with dates if  
its character has changed over the years?

1978 - 1982

I was a Trial Attorney responsible for prosecuting  
criminal civil rights cases on behalf of the  
United States, including police brutality,  
involuntary servitude and slavery, and racially  
motivated violence matters. I presented evidence  
to federal grand juries and tried cases in United  
States District Courts throughout the country.

1982 - 1986

As a litigation associate at a law firm, I  
participated in a wide-ranging civil litigation  
practice. I handled everything from written  
discovery requests and litigating discovery

disputes to taking or defending depositions. The subjects of the litigation included franchising and trade dress infringement, pharmaceutical product liability, defense contracting, consumer credit protection violations, and others. I also represented corporate clients in federal grand jury investigations.

1986 - 1993

As an Assistant United States Attorney in two judicial districts, I was responsible for representing the United States in all aspects of federal criminal prosecutions, including grand jury, trial, and appellate proceedings. My emphases were in matters involving public corruption, financial crimes, procurement fraud, organized crime, and narcotics.

1993 - 1995

As the Principal Assistant United States Attorney in the District of Columbia, I was second-in-command to then-United States Attorney Eric H. Holder, Jr. and helped him to administer the largest U.S. Attorney's Office in the nation. I provided counsel to the U.S. Attorney on strategic decisions about managing, litigating, and settling major criminal and civil cases. I also advised the U.S. Attorney on major personnel and policy issues in a 550-person office, served as the office's ethics officer, and reviewed all large civil settlements and all criminal matters involving police subjects.

1995 - present

As Chief of the Criminal Section of the Civil Rights Division, I supervise a staff of over 50 personnel including 32 lawyers who are involved in enforcing the federal criminal civil rights statutes nationwide. I also oversee the work of the National Church Arson Task Force operations team and advise senior management of the Department on policy issues related to our Section's enforcement efforts.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a federal prosecutor, my only client has been the United States. In private practice, I



represented diverse corporate clients in a number of industries, including consumer products, financial services, and defense. I also represented a local university, a national church, and an individual in his dealings with a federal agency. The areas in which I have specialized are described in my response to question 17(b)(1).

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

March 1979 to June 1979

As part of my training to prosecute criminal civil rights cases, I appeared in court regularly as a Special Assistant United States Attorney in the District of Columbia. I handled all phases of criminal misdemeanor prosecutions in the Superior Court.

June 1979 to October 1982

I appeared in court less frequently during this period. My appearances were in connection with federal grand jury investigations or were to try federal felony prosecutions. However, I appeared before federal grand juries on a regular basis.

November 1982 to February 1986

I appeared in court once.

March 1986 to October 1993

I appeared in court regularly as an Assistant United States Attorney handling federal criminal trial and appellate litigation.

October 1993 to present

When I was promoted to be the Principal Assistant U.S. Attorney, my management responsibilities replaced my in-court duties. Since that time, I have not appeared in court.

2. What percentage of these appearances was in:  
(a) federal courts;

85%.

(b) state courts of record;

15%

(c) other courts.

None.

3. What percentage of your litigation was:

(a) civil;

15 to 20%.

(b) criminal.

80 to 85%.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 30. I was sole counsel in 25, lead counsel in one, co-counsel in one, and associate counsel in 3.

5. What percentage of these trials was:

(a) jury;

Roughly 20%.

(b) non-jury.

Roughly 80%.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- A. Trial: US v. Joseph Paul Franklin, Cr. 80-125J  
 Dates: February and March of 1981  
 Court: United States District Court, District of Utah  
 Judge: Honorable Bruce Jenkins  
 Co-counsel: Steven Snarr, Northwest Pipeline, 295 Chipeta Way, Salt Lake City, UT 84108, phone 801-584-7094.  
 Opposing counsel: Robert Van Sciver, Box 217, San Carlos, Sonoma, Mexico 85506, phone 011-526-226-0534; and Edward Brass, 321 S. 600 E., Salt Lake City, UT 84102, phone 801-322-5678.

Franklin, a drifter and former Klansman, lay in wait with a high-powered rifle in bushes outside of a Salt Lake City park for two black male teenagers who were jogging with two teenage white women. He shot and killed the black joggers and fled. After a trial that generated national attention, the jury found Franklin guilty and he was sentenced to two consecutive life terms. I served as co-counsel with Assistant United States Attorney Steven Snarr from the beginning of the investigation through the post-trial proceedings. The defendant's conviction was affirmed on appeal in a published opinion. See US v. Joseph Paul Franklin, 704 F.2d 1183 (10th Cir.), cert. denied, 464 U.S. 845 (1983).

- B. Trial: US v. Marion S. Barry, Jr., Crim. No. 90-068(TPJ)  
 Dates: June through August of 1990  
 Court: United States District Court for the District of Columbia  
 Judge: Honorable Thomas Penfield Jackson  
 Co-counsel: Judge Judith E. Retchin, Superior Court of the District of Columbia, 500 Indiana Avenue, N.W., Washington, D.C. 20001, phone 202-879-1866.  
 Opposing counsel: The late R. Kenneth Mundy and Robert W. Mance, 1850 M Street, N.W., Washington, D.C., phone 202-223-1254.

The Mayor of Washington, D.C. was convicted by a jury of a narcotics violation. I participated in this matter from the very beginning of the year-long grand jury investigation through post-trial proceedings,

along with Assistant United States Attorney Judith E. Retchin. I also handled spin-off cases against co-conspirators. The defendant's conviction was affirmed on appeal in a published opinion. See US v. Marion S. Barry, Jr., 938 F.2d 1327 (D.C. Cir. 1991).

- C. Trial: US v. Dennis Warren et al., Criminal No. 81-11-CR-B  
 Dates: January 1982  
 Court: United States District Court for the Eastern District of North Carolina  
 Judge: Honorable Earl Britt  
 Co-counsel: Susan J. King, Deputy Attorney General, State of California, 50 Fremont, San Francisco, CA, phone 415-356-6041.  
 Opposing counsel: George Mast, Mast, Schulz, Mast, Stem & Mills, Gaskin Building, P.O. Box 119, Smithfield, NC 27577, phone 919-934-6187; and L. Lamar Armstrong, Jr., Armstrong & Armstrong, P.A., 602 S. 3<sup>rd</sup> Street, P.O. Box 27, Smithfield, NC 27577, phone 919-934-1575.

Farm labor contractors were convicted by a jury of kidnapping, slavery, and conspiracy to hold migrant workers to involuntary servitude resulting in death. An escaped worker's initial complaint produced a swift federal response which freed many persons held against their will at a work camp. I participated in this matter from its inception through the post-trial proceedings. The defendants' convictions were affirmed on appeal in a published opinion. See US v. Harris, 701 F.2d 1095 (4th Cir.), cert. denied, 463 U.S. 1214 (1983).

- D. Case: US v. Henry Fury, 88 Cr. 212 (GLG)  
 Dates: April 1988  
 Court: United States District Court for the Southern District of New York  
 Judge: Honorable Gerard Goettel  
 Co-counsel: None  
 Opposing counsel: Originally, Robert Morvillo, 565 5th Avenue, New York, NY 10017, phone 212-856-9600; and later, Joseph Belvedere, 24 Woodland Terrace Court, Kent Lakes, NY 10512, phone 914-225-7937.



Following an extensive investigation and intensive negotiations, a former judge pled guilty to bank fraud after embezzling \$2 million from clients of his real estate title company. He received a two-year prison sentence. I handled all phases of this matter for the government from the beginning of the investigation.

- E. Trial: US v. Clyde Wayne Royals, CR 582-07  
 Dates: September 1982  
 Court: United States District Court for the Southern District of Georgia  
 Judge: Honorable Anthony Alaimo  
 Co-counsel: Theodore Merritt, Assistant United States Attorney, 1003 J.W. McCormack Post Office and Courthouse, Boston, MA 02109, phone 617-223-4615.  
 Opposing counsel: Ted Solomon, 515 West 12 Street, Alma, GA 31510, phone 912-632-7777.

A rural Georgia Klan organizer was acquitted of mailing threatening letters on Klan stationery following a cross-burning and three shootings into residences aimed at intimidating biracial couples. I entered into this matter after the indictment was returned and was lead counsel at the trial.

- F. Trial: US v. Dennis Sobin, Crim. No. 92-182(NHJ)  
 Dates: February and March of 1993  
 Court: United States District Court for the District of Columbia  
 Judge: Honorable Norma Holloway Johnson  
 Co-counsel: None  
 Opposing counsel: Penny Marshall, Office of the Federal Public Defender, 715 King Street, Wilmington, DE, phone 302-573-6010; and Beth S. Brinkmann, U.S. Department of Justice, Office of the Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, phone 202-514-4132.

An entrepreneur successfully extinguished \$266,000 in debts by declaring bankruptcy and scheming with others fraudulently to hide from the bankruptcy court over \$1 million in earnings. The defendant was convicted following a jury trial. I inherited this

investigation from another prosecutor and was sole counsel for the government at trial. The defendant's conviction was affirmed on appeal in a published opinion. See US v. Dennis Sobin, 56 F.3d 1423 (D.C. Cir. 1995).

- G. Trial: US v. Charles Lloyd, Crim. No. 91-0190(JHP)  
 Dates: October and November of 1991  
 Court: United States District Court for the District of Columbia  
 Judge: Honorable John H. Pratt  
 Co-counsel: None  
 Opposing counsel: Dovey Roundtree, 9004 Park Grove Street, Huntersville, NC 28078, phone 704-948-7365; and Darrel S. Parker, 1822 11<sup>th</sup> Street, N.W., Washington, D.C. 20001, phone 202-234-1722.

A local tax preparer was convicted of preparing false federal tax returns for clients in an apparent effort to boost his reputation for securing big refunds for clients. This defendant became the focus of an investigation by local and federal tax authorities when a pattern of inflated and fictitious deductions and expenses were discovered in audits done on returns he prepared for unsophisticated or, in some instances, undereducated, taxpayers. I inherited this case after it had been indicted, and I tried it as sole counsel for the government. The defendant's conviction was affirmed in part on appeal in a published opinion. See US v. Charles Lloyd, 71 F.3d 408 (D.C. Cir. 1995).

- H. Trial: US v. Theodore Travers, Crim. No. 88-0458(RCL)  
 Dates: May of 1989  
 Court: United States District Court for the District of Columbia  
 Judge: Honorable Royce C. Lamberth  
 Co-counsel: None  
 Opposing counsel: Elise Haldane, 1900 L Street, N.W., Washington, D.C., phone 202-659-8700.

The defendant was the leader of an interstate stolen car ring that preyed upon many local car owners. We convinced two insiders to plead guilty, and

successfully prosecuted the ringleader. I inherited this case after it had been indicted, and I tried it as sole counsel for the government.

- I. Trial: US v. Robert Staton and Tammy Williams,  
Crim. No. 88-404(JHP)  
Dates: January 1989  
Court: United States District Court of the  
District of Columbia  
Judge: Honorable John H. Pratt  
Co-counsel: None  
Opposing  
counsel: Steven R. Kiersh, 1825 K Street, N.W.,  
Washington, D.C., phone 202-347-0200;  
and Joseph R. Conte, 601 Pennsylvania  
Avenue, N.W., Washington, D.C., phone  
202-638-4100.

An armed couple sold crack cocaine from their apartment where their newborn slept and while they had another baby on the way. Neither accepted a plea offer, both were convicted by a jury of narcotics violations, and both the man and the pregnant woman were sentenced to over 17 years in prison under the federal sentencing guidelines. I inherited this matter after it had been indicted and was sole counsel for the government at the trial.

- J. Trial: US v. Phillip Singletary, Crim. No. 88-  
0405(JHG)  
Dates: January 1989  
Court: United States District Court of the  
District of Columbia  
Judge: Honorable Joyce Hens Green  
Co-counsel: None  
Opposing  
counsel: Arthur M. Levin, 9213 Dorothy Lane,  
Springfield, VA, phone 703-569-3306.

The defendant was arrested at a bus station having transported a large package of crack cocaine into Washington, D.C. He was convicted and sentenced to 11 years in prison. I inherited this matter after it had been indicted and was sole counsel for the government at the trial.

Names, addresses, and phone numbers of members of the legal community who have had recent contact with me:

- 1) Judge Merrick Garland, United States Court of Appeals for the District of Columbia Circuit, 333

Constitution Avenue, N.W., Washington, D.C.  
20001. Phone: 202-216-7460.

- 2) Judge Emmet Sullivan, United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C. 20001. Phone: 202-273-0788.
- 3) Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. Phone: 202-514-2101.
- 4) Karla Dobinski, Director of Operations, National Church Arson Task Force and Deputy Chief, Criminal Section, Civil Rights Division, 409 7th Street, N.W., Suite 4, Washington, D.C. 20530. Phone: 202-633-1130.
- 5) Darryl Jackson, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, D.C. 20004. Phone: 202-942-5016.
- 6) Judge Vicki Miles-LaGrange, United States District Court for the Western District of Oklahoma, 200 N.W. 4<sup>th</sup> Street, Room 5011, Oklahoma City, OK. 73102. Phone: 405-231-4518.
- 7) Mark Tuohey, Esq., Vinson & Elkins, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Phone: 202-639-6500.
- 8) William Yeomans, Chief of Staff, Civil Rights Division, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. Phone: 202-514-4127.
- 9) Devarieste Curry, Esq., 1250 24th Street, N.W., Suite 300, Washington, D.C. 20037. Phone: 202-467-8333.
- 10) Ramona Romero, Esq., Crowell & Moring, 1000 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Phone: 202-624-2944.
- 11) Thomas Perez, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. Phone: 202-514-3828.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters



that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I have been involved in numerous legal teaching and training activities. For example, I have been a guest faculty member at Harvard Law School's Trial Advocacy Workshop since 1984, and was a faculty member of trial advocacy training workshops in 1992 in South Africa that were co-sponsored by the U.S.-South Africa Leader Exchange Program and the Black Lawyers Association of South Africa. Also, I have addressed or moderated programs on criminal justice topics sponsored by the American Bar Association, the Federal Judicial Center, the FBI, and the Justice Department's Office of Legal Education.

In addition, I have served on bar and court committees. I currently serve on the new D.C. Bar Committee on Professionalism and Public Understanding About the Law. Its mission is to promote responsible lawyering by members of the D.C. Bar, disseminate to its members information about the public perception of lawyers, and to inform the public about the proper roles of lawyers and judges in our system. I have also been a member of the judicial conference planning committees for both the local and federal courts in Washington, D.C.

I also served on the D.C. Bar Drug Task Force. Its mission was to determine how the bar could best contribute to the effort to reduce drug abuse. Its work resulted in the formation of the D.C. Coalition Against Drugs and Violence. The Coalition brought together representatives of the religious, legal, academic, public safety, medical and treatment communities to identify and fill gaps in existing anti-drug and anti-violence programs in a comprehensive and cooperative fashion. I served as one of its first co-chairs of its Public Safety Task Force.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipt from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

My wife and I own a townhouse in Southwest, Washington which is rented out to tenants who currently pay \$1,025 per month in rent.

Johnston, Lemon & Co. periodically pays me earnings from a portfolio of stocks and bonds which is currently valued at under \$40,000.

I belong to the Civil Service Retirement System and have accumulated retirement benefits during my federal service.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will make full disclosure to parties where potential conflict exists, and will recuse myself from a matter where appropriate in accordance with the Code of Judicial Conduct and the applicable statutory provisions for disqualifications or recusal. Litigation involving matters in which I was directly involved during my tenure at the U.S. Attorney's Office in the District of Columbia and as Chief of the Criminal Section of the Civil Rights Division may present a potential conflict of interest. In addition, litigation involving my or my wife's investments or my wife's employment may present a potential conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None other than serving out my term as a member of the Board of Trustees of Vassar College and as a member of the Board of Directors of the Alumnae and Alumni of Vassar College.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

As a high school student, I volunteered for a day at a campaign office supporting the reelection of John V. Lindsay as Mayor of New York City. Approximately a year or two later, I volunteered for a day at a campaign office for a Newark, New Jersey congressional candidate whom I no longer recall.

AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
Nomination ReportReport Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(3 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> <i>(Last name, first, middle initial)</i> Roberts, Richard W.	<b>2. Court or Organization</b> U.S. District Court, D.D.C.	<b>3. Date of Report</b> 02/03/1998
<b>4. Title</b> <i>(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)</i> U.S. District Judge Nominee	<b>5. Report Type (check type)</b> <input checked="" type="checkbox"/> Nomination, Date <u>01/27/1998</u> ___ Initial ___ Annual ___ Final	<b>6. Reporting Period</b> 01/01/1997 to 01/03/1998
<b>7. Chambers or Office Address</b> U.S. Department of Justice 601 D Street, N.W. - Room 5802 Washington, D.C. 20530	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b> Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** *(Reporting individual only; see pp. 9-13 of Instructions)***NAME OF ORGANIZATION / ENTITY**

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Member, Board of Trustees	Vassar College
2 Member, Board of Directors	Alumnae and Alumni of Vassar College
3	

**II. AGREEMENTS** *(Reporting individual only; see pp. 14-17 of Instructions.)***DATE****PARTIES AND TERMS**

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	
2	
3	

**III. NON-INVESTMENT INCOME** *(Reporting individual and spouse; see pp. 18-25 of Instructions.)***DATE****PARTIES AND TERMS****GROSS INCOME**  
(yours, not spouse's)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income.)		
1		
2		
3		
4		
5		



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Roberts, Richard W.

Date of Report

02/03/1998

## V. REIMBURSEMENTS and GIFTS — transportation, lodging, food, entertainment.

Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	Exempt	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts)		
1	Exempt		
2			
3			
4			

## VI. LIABILITIES

Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	Bank of America	Mortgage on Rental Property	L
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Roberts, Richard W.	Date of Report 02/03/1998
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## VII. Page 1 INVESTMENTS AND TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(0)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period  <i>Exempt</i>
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W) (3) Type (e.g., buy, sell, merger, redemption) (4) Date: Month-Day (5) Value Gain Code (I-P) (6) Gain Code (A-H) (7) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			<i>Exempt</i>
1 Rental property, Washington, D.C. (J)	D	Rent	M W
2 Justice Federal Credit Union (savings and checking)	C	Interest	L T
3 National Westminster Bank (J with father)	B	Interest	K T
4 Chase Manhattan Bank (J with father)	A	Interest	J T
5 Citibank checking (J)	A	Interest	J T
6 Chevy Chase Savings Bank preferred stock	A	Dividend	J T
7 EPL Technologies common stock	A	Dividend	J T
8 Food Lion Inc. common stock	A	Dividend	J T
9 Riggs National Corp. preferred stock	A	Dividend	J T
10 Sterling Vision Inc. common stock	A	Dividend	J T
11 Playtex Family Products Corp. bond	A	Interest	J T
12 RC Arby's Corp. bond	A	Interest	J T
13 Stone Container Corp. bond	A	Interest	J T
14 Rowe Furniture Corp. common stock (no longer held)	A	Dividend	J T
15 Johnstown America Industries Inc. com stock (no longer held)	A	Dividend	J T
16 Fort Howard Corp. bond (no longer held)	A	Interest	J T
17 Alliance Capital Reserves money market	A	Interest	J T
1 Loss/Gain Codes: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000 E=\$15,001-\$50,000
2 Val Codes: J=\$15,000 or less (Col. C1, D3)	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000 N=\$250,001-\$500,000
3 Val Mth Codes: Q=Appraisal (Col. C2)	R=Cost (real estate only)	S=Assessment	T=Cash/Market
U=Book Value	V=Other	W=Estimated	

02/03/1998

## FINANCIAL DISCLOSURE REPORT

Roberts, Richard W.

VII. Page 2 INVESTMENTS and TRUSTS

- income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets		B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period						
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.							(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)										Exempt
18 Small claims Judgment against John Bowen			None	J	T					
19 Note from Robert Wynn			None	J	T					
20 Small claims Judgment against Gloria Boyd			None	J	T					
21 Crestar Bank (IRA) (2 CDs) (S)		A	Interest	J	T					
22 Smith Barney Shearson IRA (Treasury coupon bond) (S)			None	J	T					
23 Citibank (savings and checking) (S)		C	Interest	L	T					
24 Washington Women's Investment Club 1/20 interest (S)		A	Dividend	J	U					
25 CIGNA Retirement & Invmt. Svces. Keogh: Janus Worldwide (S)		C	Dividend	K	T					
26 CIGNA Retirement & Invmt. Svces. Keogh: AIM Constellation (S)		C	Dividend	K	T					
27 CIGNA Retirement & Invmt. Svces. Keogh: Fidelity Contrafund(S)		D	Dividend	L	T					
28 CIGNA R&I Svces. Keogh: Cigna Active Managed Fixed Inc. (S)		H	Interest	K	T					
29 CIGNA R&I Svces. Keogh: Fidelity Growth & Income (S)		E	Dividend	L	T					
30 CIGNA R&I Svces. Keogh: PBHG Growth (S)		A	Dividend	K	T					
31 CIGNA R&I Svces. 401(K) (IRA): Fidelity Growth & Income (S)		D	Dividend	K	T					
32 CIGNA R&I Svces. 401(K) (IRA): Fidelity Contrafund (S)		D	Dividend	K	T					
33 CIGNA R&I Svces. 401(K) (IRA): PBHG Growth (S)		A	Dividend	K	T					
34 CIGNA R&I Svces. 401(K) (IRA): High Bond Yield (S)		H	Interest	J	T					
1 no Gain Codes: A=\$1,000 or less (Col. B1, D4)		B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3)		K=\$15,001-\$50,000		L=\$50,001-\$100,000		M=\$100,001-\$250,000		N=\$250,001-\$500,000		
		O=\$500,001-\$1,000,000		P1=\$1,000,001-\$5,000,000		P2=\$5,000,001-\$25,000,000		P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2)		R=Cost (real estate only) U=Book Value		S=Assessment W=Estimated		T=Cash/Market				

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Roberts, Richard W.	Date of Report 02/03/1998
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. (Indicate part of report.)

☒ NONE (No additional information or explanations.)



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Roberts, Richard W.

Date of Report

02/03/1998

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

*Richard W. Roberts*

Date

*2/3/98*

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

**FINANCIAL STATEMENT****NET WORTH**  

---

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	\$	205,901		Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		36,546		Notes payable to relatives			
Unlisted securities--add schedule		2,440		Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends		1,100		Unpaid income tax			
Due from others		3,000		Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule	\$	858,000	
Real estate owned-add schedule	\$	1,144,000		Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		93,000					
Cash value-life insurance							
Other assets itemize:		355,000					
<i>See schedule</i>							
				Total liabilities		658,000	
				Net Worth		984,087	
Total Assets		1,844,087		Total liabilities and net worth	1	844,087	
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

## SCHEDULES TO FINANCIAL NET WORTH STATEMENT

## ASSETS (amounts approximate)

Cash on hand and in banks

## My accounts:

Justice Federal Credit Union (savings and checking)	\$ 66,000
Marine Midland Bank (savings and checking)	3,000
Dreyfuss Liquid Assets	1,800

## Father's accounts listing me a joint holder:

National Westminster Bank	45,000
Chase Manhattan Bank	15,000

## Joint account with wife:

Citibank (checking)	4,000
---------------------	-------

## Minor children's accounts:

Citibank (son)	2,100
Justice Federal Credit Union (son and daughter)	4,000

## Wife's accounts:

Citibank (savings and checking)	68,000
Department of State Federal Credit Union	1
	-----
	\$ 208,901

Listed securities

Chevy Chase Savings Bank stock	4,650
EPL Technologies Inc. stock	3,000
Food Lion Inc. stock	4,219
Riggs National Corp. stock	5,040
Sterling Vision Inc. stock	4,450
Playtex Family Products Corp. bond	5,100
RC Arbys Corp. bond	5,125
Stone Container Corp.	5,012
	-----
	\$ 36,596

Unlisted securities

Alliance Capital Reserves money market	2,490
Capital Senior Living Communities stock (value minimal; no longer traded)	
	-----
	\$ 2,490

Accounts and notes receivable

Judgment (John Bowen, acquaintance)	1,000
Note (Robert Wynn, cousin)	1,100
Judgment (Gloria Boyd, former tenant)	2,000
	-----
	\$ 4,100



Real estate owned

Current residence in Washington, D.C.	
Purchase price:	\$ 610,000
Former residence in Maryland.	
Current listing price:	389,000
Rental property in Washington, D.C.	
Approximate value:	145,000
	-----
	\$1,144,000

Autos and other personal property

Three autos	23,000
Other personal property	70,000
	-----
	\$ 93,000

Other assets

Wife's Keogh at Arent, Fox, Kintner, Plotkin & Kahn, administered by CIGNA Retirement and Investment Services	221,000
Wife's IRA at Arent, Fox, Kintner, Plotkin & Kahn, administered by CIGNA Retirement and Investment Services	108,000
Wife's IRA at Crestar Bank	11,000
Wife's IRA with Smith Barney Shearson	11,000
Wife's 1/20th interest in Washington Women's Investment Club partnership	4,000
	-----
	\$ 355,000

## LIABILITIES (amounts approximate)

Real estate mortgages payable

Fleet Mortgage Group (current residence)	487,000
GE Capital Mortgage Services (former residence)	286,000
BankAmerica (rental property)	85,000
	-----
	\$ 858,000

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In a law school clinical program, for two semesters, I represented tenants of public housing in tenancy termination hearings before the New York City Housing Authority, and battered spouses in family court matters.

While in private practice, I performed pro bono services for several non-profit service organizations, including incorporating and/or obtaining tax-exempt status from the IRS for a sickle cell anemia group, and for an institute providing legal education preparation for working class students and students of color. I devoted approximately 30 hours of work to each organization.

I am a co-founder and 15-year member of the Washington, D.C. chapter of Concerned Black Men, Inc. ("CBM"). A non-profit 501(c)(3) organization, CBM was founded to provide positive male role models for youth in the D.C. area, and to highlight and encourage those youngsters' positive accomplishments. In the early years, I served as the Secretary and chaired several committees, including Membership, Elections, and Oratory Contest. More recently, I served as the D.C. chapter's Deputy General Counsel and helped to found the National Organization of Concerned Black Men, Inc. and served as its Deputy General Counsel.

My most important work in CBM, though, has been working with young men and women in Washington, D.C. in our CBM programs. That work has included helping secondary school students hone their writing and oratory skills in preparation for our annual Martin Luther King, Jr. Oratory contest; helping youngsters through our Self-Development Committee to improve their self-esteem and confidence by teaching, among other things, job interviewing techniques and dressing for success; enhancing young people's understanding of African-American heritage through preparing materials for and hosting our African-American History Bee; honoring students through service on the committee planning the annual Youth Recognition and Scholarship Awards Banquet; talking with young people about the legal consequences of using drugs and guns; participating in programs for students

in our adopted Stanton Elementary School; working with Bell Multicultural High School student clubs through our International Awareness Committee; and marching with youth in the annual Ward 8 King Holiday Parade. In my early years, I devoted roughly two hours per week to CBM activities. Today, with greater obligations, I participate on a more occasional basis.

I have regularly volunteered several hours at the annual Vassar Book Sale in Washington, D.C., which raises scholarship money for D.C. high school students enrolling at Vassar College.

As a member of the Sigma Pi Phi, Epsilon Boulé, Social Action Committee, I have helped judge Black History Bees at Tyler Elementary School in Washington, D.C. I have devoted two to three hours to each Bee.

I have been a volunteer speaker at D.C. public schools (Payne Elementary, Eastern High, Petworth Elementary, Amidon Elementary, Stevens Elementary) in connection with the U.S. Attorney's Office Community Outreach Program. I have devoted an average of roughly three hours to each appearance.

I participated in the Whitman-Walker Clinic AIDS Awareness Walk, and the Law Enforcement Torch Run/Walk in support of the Special Olympics. Each lasted in excess of two hours.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I have never belonged to an organization which discriminated in an invidious sense. In 1994, I became a member of a fraternity, Sigma Pi Phi, Epsilon Boulé, here in Washington, D.C. Since approximately 1990, I have been a member of the Department of Justice Association of Black Attorneys. Off and on since 1987, I have belonged to the National Black Prosecutors Association. Since approximately 1983, I have belonged to the African American Alumni of Vassar College. Since 1982, I have been a member of Concerned Black Men, Inc., Washington, D.C. Chapter. From 1970 to 1974, I was a member of the Students Afro-American Society, an association of black students at Vassar College. From 1957 to 1970, I

was a member of St. Stephen's Protestant Episcopal Church in Jamaica, New York.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a selection commission in this jurisdiction entitled the D.C. Federal Judicial Nominating Commission. I completed a questionnaire supplied by Congresswoman Eleanor Holmes Norton's office and submitted it via the Congresswoman's office to the Commission. The Commission interviewed me and later recommended me to Congresswoman Norton. Congresswoman Norton interviewed me and recommended to the President that he nominate me. Shortly thereafter, the White House Counsel's Office contacted me and sent me several questionnaires to complete. In addition, the Office of Policy Development at the Justice Department contacted me concerning the completion of the questionnaires and later interviewed me. After I submitted the SF-86 national security form, I was contacted and interviewed by an FBI agent. I completed the American Bar Association Personal Data Questionnaire and submitted it for evaluation by the ABA Standing Committee on Federal Judiciary. On January 28, 1998, I was notified by Congresswoman Norton and the White House Counsel's office that the President had nominated me.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:



- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The federal judiciary is one of three coordinate branches of government created by the Constitution. The judiciary's powers derive from the Constitution and its jurisdiction is prescribed by acts of Congress. In that way, federal courts are courts of limited jurisdiction, unlike many state courts of general jurisdiction. Thus, it is important for federal judges to assure that they entertain only those matters that they are empowered to hear; that those matters have matured into actual cases or controversies; and that the parties have established their entitlement to present the claims asserted.

In applying legal principles to factual disputes, the federal judge's proper role is to interpret the law fairly, not to rewrite it; and to follow precedent, and not to remake it. Federal judges must not substitute their preferences for those adopted by the people's elected representatives in Congress. And, relief fashioned in a case should be properly tailored to remedy the wrong suffered in the case, and not to remedy wrongs suffered outside of the controversy before the court.

## SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

## 1. Full name (include any former names used.)

Ronnie Lee White.

## 2. Address: List current place of residence and office address(es).

St. Louis, MO, residence.

121 S. Meramec, 4<sup>th</sup> Floor, Clayton, MO 63105, official station.

207 W. High, PO Box 150, Jefferson City, MO 65102, office.

## 3. Date and place of birth.

May 31, 1953: St. Louis, MO.

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married - Sylvia D. (Curtis) White, Reading Specialist, School District of University City, MO, 8346 Delcrest Dr., University City, MO 63124.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

St. Louis Community College at Meramec, January 1975 to December 1977 Associates of Arts Degree, December 21, 1977.

St. Louis University, January 1978 to May 1979, Bachelor of Arts Degree (Political Science), May 11, 1979.

University of Missouri - Kansas City School of Law, September 1980 to May 1983, Juris Doctorate Degree, May 13, 1983.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

September 1979 to August 1980, Substitute teacher, St. Louis Public School System, St. Louis, MO.

September 1982 to May 1983, Trial Team Law Intern, Jackson County Prosecutor's Office, Kansas City, MO.

September 1983 to September 1984, Substitute teacher, St. Louis Public School System, St. Louis, MO.

**September 1984 to September 1987.** Trial Attorney, Office of the Public Defender-City of St. Louis, St. Louis, MO.

**September 1987 to August 1988.** Associate with the Law Offices of Young, Russell, Crawford & Black, St. Louis, MO

**August 1988 to May 1989.** Trial Attorney, Office of the Special Public Defender, St. Louis County St. Louis, MO

**August 1988 to June 1993.** I was a partner with the Law Offices of Cahill, White & Hemphill, St. Louis, MO

**August 1989 to May 1993.** State Representative - 63<sup>rd</sup> District, State of Missouri, Jefferson City, MO

**June 1993 to June 1994.** City Counselor, Office of the City Counselor - City of St. Louis, St. Louis, MO

**June 1994 to November 1995.** Judge Missouri Court of Appeals - Eastern District, St. Louis, MO

**November 1995 to present.** Judge Missouri Supreme Court, Jefferson City, MO

**January 1997 to April 1997.** Adjunct Faculty Member, Washington University School of Law, St. Louis, MO

- 7 **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes, July 1971 to September 1980, U.S. Army Services E-5 (499-54-2905) Inactive (Honorable discharge).

- 8 **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I have not received any honorary degrees or society memberships.

Youth Build of St. Louis - Certificate of Appreciation, January 1993.

University of Missouri - St. Louis - Outstanding Public Service Award, March 1993

St. Louis Women's Political Caucus - President's "Good Guy Award", March 1993.

Harris Stowe State College - Award for Effort in Expanding Mission of College, June 1993

Women of Color Partnership Program Award, October 1992.

Dropout Prevention Project - Law & Citizenship Education Unit - Certificate of Gratitude, 1992-1993.

Law and Consumer Education Program - Certificate of Appreciation, 1990-1991.

American Cancer Society - Certificate of Appreciation, October 1990.

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Gender Task Force Committee May 1994 to present.

Missouri Bar. September 1984 to present.

Metropolitan Bar Association of St. Louis, September 1985 to present.

Mound City Bar Association, September 1984 to present.

Missouri Association of Trial attorneys 1987 to 1993.

American Association of Trial Attorneys 1987 to 1993.

I have never served as an officer in any of the above listed groups.

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Eta Boule Fraternity - Member.

I do not belong to any organization that lobby before public bodies.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States District Court for the Eastern District of Missouri. admitted September 1987.

United States District Court for the Western District of Missouri. admitted September 1984.

State Courts of Missouri. admitted September 1984.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

No.

13. **Health:** What is the present state of your health? List the date of your last physical examination.

The present state of my health is excellent. The date of my last physical examination was July 23, 1996.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

**Judge. Missouri Supreme Court.** appointed by Governor Mel Carnahan October 1995 to present. This is a court of limited jurisdiction with exclusive jurisdiction in those cases involving: the



validity of a Missouri statute or state constitution, the state's revenue laws, challenges to the title of any state office; and death sentences.

**Judge, Missouri Court of Appeals for the Eastern District of Missouri**, appointed by Governor Mel Carnahan June 1994 to October 1995. This is a court of general appellate jurisdiction. Cases appealed from the associate and circuit courts are within the jurisdiction of this court.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

1. **State v. Kinder** N. 75082, WL 724594 (Mo. banc Dec. 17, 1996) (J. White dissenting).

**In re: McBride**, No. 78457, WL 78550 (Mo. banc Feb 25, 1997).

**State v. Smulls**, No. 75511, WL 344673 (June 25, 1996), opinion modified and supersede by State v. Smulls, 935 S.W. 2d 9 (Mo. banc 1996).

**State v. Nunley**, 923 S.W. 2d 911 (Mo. banc 1996), cert. Denied, 117 S.Ct. 772 (1997).

**Cox v. Tyson Foods, Inc.**, 920 S.W. 2d 534 (Mo. banc 1996).

**Boyd v. State Board of Registration for the Healing Arts**, 916 S.W. 2d 311 (Mo. App. 1996).

**Beatty v. Metropolitan St. Louis Sewer District**, No. 65824 (opinion by J. White filed Mar. 28, 1995). Opinion superseded by Beatty v. Metropolitan St. Louis Sewer District, 914 S.W. 2d 791 (Mo. banc 1995).

**Duggan v. Pulitzer Publishing, Co.**, 913 S.W. 2d 807 (Mo. App. 1995).

**Meridian Enterprises Corp. v. KCBS, Inc.**, 910 S.W. 2d 329 (Mo. App. 1995).

**State v. McFerron**, 890 S.W. 2d 764 (Mo. App. 1995).

2. **State v. Smulls** - Defendant was convicted of first degree murder and sentenced to death. Defendant appealed the conviction, sentence and denial of post-conviction relief. In the original opinion of June 25, 1996, the conviction and sentence were affirmed. The judgment entered for defendant's post-conviction motion was reversed because the trial court erred in refusing to recuse. Slip op. At 29-33. The language and result regarding the trial judge's recusal was criticized. The language used for discussing the recusal was modified and a new opinion issued. **State v. Smulls**, 935 S.W.2d 9 (Mo. banc 1996).

**State v. Bledsoe** - Defendant was convicted in the Circuit Court, St. Louis County, Daniel J. O'Toole, J., of two counts of assault in second degree and two counts of armed criminal action. Defendant appealed. The Court of Appeals, Crandall, J., held that evidence was sufficient to find serious disfigurement supporting conviction for second-degree assault. Opinion written by White, J. superseded by State v. Bledsoe, 920 S.W.2d 538 (Mo. App 1996).

**Beatty v. Metropolitan St. Louis Sewer District** - Landowner brought action challenging metropolitan sewer district's authority to issue revenue bonds and increase its charges without a vote of the people. The Circuit Court, St. Louis County, Ninian M. Edwards, J., dismiss. Landowner appealed. The Supreme Court, Robertson J., 700 S.W.2d 831, affirmed in part, reversed in part, and remanded. On remand, the Circuit Court, Robert W. Saitz, J., held that district had authority to issue revenue bonds. Landowner appealed. The Court of Appeals, 731 S.W.2d 318, reversed, and district entered consent decree. Subsequently, landowner and others filed new action seeking declaration that district's failure to submit new charges to voters for approval violated State constitution. District moved to reopen former suit and to consolidate it with instant suit. After granting motion, the Circuit Court held that new sewer charges did not fall under state constitutional provision. Plaintiffs appealed. The Court of Appeals, en banc, ordered transfer of case. The Supreme Court, 867 S.W.2d 217, reversed and remanded. On remand, the Circuit Court, Michael F. Godfrey, J., found that suit was brought by individual plaintiffs as representative taxpayer suit and ordered district to credit its customers' bills as method of refund. District appealed. Judge White writing for the majority of the Court of Appeals ordered District to credit customers bills. The Supreme Court, Price, J., held that (1) trial court on remand could not for first time find that case was filed as "representative taxpayer suit" and order relief concerning individuals and entities who were not parties to case, absent compliance with procedural rule governing class actions, and (2) sovereign immunity did not apply so as to immunize district against liability. On district's motion for rehearing, the Supreme Court, Price, J., further held that: (3) plaintiffs were entitled to credit-refund under district ordinance increasing district charges, even assuming that entirety or ordinance had been declared constitutionally invalid, and (4) it would not declare in present action whether all other district customers were entitled to class relief. Opinion written by White, J. superseded by **Beatty v. Metropolitan St. Louis Sewer District**, 914 S.W.2d 791 (Mo. banc 1995).

3. **State v. Damaske** - 936 S.W.2d 565 (Mo. banc 1996) (J. White dissenting).

**Consolidated School District No. 1 v. Jackson County, MO** - 936 S.W.2d 102 (Mo. banc 1996).

**State v. Smulls** - No. 75511, WL 344 673 (June 25, 1996). Opinion Modified and superseded by **State v. Smulls**, 935 S.W.2d 9 (Mo. banc 1996).

**State v. Taylor** - 929 S.W.2d 209 (Mo. banc 1996), cert. denied, S. Ct., WL 73868 (Feb. 24, 1997).

**State v. Nunley** - 923 S.W.2d 911 (Mo. banc 1996), cert. denied, 117 S. Ct., 772 (1997).

**Beatty v. Metropolitan St. Louis Sewer District** - No. 65824 (opinion by J. White filed Mar. 28, 1995). Opinion superseded by **Beatty v. Metropolitan St. Louis Sewer District**, 914 S.W.2d 791 (Mo. banc 1995).

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

City Counselor - City of St. Louis, June 1993 to June 1994 - Appointed position.

State Representative - State of Missouri - 63<sup>rd</sup> District, August 1989 to June 1993 - Elected position.

Commission Member - St. Louis Housing Authority, February 1988 to August 1989 - Appointed position.

I have never been an unsuccessful candidate for elective public office.

**17. Legal Career:**

- a. **Describe chronologically your law practice and experience after graduation from law school including.**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

I did not serve as clerk to a judge.

2. **whether you practiced alone, and if so, the addresses and dates;**

I did not practice law alone.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

**September 1984 to September 1987,** Office of the Public Defender-City of St. Louis, 10 N. Tucker Blvd. St. Louis, MO. Trial Attorney.

**September 1987 to August 1988,** Law Offices of Young, Russell, Crawford & Black, 408 Olive St., St. Louis, MO. Associate.

**August 1988 to May 1989,** Office of the Special Public Defender, St. Louis County, 10 N. Tucker Blvd., St. Louis, MO. Trial Attorney.

**August 1988 to June 1993,** Law Offices of Cahill, White & Hemphill, 1221 Locust St., Ste. 1000, St. Louis, MO. Partner.

**August 1989 to May 1993,** Missouri House of Representatives, State of Missouri, Jefferson City, MO. State Representative.

**June 1993 to June 1994,** Office of the City Counselor - City of St. Louis, 12<sup>th</sup> & Market St., St. Louis, MO. City Counselor.

b.

1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**
2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

I practiced criminal, civil, domestic and traffic law. My practice was a general practice, I represented individuals with usually very basic legal problems. I spent a considerable amount of time in court appearing before trial court judges

representing my clients. I represented also clients in personal injury cases which usually consisted of negotiating with insurance adjusters to successfully conclude my clients cases.

c.

1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court frequently. My appearances varied, they included jury trials, bench trials and motions. This experience varied from September 1984 to June 1993.

2. What percentage of these appearances was in:

- (a) federal courts; 1%
- (b) state courts of record; 99%
- (c) other courts. None

3. What percentage of your litigation was:

- (a) civil; Less than 2%
- (b) criminal. 98%

4. State the number of cases in courts of record your tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried at least 25 cases to verdict or judgment. I was sole counsel in all of the cases I tried to a jury.

5. What percentage of these trials was:

- (a) jury; 65%
- (b) non-jury. 35%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. April 6, 1994 - State ex rel., the City of St. Louis, Freeman Bosley, Jr., and The Metropolitan St. Louis Sewer District v. Honorable Thomas C. Mummert III, Judge, Circuit Court, St. Louis City, et al.

Missouri Supreme Court Judges: Elwood Thomas, John Holstein, Ray Price, Steve Limbaugh, Edward Robertson, Ann K. Covington, Duane Benton.

State ex rel. City of St. Louis v. Mummert, 875 S.W.2d 108 (Mo. banc 1994).

Co-Counsel: Edward J. Hanlon, Deputy City Counselor, City Hall, Room 300, St. Louis, MO 63103, (314) 622-4554.

Co-Counsel: James M. Byrne, Jeffrey J. Kramer, 2000 Hampton Ave., St. Louis, MO 63139, (314) 768-6234.

Opposing Counsel: John F. Galvin, One City Centre, 15<sup>th</sup> Floor, St. Louis, MO 63101, (314) 231-3332.

I represented Mayor Freeman R. Bosley, Jr., in an effort to have the 22<sup>nd</sup> Judicial Circuit Court Judges approve his nominees to the Metropolitan Sewer Districts board. I researched and drafted sections of the brief filed with the court in this case. I argued this case before the Court En Banc and was successful in having the statute in question severed so that the mayor's nominees could sit as board members.

2. June, 1993 - Keita Taylor v. Dennis Poeschel and City of Berkeley, MO.

U.S. District Court - Eastern District of Missouri, Judge Jean Hamilton, Cause No. 492CV00693

Opposing Counsel: Robert J. Krehbiel, Donna Morrison, 200 North Broadway - 12<sup>th</sup> Floor, St. Louis, MO 63102, (314) 621-7755.

As sole counsel, I represented the plaintiff Keita Taylor in a "1983" action against the defendants in the case in a civil jury trial. I researched the law, drafted, prepared and filed the pre-trials documents in compliance with the Federal Rules of Civil Procedure. I argued and responded to all pre-trial motions. I also drafted the complaint that was filed in this matter. The jury trial returned a verdict in favor of the defendants. This case was significant in that I gained experience in presenting a personal injury claim in federal court.

3. June 1989 - United States of America v. Charles Ross

U.S. District Court - Eastern District of Missouri, Judge John Nangle, U.S. v. Ross, 872 F.2d 249 (8<sup>th</sup> Cir. 1989).

Opposing Counsel: Dean Hoag, Assistant U.S. Attorney, 1114 Market St., St. Louis, MO 63101 (314) 539-2200.

As sole counsel, I represented the defendant Ross in a criminal jury trial. Mr. Ross was charged with being a felon in possession of a weapon. I researched and drafted all pre-trial motions filed in this case. I also argued the motions to suppress evidence and identification to the Court before trial commenced. The jury returned a



guilty verdict against defendant Ross. I drafted and filed the motion for new trial and prepared Mr. Ross' appeal to the Eighth Circuit U.S. Court of Appeals. The conviction was affirmed. The case was significant because it was my first jury trial in federal court where I was lead counsel and without co-counsel.

4. October 1992 - State of Missouri v. Rolander Person.

St. Louis County Circuit Court, Judge Bernhardt C. Drumm, Jr., Cause No. CR-003844-9F

Opposing Counsel: Edward McSweeney, Assistant Prosecuting Attorney, St. Louis County Prosecuting Attorney, 41 South Central, Clayton, MO 63105, (314) 889-2760.

As sole counsel, I represented Mr. Person who was charged with various sexual assaults against a minor. I prepared all pre-trial motions on behalf of Mr. Person. I conducted interviews with Mr. Person's witnesses and subpoenaed them to court. I prepared our exhibits and moved for their admission at the appropriate time during trial. The case was tried to a jury. The jury returned verdicts of not guilty on all counts. This case was significant because the defendant faced a substantial amount of jail time, if convicted, for offenses he profusely denied being involved.

5. August 24-26, 1992 - State of Missouri v. Aaron Martin.

St. Louis City Circuit Court, Judge Timothy Wilson, Cause No. 911-0001645A.

Opposing Counsel: Robert Craddick, Assistant Circuit Attorney, Office of Circuit Attorney, 1320 Market St., Rm. 330, St. Louis, MO 63103, (314) 622-4941.

I was sole counsel, I represented the Mr. Martin who was charged with several counts of robbery and armed criminal action. I interviewed all of the defense witnesses. I prepared and argued all pre-trial motions. I argued our motion-in-limine to exclude certain testimony from the trial. This matter was tried to a jury. After three days of trial, the jury returned a verdict of not guilty on all counts. This case was significant because defendant was a prior offender who had to testify to present his story and who faced substantial prison time if convicted.

6. December 8, 1989 - State of Missouri v. Jack Kumping.

St. Louis City Circuit Court, Judge Jack L. Koehr, Cause No. 891-00143.

Co-Counsel: Sandra Farragut-Hemphill, St. Louis county Court Building, Div. 42, 7900 Carondelet, Clayton, MO 63105, (314) 889-3062.

Opposing Counsel: Jeffery Jamison, One North Jefferson Ave., St. Louis, MO 63103, (314) 955-6077.

As sole counsel I represented the Mr. Kumping who was charged with deviate sexual assault. I interviewed and deposed some of the State's witnesses. I prepared, filed and argued all pre-trial motions. This matter was tried to a jury. The jury returned a guilty verdict. This case was significant because Mr. Kumping was an elderly gentlemen who maintained his innocence throughout the trial.

7. May 27, 1988 - State of Missouri v. Mark Wright

St. Louis Circuit Court, Judge Floyd McBride, Cause No. 871-3576.

Opposing Counsel: Mary Ann Medler, U.S. Magistrate Judge, 1114 Market St. Rm. 736, St. Louis, MO (314) 539-6924

As sole counsel, I represented Mr. Wright who was charged with five counts of burglary. I drafted and prepared all pre-trial motions. I argued the motion to suppress statements to the court before the trial commenced. This case was tried to a jury. The jury returned not guilty verdicts on three counts, they were hung and unable to reach a verdict on one count and they found him guilty of one count. This case was significant because I was successful in convincing the jury on some of the charges, even though the defendant had made written confessions.

8. February 21, 1989 - State of Missouri v. James Brown

St. Louis City Circuit Court, Judge Floyd McBride, Cause No. 871-00530.

Opposing Counsel: Daniel Bruntrager, 1015 Locust St., Ste. 820, St. Louis, MO 63103, (314) 621-0066.

As sole counsel, I represented Mr. Brown who was charged with possession of a controlled substance. I drafted and prepared all pre-trial motions on behalf of Mr. Brown. This matter was tried to a jury. The jury returned a guilty verdict. This case is significant because defendant had an extensive record of conviction and I could not put him on the stand to testify. Therefore, I had to voir dire at length concerning a defendant's right to remain silent.

9. February 23, 1989 - State of Missouri v. Steven Huffman

St. Louis City Circuit Court, Judge, Cause No. 87-03032.

Opposing Counsel: George W. Draper, III, St. Louis County Circuit Court, Div. 35, 7900 Carondelet, Clayton, MO 63105, (314) 854-7594.

As sole counsel, I represented Mr. Huffman who was charged with assault first degree and armed criminal action. This case was tried to a jury. The jury returned a verdict of not guilty on all counts. This case was significant because defendant had numerous prior convictions and had to testify to present his case to the jury.

10. February 22, 1987 - State of Missouri v. Linda Dailey

St. Louis City Circuit Court, Judge James S. Cocoran (Deceased), Cause No. 861-01026B.

Opposing Counsel: Dee Joyce-Hayes, Circuit Attorney, Office of Circuit Attorney, 1320 Market St., Rm. 330, St. Louis, MO 63103, (314) 622-4941.

As sole counsel, I represented Ms. Dailey who was charged with assault first degree. This case was tried to a jury. The jury returned a verdict of guilty on the lesser

charge of endangering the welfare of a child and assessed punishment as a fine to be set by the court. The case was significant because the defendant was charged with assaulting her own child who had suffered severe injuries. I was successful in convincing the jury of the defendant's innocence of the greater charge.

- 19 **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I served as a member of the Regional Justice Information Services Commission. I worked with a seven member commission to establish and implement policy for the dissemination of information concerning individual arrest records. I served with the Chief of Police from the City of St. Louis MO, City of Hazelwood MO, and St. Louis County MO. The REJIS commission provided arrest information to over 96 municipalities in the St. Louis area. September 1995 to May 1997.

I have served as an adjunct faculty member in a Trial Advocacy course at the Washington University School of Law, St. Louis MO. I taught second and third year law students in all areas of trial practice from drafting and arguing pre-trial motions to preparing post trial motions. January 1997 to May 1997.

I have served as a faculty member for the National Institute of Trial Advocacy Mid-America Regional Trial Training Program. This program was held at the Washington University School of Law, St. Louis MO from May 25 through June 4, 1995. I participated as a trial team leader for a group of eight students assisting with the development of their trial skills over a two week period. I taught all trial skills from voir dire through closing arguments in both civil and criminal trials. The students in my group included lawyers with many years of practice as well as new lawyers.

I served on the "Gender Task Force Committee" established by the Missouri Supreme Court. The work of this committee resulted in establishing a new Supreme Rule (8) prohibiting gender bias by judicial officials. 1994 to present

I served as chairman of the House of Representatives - Judiciary & Ethics Committee and Civil & Criminal Justice Committee during my tenure in the Missouri General Assembly. As chairman of these committees, I mainly handled legislation for the Missouri Bar. I sponsored bills to increase the amount per page court reporters could charge for transcribed pages; to increase the amount of small estates in probate matters, and to allow fingerprinting of juveniles. August 1989 to May 1993

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I do not have any financial arrangements as stated or requested by this question.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will follow the Code of Judicial Conduct to resolve any potential conflicts of interest.

I do not have any potential conflict of interests regarding any financial arrangements.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

Financial Disclosure Report attached.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See completed financial net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Yes, I was a candidate for State Representative from the 63<sup>rd</sup> District in November 1989, November 1990 and 1992. I was elected as a Democrat to serve the constituents of the 63<sup>rd</sup> District in the Missouri General Assembly.

## FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 6, 101-112)

AO-10  
Rev. 1/96

## NOMINATION

1. Person Reporting (Last name, first, middle initial) <b>White, Ronnie L.</b>	2. Court or Organization <b>U.S. District Court, E.D. MO</b>	3. Date of Report <b>06/23/97</b>
4. Title (Article III judges indicate active or senior status. Magistrate judges indicate full- or part-time) <b>U.S. District Judge</b>	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination. Date <u>  /  /  </u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period <b>01/01/96 - 06/23/97</b>
7. Chambers or Office Address <b>Missouri State Supreme Court 207 E High St. Jefferson City, MO 65102</b>	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. Reporting individual only, see pp. 5-13 of Instructions

## POSITION

## NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

Board Member 1995 & 1996 Herbert Hoover Boys & Girls Club of St. Louis

Board Member 1995 & 1996 Regional Justice Information Systems

II. AGREEMENTS. Reporting individual only, see pp. 14-17 of Instructions

## DATE

## PARTIES AND TERMS

☒

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 18-25 of Instructions.)

## DATE

## SOURCE AND TYPE

GROSS INCOME  
(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1	<u>1996</u>	<u>State of Missouri - Judiciary</u>	<u>\$ 95223.00</u>
2	<u>1995</u>	<u>State of Missouri - Judiciary</u>	<u>\$ 84947.00</u>
3	<u>1996</u>	<u>School District of University City, MO</u>	<u>\$ (S)</u>
4	<u>1995</u>	<u>School District of University City, MO</u>	<u>\$ (S)</u>
5			<u>\$</u>



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
White, Ronnie L.Date of Report  
06/23/97

## IV. REIMBURSEMENTS and GIFTS

-- transportation, lodging, food, entertainment

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

SOURCEDESCRIPTION☐

NONE (No such reportable reimbursements or gifts)

1 Exempt

2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to

indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

SOURCEDESCRIPTIONVALUE☐

NONE (No such reportable gifts)

1 Exempt		\$ 0.00
2		\$
3		\$
4		\$

## VI. LIABILITIES.

(Includes those of spouse and dependent children; indicate where applicable, person responsible

for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE\*☐

NONE (No reportable liabilities)

1 Liberty Lending Service	Rental Property Mortgage	K
2 Harbourton Mortgage Co.	Rental Property Mortgage	L
3 Credit Cards	Debt Consolidation	K
4		
5		
6		
7		

\* VALUE CODES: J = \$15,000 or less K = \$15,001 - \$50,000 L = \$50,001 - \$100,000 M = \$100,001 to \$250,000  
 W = \$250,001 - \$500,000 O = \$500,001 - \$1,000,000 Z = More than \$1,000,000

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting White, Ronnie L.	Date of Report 06/23/97
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**VII. Page 1 INVESTMENTS and TRUSTS** -- income, value, transactions (Includes those of spouse and dependent children. See pp 37-54 of Instructions )

A. Description of Assets (including trust assets)  Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt 1 Code (A-H)	(2) Type (e.g., div., or rent or amt.)	(1) Value2 Code (J-P)	(2) Value Method3 Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
					(2) Date: Month/Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
<input type="checkbox"/> NONE (No reportable income assets or transactions)									
1. Real Property, 12000 Oakwood St, Dallas, TX 75243	A	RENT	J						EXEMPT
2. Real Property, 12000 Oakwood St, Dallas, TX 75243	A	RENT	J						EXEMPT
3.									
4.									
5.									
6.									
7.									
8.									
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									
18.									
1. Income/Gain Codes (See Col. B1 & D4)	A=\$1,000 or less E=\$15,001 to \$50,000	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000					
2. Value Codes (See Col. C1 & D3)	J=\$15,000 or less N=\$250,001 to \$500,000	K=\$15,001 to \$50,000 O=\$500,001 to \$1,000,000	L=\$50,001 to \$100,000 P=More than \$1,000,000	M=\$100,001 to \$250,000					
3. Value Method Codes (See Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market					

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

White, Ronnie L.

Date of Report

06/23/97

## VIII. ADDITIONAL INFORMATION or EXPLANATIONS.

(Indicate part of Report.)

None

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

White, Ronnie L.

Date of Report

06/23/97

## IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 7, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

*Ronnie L. White*

Date

*June 23, 1997*

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. APP. 6, SECTION 104).

## FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

Ronnie L. White -

**FINANCIAL STATEMENT**  
**NET WORTH**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

	Self	Spouse		Self	Spouse
ASSETS			LIABILITIES		
Cash on hand and in banks	5,922	0	Notes payable to banks-secured	0	0
U.S. Government securities-add schedule	0	0	Notes payable to banks-unsecured	0	0
Listed securities-add schedule	0	0	Notes payable to relatives	0	0
Unlisted securities-add schedule	0	0	Notes payable to others	0	0
Accounts and notes receivable	0	0	Accounts and bills due	50,000 app	0
Due from relatives and friends	0	0	Unpaid income taxes	0	0
Due from others	0	0	Other unpaid tax and interest	0	0
Doubtful			Real estate mortgages payable-add schedule	416,200	0
Real estate owned-add schedule	456,500	0	Chattel mortgages and other liens payable	0	0
Real estate mortgages receivable	0	0	Other debts-itemize	None	None
Autos and other personal property	0	0			
Cash value-life insurance	0	0			
Other assets-itemize					
Deferred Compensation	27,400	45,000			
			Total liabilities	466,200	0
			Net Worth	23,622	0
Total Assets	489,822	45,000	Total liabilities and net worth	489,822	0
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, co-maker or guarantor	0	0	Are any assets pledged? (add schedule.)	No	No
On leases or contracts	0	0	Are you a defendant in any suits or legal actions?	No	No
Legal Claims	0	0	Have you ever taken bankruptcy?	No	No
Provision for Federal Income tax	0	0			
Other special debt	0	0			



### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have served as a former advisory board member for the Maria Droste Residence Organization. This group assisted homeless women in finding shelter and employment. I devoted several days a year to this effort. (1994 to 1996).

I have served as a commissioner with the St. Louis Housing Authority. This board established policy and procedures for implementing federally funded low-income housing in St. Louis, MO. I was one of a seven member board, with all members being appointed to two year terms by the Mayor of St. Louis. I served as a commissioner for approximately a year and a half, devoting 10 to 15 hours a month to St. Louis Housing Authority matters. (1988 to 1989).

I have served as a board member of the Herbert Hoover Boys and Girls Club of St. Louis. We established policy for implementing athletic and educational programs for inner-city youth on a year round basis. We also assisted in fund-raising activities to support the operation of the club. I devoted several hours per month to the Herbert Hoover Boys and Girls Club. (1995 to 1997).

I have volunteered and served as a coach for both T-ball and baseball at the Emerson Family YMCA in St. Louis, MO. I coached a team of boys and girls during the baseball season with one practice and one game a week during an eight week period. My teams consisted of children from diverse backgrounds and socio-economic status. I devoted eight hours per week to coaching. (1995 & 1996).

I currently serve as a board member of the Jamison Memorial Christian Methodist Episcopal Church Youth Group. We interact with the youth members of our church as well as with the youth who live in the neighborhood by planning activities and inviting quest speakers to address the youth. I devote several hours per week to the church. (1993 to present).

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

No.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism".**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.**

**Some of the characteristics of this "judicial activism" have been said to include:**

- a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**
- e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

I believe the judiciary should exercise judicial restraint in deciding cases or controversies. The framers of our Constitution were very deliberate in establishing the judicial, executive and legislative branches of government. I believe each branch should respect the powers and duties of the other.

It has been my practice as a judge on the Missouri Supreme Court to write as narrowly as possible deciding those issues that are in controversy and not others. I believe to write broader than necessary results in unintended consequences. I think it is unnecessary for the judiciary to impose duties upon society or government that are not necessarily related to the controversy before the court.

The role of the federal district court is very important in the federal judicial system. I believe district court judges should carefully follow precedent established by the U.S. Court of Appeals and the U.S. Supreme Court. I also think district court judges must be mindful of who has standing to bring lawsuits in federal courts and whether the attorneys representing litigants have followed the Federal Rules of Civil and Criminal Procedure.

**RESPONSES OF ROSEMARY S. POOLER TO  
QUESTIONS FROM SENATOR ASHCROFT**

1. Which Supreme Court Justice, past or present, do you most admire, and why.

From a personal perspective, I most admire Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsburg because both have had extraordinarily distinguished professional careers while successfully raising families.

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Supreme Court Justice David Souter's opinions, which are rich in historical associations, remind the reader of the value of separation of powers.

3. What does the discretionary power of the judiciary mean to you?

As a trial court judge I deal with certain matters committed to the court's limited discretion. I exercise my discretion in case management, scheduling, jury selection, evidentiary rulings, Rule 11 decisions and in limited elements of sentencing. My discretionary rulings are constrained by statute, precedent and reasonableness. Furthermore, the abuse of discretion standard of review sets the parameters for any exercise of discretion. An appeals court judge's discretion is further circumscribed because this standard of review forbids appellate judges from substituting their discretion for that of the trial court.

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge and why?

I have had the opportunity of knowing and observing many distinguished judges, but I have known Stewart F. Hancock, Jr., former judge of the New York Court of Appeals, throughout his long and exemplary career. As a trial court judge, Judge Hancock was unfailingly courteous to litigants and attorneys, careful in his preparation, and respectful of precedent. Later Judge Hancock became an appellate judge and finally a member of New York's highest court. In those capacities, he maintained his judicial demeanor and added a clarity of reasoning and writing that caused him to be widely admired. If I am fortunate enough to be confirmed, I will seek to emulate all of those qualities.

5. Which law review article or book has most influenced your view of the law?

I cannot identify a single law review article or book that has most influenced my view of the law. However, no article or book can transcend the importance of the original sources: the Constitution and statutes that I must apply to the facts before me.

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute.

The starting point for construing a statute is its plain language. The next source to which I turn is applicable precedent. Only as a last resort do I consider legislative history because a particular Senator's or Representative's comments are not a substitute for the will of the majority of the Congress as expressed in the words of the statute itself. However, I note that legislative findings -- which are enacted by the Congress as a whole -- may play a role in statutory interpretation.

**RESPONSES OF ROSEMARY S. POOLER TO  
QUESTIONS FROM SENATOR SESSIONS**

1. In your opinion, what is the greatest Supreme Court decision in American history?

Marbury v. Madison, 5 U.S. 137 (1803), which established the obligation of the courts and all other branches of government to follow the United States Constitution, is the most important Supreme Court decision in American history.

2. What is the worst Supreme Court decision?

Dred Scott v. Sandford, 60 U.S. 393 (1856), which upheld the legality of slavery, was arguably the worst Supreme Court decision.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

Judge Richard J. Cardamone of the United States Court of Appeals for the Second Circuit has most influenced my judicial philosophy. Judge Cardamone approaches each case with respect for the litigants and carefully applies existing precedent to the facts of the case. His opinions reflect that respect and carefulness as well as a clarity of thought and expression that I admire.

4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

5. Do you have any concerns about the constitutionality of the Prison Litigation Reform Act?

Like all acts of Congress, the Prison Litigation Reform Act ("PLRA") is presumed to be constitutional, and I would begin any consideration of the PLRA in any case before me with that in mind. Additionally, the Second Circuit has already upheld two separate sections of the PLRA -- see Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997) (consent decree termination provision); Nicholas v. Tucker, 114 F.3d 17 (2d Cir. 1997) (filing fees) -- and therefore, I have no basis for concerns about the constitutionality of the PLRA.

6. In your legal opinion, is the 1995 Habeas Corpus Reform Act constitutional?

As noted above, I presume the constitutionality of all legislative enactments. The Supreme Court in Felker v. Turpin, 116 S. Ct. 2333 (1996) upheld the Act and distinguished between the Act's legitimate restrictions against abuse of the writ filed in district courts and the Act's failure to implicate the Supreme Court's jurisdiction over habeas petitions filed as original matters. I am also, of course, bound by the Second Circuit's decision in Trisman v. United



States, 124 F.3d 361 (2d Cir. 1997), which upheld the Act but also held that under the very narrow circumstances where a lack of collateral review under 28 U.S.C. § 2255 raises serious constitutional questions, a federal prisoner may bring a habeas petition under 28 U.S.C. § 2241. I am further aware, however, that the Second Circuit granted an interlocutory appeal in Rosa v. Senkowski, 1997 WL 436484 (2d Cir. Aug. 1, 1997), which addressed the constitutionality of the Act's one-year statute of limitations and held that its application under the facts of the case was an improper suspension of the writ of habeas corpus.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictist judicial scrutiny.

At my hearing last week, I assured Chairman Hatch that I would follow Supreme Court precedent, and I intend to do so with respect to racial preferences and all other matters.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

Supreme Court precedent, most particularly Adarand v. Peña, makes it clear that it is extremely difficult for a government program or statute embodying a racial classification to survive examination under the strict scrutiny standard.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures.

I know of no constitutional provision or precedent that would trigger a stricter standard of review of voter referenda. Although I am unfamiliar with this issue because New York does not have a provision for voter referenda, I would not impose heightened review because of the Ninth and Tenth Amendments' reservation of rights to the people.

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

As noted previously, legislative enactments enjoy a presumption of constitutionality. Moreover, the Ninth Circuit has resolved the constitutionality of the California Civil Rights Initiative. Accordingly, I have no reason to believe the California Civil Rights Initiative violates any federal or state constitutional provision.

**Answers of Robert D. Sack to Questions from Senator Sessions**

**Please identify anyone who helped you answer the following questions.**

I received no help in responding to these answers except insofar as I have shown them to representatives of the Department of Justice before submitting them to the Senate Judiciary Committee.

1. **In your opinion, what is the greatest Supreme Court decision in American history?**

*Marbury v. Madison*, 5 U.S. 137 (1803), which helped explicate the relationship among Congress, the Supreme Court and the Constitution, elaborating on the system of checks and balances established by the Constitution.

2. **What is the worst Supreme Court decision?**

*Korematsu v. United States*, 323 U.S. 214 (1944), which held permissible under the Fifth Amendment to the Constitution the internment of Japanese Americans during World War II.

3. **Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?**

Judge Learned Hand, of the Second Circuit, particularly as described in his biography by Professor Gerald Gunther, for his intelligence, clarity of expression, open mindedness and devotion to judicial self-restraint.

**You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.**

**Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."**

4. **Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?**

**Yes.**

**Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.**

5. **Do you have any concerns about the constitutionality of the Prison Legal Reform Act?**

I have no such concerns. There is a strong presumption that the Act, like all other acts of Congress, is constitutional. If my nomination to be a Court of Appeals judge were to be confirmed and I were thereafter to sit on a panel considering a challenge to any portion of the Act, I could not conclude that that portion of the Act was unconstitutional unless required to do so by Supreme Court or Second Circuit precedent. I know of no such precedent. To the contrary, I understand that the Second Circuit Court of Appeals has held the termination provisions of the Act to be constitutional, citing five other Courts of Appeals that had previously also held the termination provisions to be constitutional. *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997). I also understand that the Second Circuit has held that the Act's filing-fee provisions are constitutional, citing three other Courts of Appeals that had previously also held the filing fee provisions to be constitutional. *Nicholas v. Tucker*, 114 F.3d 17 (2d Cir. 1997), cert. denied, 1998 U.S. LEXIS 3226 (May 18, 1998). If I am fortunate enough to be confirmed as a Judge for the Second Circuit, I will, of course, be bound by that precedent.

6. **In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?**

Yes. There is a strong presumption that the Habeas Corpus Reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996, like all other provisions of acts of Congress, are constitutional. If my nomination to be a Court of Appeals judge were to be confirmed and I were thereafter to sit on a panel considering a challenge to the Act, I could not conclude that any part of the Act was unconstitutional unless required to do so by Supreme Court or Second Circuit precedent. I know of no such precedent. To the contrary, in *Felker v. Turpin*, 518 U.S. 651 (1996), the United States Supreme Court held constitutional substantial portions of the Habeas Corpus Reform provisions. If I am fortunate enough to be confirmed as a Judge for the Second Circuit, I will, of course, be absolutely bound by that precedent.

**If confirmed, you will preside over many employment discrimination cases as a federal judge.**

7. **In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?**

I would absolutely follow *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2106-07 (1995), which held that race-based federal government affirmative action programs are unconstitutional under the Due Process Clause of the Fifth Amendment unless they meet strict scrutiny, i.e., unless they are narrowly tailored measures that further compelling governmental interests.

8. **In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?**

Strict scrutiny is a most difficult constitutional standard for a statute to meet. I would expect that in the wake of *Adarand*, as courts apply the rule of *Adarand* from case to case, strict scrutiny will prove to be an extremely difficult standard for government affirmative action programs to meet.

9. **As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?**

I do not believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures.

10. **Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?**

I believe that the Initiative is constitutional, having been held to be so by the Ninth Circuit Court of Appeals in *Coalition For Economic Equity v. Wilson*, 122 F3d 692 (9th Cir.), *cert denied*, 118 S. Ct. 397 (1997).

Answers of Robert D. Sack to Questions from Senator Ashcroft

1. **Which Supreme Court Justice, past or present, do you most admire, and why?**

The Supreme Court Justice I most admire is Justice Robert H. Jackson: for his devotion to the rule of law and to freedom of individual conscience, his eloquence and extraordinary clarity of expression, and for his service as the Chief Prosecutor at the Nuremberg trials.

2. **What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?**

Judge Learned Hand who, among his many attributes, insisted that federal judges confine themselves to deciding cases and controversies and that they not arrogate to themselves the legislative function.

3. **What does the discretionary power of the judiciary mean to you?**

Trial judges are invested by law with certain discretion as to decisions in a wide variety of areas, for example, in admitting evidence and in determining whether Rule 11 sanctions should be imposed. All such discretion is limited by law.

A federal Court of Appeals judge has substantially less discretion. In the typical case, a Court of Appeals judge would be limited to determining whether a trial judge had abused his or her discretion and would not be permitted to substitute his or her discretion for that of the District Court judge.

4. **Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?**

I believe that in choosing a judge whom I can rightly cite as a personal model, it is proper for me to point to a judge whom I know personally, rather than one whom I know by his or her writings or reputation alone. On that basis, the judge who has served as such a model for me is Judge Michael B. Mukasey of the Southern District of New York.

Judge Mukasey was my law partner at the firm of Patterson, Belknap, Webb & Tyler from approximately 1979 to 1986. In 1987 he fulfilled his lifelong ambition by being nominated by President Reagan to be a Federal District Judge for the Southern District of New York, and being confirmed by the Senate. Judge Mukasey quickly achieved a reputation among members of the New York bar as a dedicated, intelligent and thoughtful member of the judiciary.

Several years ago, Judge Mukasey chanced to be selected to preside over the first of the World Trade Center bombing cases. He performed that duty with great distinction and dignity and in the face of challenges to his presiding at the trial because of his religious heritage. At that time and since, because of concerns arising out of his participation in that trial, Judge Mukasey has received 24-hour special security protection. It is, to my



own observation, an extraordinary intrusion into his everyday life and to his privacy. He has borne this unusual and unasked-for burden with exemplary equanimity and cheerfulness. He seems to treat it simply as part of the responsibility he undertook when he took his oath of office. His behavior under these trying circumstances is a model to me for the sense of duty, purpose and dedication that it displays.

**5. Which law review article or book has most influenced your view of the law?**

Professor Alexander M. Bickel, *THE MORALITY OF CONSENT*, Part 3 (1975). As an advocate for the press, I have frequently referred to this portion of Professor Bickel's book as what I believe to be a sound basis for understanding the relationship between institutions seeking to preserve confidentiality on the one hand, and the press seeking to obtain and disseminate news on the other.

**6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?**

I think that a judge is bound by what legislation says. I am highly skeptical about the use of legislative history, which cannot define the intent of Congress and never has the force of law. The only occasion I can imagine where legislative history might be useful is in that rare circumstance in which a committee report or similar document might serve to give a lawyer or judge seeking to understand or apply a statute a sense of context that might help him or her evaluate an unclear word or phrase.

## FOLLOW UP QUESTIONS FOR VICTORIA ROBERTS FROM SENATOR HATCH

### QUESTION:

1. In your questionnaire, you stated in response to question about any memberships you hold or may have held in any organization that discriminated: "I was a Girl Scout in the 1960's. I was 10-12 years old and didn't consider that the policy was discriminatory. I was a member of the Board of Directors of the Girl Scouts in 1984-1986." Do you believe that a "girls-only" policy or an organization such as the Girl Scouts (or a "boys-only" policy of an organization such as the Boy Scouts) "[is] discriminatory" such that it violates federal law? Please explain why or why not.

### ANSWER:

1. I believe that private discrimination based on gender is not automatically in violation of federal law, except in areas covered by specific statutes, such as Title VII and fair housing laws, which clearly outlaw private, gender based policies and practices. And, the Constitution reaches state action, not actions by private citizens. Beyond specific laws, however, a "girls-only" policy or a "boys-only" policy, would not automatically violate federal law.

### QUESTION:

2. An official press release issued on March 18, 1997, by the State Bar of Michigan under your authority as President states: "President Roberts noted that Article III of the Constitution provides for impeachment of Federal judges only for "Treason, Bribery, or other high Crimes and Misdemeanors . . . ." In fact, Article III contains no such language, providing (with respect to removal from office of federal judges) in section 1, only that "Judges . . . shall hold their Offices during good Behaviour." Please explain your comments.

### ANSWER:

2. You are correct that Article III does not contain that language. However, Article II, Section 4 of the Constitution requires "Treason, Bribery, or other high Crimes and Misdemeanors" for the removal of "all Civil Officers of the United States..." It is not settled whether that standard is different from the standard stated under the general impeachment provision. See, The Tempting of America: The Political Seduction of the Law, Robert L. Bork, 1990, at p. 22.

Victoria A. Roberts

Indeed, Federal Judge Alcee Hastings was impeached by the House of Representatives on August 3, 1988 by 413-3, for "high crimes and misdemeanors." He was subsequently convicted by the Senate. And, U.S. District Judge Claiborne was convicted for "high crimes and misdemeanors" related to his 1984 conviction for tax fraud.

**QUESTION:**

3. Assume that a federal judge, motivated solely by racial animus, deliberately ignores the U.S. Supreme Court ruling in Sipes v McGhee, and enforces a racial covenant against a black family that seeks to buy a house owned by a State government; assume further that what the judge has done is not itself a criminal offense. Could a congressman legitimately consider this to be "[bad] Behaviour," such that it makes the judge impeachable under Article III, section 1? Please explain your answer.

**ANSWER:**

3. I believe that a federal judge would not be subject to removal from the bench simply because he or she made a ruling in contravention of Sipes v McGhee. While disregard for the law is serious, the removal from office provisions of the Constitution contemplate offenses such as those listed in Article II, and would include such breaches as conviction for a crime, perjury, falsifying documents, and the like. The appellate process, rather than impeachment, is readily available in this system of checks and balances to correct the injustice caused by a judge's failure to follow the law.

**QUESTION:**

4. If your answer to 3, above, is "yes," please reconcile your answer to your statement in the official March 18, 1997, press release described in 3, above, that "[w]e deplore any attempt to use the judicial impeachment process provided for in the Constitution to remove judges because of their decisions." If your answer to 3, above, is "no" please reconcile your answer to your statement in an official press release issued on February 20, 1997, by the State Bar of Michigan, under your authority as President, that racist statements alleged to have been made in private considerations by a judge, "if true, [constituted] grounds for removal from the bench" under circumstances where there was no suggestion that the racial animus presumably behind such statements ever had affected the

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judge's actual decisions.

ANSWER:

4. My comments regarding this state court judge and our local rule, are not incompatible with my view that federal judges can only be removed from the bench under the authority set forth in the Constitution.

My February 20, 1997 press release had to do with a state court judge and allegedly racially biased statements she made in tape recorded telephone conversations (Since my press release, a hearing has been held and findings have been issued that the judge did, in fact, make the statements). Our state Code of Judicial Conduct specifically provides that "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety . . . A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly . . . At all times, the conduct and manner of a judge should promote public confidence in the integrity of the judiciary. Without regard to a person's race, gender or other protected personal characteristic, a judge should treat every person fairly . . ." Canon 2. (emphasis supplied)

A violation of this Canon can subject a state court judge to various disciplines, including removal from the bench. A number of experts, including legal ethicists, are of the view that the judge I spoke of, can and should be removed from the bench because of her remarks, albeit "off the bench." That is the recommendation of the Judicial Tenure Commission; that is what the Michigan Supreme Court is considering. The widely held belief is that such remarks compromise the trust individuals need to have in the judicial system and judicial officers. Our local rules provide for removal from office for actions which compromise this trust.

*Victoria A. Roberts*  
 VICTORIA A. ROBERTS

Dated: May 19, 1998

QUESTIONS FOR VICTORIA A. ROBERTS  
FROM SENATOR ASHCROFT

QUESTION:

1. What Supreme Court Justice, past or present, do you most admire and why?

ANSWER:

1. I admire Justice Sandra Day O'Connor and the stellar career achievements she enjoyed before becoming our country's first female Supreme Court Justice.

As a Justice of the Court, she has demonstrated her leadership capabilities; she has practiced restraint; she gives deference to separation of powers issues and bases her analysis and opinions on these principles.

QUESTION:

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

ANSWER:

2. The fourth Chief Justice of the United States, Justice John Marshall, held fast to his belief in the independence of the Court. He was a strong advocate for the legitimacy of judicial review in Marbury v Madison.



Victoria A. Roberts

**QUESTION:**

3. What does the discretionary power of the judiciary mean to you?

**ANSWER:**

3. The boundaries of a judge's discretion are defined by the Constitution and duly enacted legislation. For example, judges have discretionary power within the Sentencing Guidelines and in applying the rules of evidence or the rules of civil procedure. Discretionary power, however, must be granted.

**QUESTION:**

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

**ANSWER:**

4. The Honorable Julian A. Cook, former Chief Judge of the United States District Court for the Eastern District of Michigan, has been most influential with me as I have formed a judicial philosophy. Judge Cook is known for his intellect, restraint, and for his keen ability to treat all participants in the process with the dignity and respect to which all are entitled. He has received uniformly high marks from attorneys who appear before him, and from his colleagues on the bench. I have the utmost respect for him, and would consider him a role model.

**QUESTION:**

5. Which law review article or book has most influenced your view of the law?

**ANSWER:**

5. Ten Commandments for the New Judge, by the Honorable Edward J. Devitt, 65 A.B.A.J. 574 (1979).

Victoria A. Roberts

**QUESTION:**

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

**ANSWER:**

6. A federal judge, in interpreting a statute, should use legislative history as a last resort. I would look at the plain language of the statute to determine its meaning and application. I would also look for guidance to established precedent interpreting the statute. If there is none, there may be analogous legislation and cases interpreting it, which may be helpful to the analysis. Barring the availability of the above, committee reports, hearing transcripts, floor statements and the like, may shed some light on legislative intent. However, a judge should proceed with caution and should not rely upon legislative history because the history, and the record of it, may be incomplete; it may also express the narrow intentions of a few. Because legislative history has not been passed on by a majority of the legislating body, its role should be minor at best.

*Victoria A. Roberts*  
VICTORIA A. ROBERTS

Dated: May 19, 1998

## QUESTIONS FOR VICTORIA ROBERTS FROM SENATOR SESSIONS

Please identify anyone who helped you answer the following questions.

**ANSWER:** The substance of the answers is my own. White House Counsel and Counsel from the United States Department of Justice, Office of Policy and Development, helped to edit my responses.

**QUESTION:**

1. In your opinion, what is the greatest Supreme Court decision in American history?

**ANSWER:**

1. I believe the greatest United States Supreme Court decision is Brown v. Board of Education.

**QUESTION:**

2. What is the worst Supreme Court decision?

**ANSWER:**

2. I believe that the Dred Scott decision is the worst decision ever rendered by the Supreme Court.

**QUESTION:**

3. What Supreme Court Justice or federal judge has most influenced your judicial philosophy?

**ANSWER:**

3. The Honorable Julian A. Cook, former Chief Judge of the United States District Court for the Eastern District of Michigan, has been most influential with me as I have formed a judicial philosophy. Judge Cook is known for his intellect, restraint, and for his keen ability to treat all participants in the process with the dignity and respect to which all are entitled. He has received uniformly high marks from attorneys who appear before him, and from his colleagues on the bench. I have the utmost respect for him, and would consider him a role model.

**QUESTION:**

4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

## ANSWER:

4. Yes. Section 2 of Article III states that the judicial power of the courts shall extend to all cases, in law and equity, arising under the Constitution and "the Laws of the United States..." Congress certainly has the power and the authority to limit the jurisdiction of the lower federal courts, so long as such limitations are constitutionally permissible.

## QUESTION:

Last year, Congress using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

5. Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

## ANSWER:

5. No. The constitutionality of the Prison Reform Litigation Act of 1995 has been challenged in a number of courts, including in the Sixth Circuit Court of Appeals. In virtually all instances, including in the Sixth Circuit, the constitutionality has been upheld. I would follow the precedent set by the courts in my circuit and by the Supreme Court, and would have no difficulty applying the law as enacted and as intended to be applied by Congress. Consequently, I have no concerns.

## QUESTION:

6. In your legal opinion, is the 1995 Habeas Corpus Reform (Act) constitutional?

## ANSWER:

6. Yes. Both the United States Supreme Court in Felker v. Turpin and a number of federal courts have interpreted various provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), including my own Sixth Circuit, in Lyons v Ohio Adult Parole Authority, 105 F2d 1063 (6th Cir 1997) rev'd in part. The Lyons case considered various habeas provisions of the AEDPA. It found guidance from decisions of other circuits and upheld the habeas provisions. I would follow the precedent of this and other guiding law if applicable to a habeas case before me.

Victoria A. Roberts

**QUESTION:**

If confirmed, you will preside over many employment discrimination cases as a federal judge.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

**ANSWER:**

7. Yes. I understand the Supreme Court decision in Adarand v. Peña to mean that any race based classification by the federal government is suspect and subject to strict scrutiny, the highest scrutiny under the Constitution; that the federal classification must serve a compelling governmental interest; and, that it must be narrowly tailored to further that interest in order to be valid. I would apply this law to any case brought before me challenging a governmental sponsored affirmative action program.

**QUESTION:**

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

**ANSWER:**

8. Strict scrutiny requires that a governmental program that is based on race be subjected to detailed and rigorous inquiry, to ensure that the personal right to equal protection of the laws has not been infringed. Units of government must clearly articulate the need and basis for a racial classification in a statute or governmental program, and tailor the classification to its justification. This standard would be difficult to meet. Adarand v Peña.

**QUESTION:**

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

**ANSWER:**

9. No. Voter referenda, like laws enacted by legislatures, are entitled to a presumption of constitutionality and should be subjected to the same scrutiny as a statute.



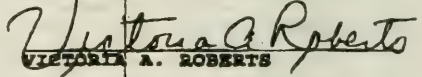
Victoria A. Roberts

## QUESTION:

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

## ANSWER:

10. No. The California Civil Rights Initiative (Proposition 209), designed to prohibit classifications based on race or gender, has passed constitutional muster after review by the Ninth Circuit Court of Appeals in Coalition for Economic Equity v. Wilson. The court determined that any law, such as proposition 209 which prohibits classifications based on race and gender, is, by definition, a law which addresses race and gender related matters in a neutral fashion.

  
VICTORIA A. ROBERTS

Dated: May 19, 1998

RESPONSES TO QUESTIONS  
FROM CHAIRMAN HATCH  
FOR RICHARD ROBERTS

1. As you know, the President withdrew his nomination of Professor Lani Guinier to be Assistant Attorney General in charge of the Civil Rights Division, on the specific ground that he disapproved of the positions she took in her published writings on the subject of race (such as racial quotas, racial categorization for voting, affirmative action, etc.). In a Black History Month speech at the U.S. Attorney's Office in Philadelphia (Feb. 27, 1997), you praised Professor Guinier as one of nine "renowned contemporary African American lawyers for whom Philadelphia has been home," describing her as someone "whose scholarly and provocative works have sparked a national dialog about race and giving political voices to the politically voiceless." Please describe your understanding of Professor Guinier's published writings on the subject of race, including a description of points of agreement and disagreement you have with those writings.

In composing remarks for the Black History celebration at the United States Attorney's Office in Philadelphia, I thought it useful to cite to examples of local women and men, regardless of political stripe, who had made history. I identified nine based upon their prominence and not on the merits of any views they held. They included high ranking officials of the Ford, Reagan and Bush administrations (William Coleman, Jr. and Edward S.G. Dennis, Jr.); circuit judges appointed by Presidents Carter (Judge Higginbotham) and Clinton (Judge McKee); district judges appointed by Presidents Nixon (Judge Green), Carter (Judge Giles), Reagan (Judge Hutton) and Bush (Judge Joyner); and Lani Guinier, a tenured University of Pennsylvania law professor and student of voting rights issues, and the Administration's first nominee to head the Civil Rights Division. I have not read Professor Guinier's published writings, but her renown and that of the others listed qualified them all for mention. Although my speech cited my own theme of taking personal responsibility, I know that a federal district judge must be bound by the Constitution and binding precedent, including on matters of race. If confirmed, I would scrupulously abide by the Constitution and binding precedent and would not substitute for them any personal policy views.

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2. According to your notes for a speech you made August 1995 to the National Black Prosecutors Association, in a discussion of the "[b]oycotts of racist businesses, ... urban rebellions," and other civil-rights protests of the 1960s, you stated: "Note Dixiecrats revenge: ... If you people or your outside agitator friends mess with any of our businesses while you're rioting, it's a crime." (a) Do you believe that the many economic boycotts organized and engaged in by civil-rights protesters of the 1960s generally were a valid exercise of constitutional rights, even though they caused economic damage to the targeted businesses that refused to treat blacks equally? (b) Do you believe that the many "urban rebellions" and sit-ins organized and engaged in by civil-rights protesters of the 1960s generally were a valid exercise of constitutional rights even though they violated loitering, disorderly-conduct, public-access, and other laws?

My outline made reference to boycotts and rebellions as examples of phenomena witnessed in the turbulent 1960's. Some of those activities involved speech protected by the First Amendment and some did not. Peaceful protest involving speech protected by the First Amendment did not lose its protection because of economic consequences that followed, nor did acts of violence, loitering or disorderly conduct gain protection when committed ostensibly in the name of civil rights reform.

3. If your answer to 2(a), above, is "yes," please explain why the same rationale should or should not apply to anti-abortion protesters.

If your answer to 2(b), above, is "yes," (a) please explain why the same rationale should or should not apply to anti-abortion protesters; and (b) please explain why the "FACE Act" (described by you on March 11, 1996, in a speech to the U.S. Attorneys Offices Criminal Chiefs Conference, as one of the foci of your Section's enforcement work), which you have described as prohibiting "blocking or damaging clinics providing reproductive health services," is or is not a "Dixiecrat revenge"-type statute.

Anti-abortion protesters enjoy the same protection of the First Amendment as other protesters do where their peaceful activity involves protected speech. By contrast, the "FACE" Act deals with acts of violence or physical obstruction.

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Those circuits to have addressed the FACE Act to date have upheld its constitutionality.

RESPONSES TO QUESTIONS  
FROM SENATOR ASHCROFT  
FOR RICHARD ROBERTS

- 1 Which Supreme Court Justice, past or present, do you most admire, and why?

I admired Justice Byron White's work. He wrote with clear and understandable prose. He made plain what his opinions did hold and what they did not hold. He approached decision-making not with an outcome in mind; rather, he paid careful attention to the facts and followed them to whatever conclusion was warranted by the applicable law.

- 2 What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Senior United States District Judge Joyce Hens Green of the District of Columbia consistently has demonstrated fairness and human compassion. However, she has always made plain what a judge's role is and what it is not; what the law does and does not permit a judge to do; where the responsibility rests for policy changes in our system of government and where it does not; how the federal judiciary is a creature of the Constitution and how its jurisdiction is not plenary but rather is prescribed by Congress. Her scrupulous adherence to her properly limited role has been instructive.

- 3 What does the discretionary power of the judiciary mean to you?

Federal judges may exercise discretion, but within narrow parameters. More particularly, rules of procedure, evidence and sentencing permit judges to exercise discretion in making certain rulings in cases, but prescribe the limitations on the range of discretion available.

- 4 Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

Senior United States District Judge Joyce Hens Green of the District of Columbia has exemplified for me the best in a federal judge. She is fair, decisive, smart, attentive, thorough in her findings of fact and conclusions of law, and unfailingly courteous. In addition, she writes with clear, understandable prose and adheres faithfully to the law.

- 5 Which law review article or book has most influenced your view of the law?

Gideon's Trumpet by Anthony Lewis had the earliest and most



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significant impact on my choice to become a lawyer and my view of the law.

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

Legislative history should play no role where the plain language of the statute is clear and unambiguous. Where guidance is needed, district judges should look to applicable decisions of the Supreme Court and their circuit court of appeals for binding interpretations of the statute. Where no precedent on point is available, opinions in the most closely analogous cases should be consulted. As a final resort, legislative history, where it is instructive and clear, may play some role.

RESPONSES TO QUESTIONS  
FROM SENATOR SESSIONS  
FOR RICHARD ROBERTS

1. In your opinion, what is the greatest Supreme Court decision in American history?

The decision in *Brown v. Board of Education* is one of the most important Supreme Court decisions in our history.

2. What is the worst Supreme Court decision?

In my assessment, *Plessy v. Ferguson* was an opinion that was rightly overruled.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

Senior United States District Judge Joyce Hens Green of the District of Columbia has exemplified for me the best in a federal judge. She is fair, decisive, smart, attentive, thorough in her findings of fact and conclusions of law, and unfailingly courteous. In addition, she writes with clear, understandable prose and adheres faithfully to the law.

4. You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.

Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

5. Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

I understand that with one exception, those circuits that

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have considered the constitutionality of the Act have upheld it. Were I a district judge facing a challenge to the constitutionality of this or any other legislative act, I would accord the act a presumption of constitutionality, look to the plain language of the applicable provision of the Constitution, and look to binding precedent from the Supreme Court or the court of appeals for my circuit. Should I need further guidance, I would look to the most closely analogous cases in the Supreme Court and the courts of appeals or, if it is instructive, to legislative history.

6. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

I understand that the Supreme Court has upheld the constitutionality of the one provision of the Act challenged in that court to date. If I am confirmed, I will carry out my duty to abide by that decision. If I am faced with a challenge to the constitutionality of the Act, I would approach it as outlined in response to question 5, above.

7. If confirmed, you will preside over many employment discrimination cases as a federal judge.

In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

Yes.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

Strict scrutiny is the most demanding standard applicable under the Equal Protection clause of the fourteenth amendment. To survive such scrutiny, the preference must be narrowly tailored to serve a compelling governmental interest.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. Such referenda and legislative enactments should be accorded the same presumption of constitutionality and undergo the same level of scrutiny.

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10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

Although I have not studied that Initiative, citizen initiatives should be accorded the presumption of constitutionality. Indeed, I understand that this Initiative borrowed language from the fourteenth amendment and that the Ninth Circuit has held that the Initiative is constitutional. This decision appears to settle the question of its constitutionality.

## JUDGE WHITE'S ANSWERS TO QUESTIONS FROM SENATOR SESSIONS

The substance of the following answers are mine. They were reviewed by Department of Justice and White House staff before being submitted to the Judiciary Committee.

- 1 In your opinion, what is the greatest Supreme Court decision in American history?

In my opinion, the *Brown vs. Board of Education* was the Supreme Court's best decision.

- 2 What is the worst Supreme Court decision?

In my opinion, the *Dred Scott* decision was the worst Supreme Court decision.

- 3 Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

Supreme Court Justice David Souter.

You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.

Article III, Section I of the Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

- 4 Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

- 5 Do you have any concerns about the constitutionality of the Prison Litigation Reform Act?

The Prison Litigation Reform Act, like all legislation, is to be accorded the presumption of constitutionality. A number of U.S. Circuit Courts have considered challenges to the constitutionality of the Prison Litigation Reform Act and it has been largely upheld. For example, the 8<sup>th</sup> Circuit has upheld the immediate termination provisions of the Prison Legal Reform Act, finding that the provisions "do not amount to an attempt by Congress to reopen final judgments of Article III courts." *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8<sup>th</sup> Cir. 1997); see also *Lyon v. Krol*, 127 F.3d 763, 764-65 (8<sup>th</sup> Cir. 1997).

Accordingly, I do not have any concerns about the constitutionality of the Prison Legal Reform Act.

- 6 In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?



The Anti-terrorism and Effective Death Penalty Act of 1996, like all legislation, is accorded the presumption of constitutionality. The U.S. Supreme Court upheld aspects of this Act in Felker v. Turpin, 116 S.Ct. 2333, 2338 (1996).

In view of this decision, I do not have any constitutional concerns about this legislation

If confirmed, you will preside over many employment discrimination cases as a federal judge.

- 7 In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

Yes, I will follow the 1995 Adarand v. Peña decision.

- 8 In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

In light of the high standard of strict scrutiny in Adarand v. Peña, it would be difficult for the government to meet this standard.

- 9 As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

I believe that both voter referenda and laws enacted by legislatures should be equally scrutinized by the judiciary. Under both methods the law is enacted by the people. Voter referenda are a direct vote of the people and laws enacted by legislatures are the indirect vote of the people through their elected representatives.

- 10 Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The 9<sup>th</sup> Circuit decided the constitutionality of the California Civil Rights Initiative and the U.S. Supreme Court declined to review the 9<sup>th</sup> Circuit's decision. Accordingly, I do not believe that the California Civil Rights Initiative violates any federal or state constitutional provisions.

## JUDGE WHITE'S ANSWERS TO QUESTIONS FROM CHAIRMAN HATCH

1. An article in the March 3, 1992 issue of the St. Louis Post-Dispatch entitled "Missouri Abortion Ban Blocked" describes an accusation by certain Missouri legislators that, while you were a committee chairman in the Missouri House of Representatives, you made promises that no vote would be taken on a controversial abortion bill at an upcoming committee meeting. The article suggested that at least one supporter of the bill relied upon that promise in his decision not to attend the meeting. Yet, during the meeting, you changed your mind and took a vote, killing the measure in a tie vote. Please describe in detail your recollection of the events described in that article.

As chairman of the Missouri House Judiciary Committee, I promised the sponsor of the legislation that I would give him a hearing date that was convenient for the majority of the committee members. On the evening in question, the bill's sponsor repeatedly demanded that we hear his bill. I objected and stated we would hear the bill at a later time, after I had an opportunity to notify all of the committee members. The bill's sponsor continued to interrupt the committee by speaking loudly without being recognized by the chair. This conduct persisted for at least fifteen minutes.

Finally, I recognized a committee member who made a motion to bring up the bill. This motion was seconded and a vote was taken which defeated the measure by a tie vote. This drastic action only occurred as a result of the persistence of the bill's sponsor. There was no attempt to deceive committee members not present by taking a vote behind their backs, however.

2. In the first version of *State v. Smulls*, you wrote that the trial judge's "mental processes are irrevocably tainted with prejudice." You also wrote that the judge's statement was "not ambiguous" and that it "reeks of racial animus."

Please allow me to explain the circumstances of the *Smulls* opinion before answering the specific questions asked.

I had been on the Missouri Supreme Court only a few months in the fall of 1995 when we heard the *Smulls* case. I drew the assignment in regular rotation to write the principal opinion for the majority who voted that the trial judge was biased and that the Rule 29.15 hearing should be conducted in front of another judge who would make the determination of whether the trial judge was biased.

When a majority opinion is written and circulated at our court, those judges who agreed will make suggestions, add language, delete words or phrases until there is a final opinion that expresses the views of the majority. Therefore, the final published opinion is the opinion of the majority even though one judge signs as the principal writer.

There are seven judges on our court. Three other judges joined me in the principal opinion; one judge wrote a concurring opinion; and two judges joined in a dissenting opinion. Thus, there were four judges who agreed with the holding in the *Smulls* case.

- (A) Do you continue to believe that the trial judge's statement shows that his mental processes were irrevocably tainted with prejudice? If so, why? If not, what has caused you to change your mind?

No, I do not continue to believe that the trial judge's statement shows that his mental processes are irrevocably tainted with prejudice.

After we handed down our first *Smulls* decision, I realized that we had behaved no differently than the trial judge by our use of strong language to criticize him. Upon careful reflection, I came to believe that we could get our point across without the strong language and appear to be more judicious than we had been.

I believe that as members of the Missouri Supreme Court we should lead by example and not just by written word. Therefore, I urged my colleagues to join me in modifying the first *Smulls* opinion by striking most of the offensive language while clearly stating our holding in the case. As a result, the writer of the concurring opinion withdrew his opinion and joined the majority for a total of five judges who concurred in the holding of *Smulls*.

- (B) Should a judge whose mental processes are irrevocably tainted with prejudice be permitted to continue to decide cases?

No.

- (C) Should the trial judge in *Smulls* have been impeached or otherwise disciplined?

I do not believe the trial judge in *Smulls* should have been impeached; however, I do believe there should have been at least an inquiry by the Judicial Disciplinary, Removal, and Retirement Commission.

- (D) To your knowledge, was any disciplinary action taken against him?

To date, no disciplinary action has been taken against the trial judge.

## JUDGE WHITE'S ANSWERS TO QUESTIONS FROM SENATOR ASHCROFT

1. Which Supreme Court Justice, past or present, do you most admire, and why?

I admire Supreme Court Justice David Souter. I admire Justice Souter because of the clarity in his writing and how well he analyzes each legal point.

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Justice Sandra Day O'Connor has most influenced my thinking concerning the constitutional separation of powers, because she has an excellent understanding of the proper function of each branch of government which is clearly expressed in her writings.

3. What does the discretionary power of the judiciary mean to you?

Federal district court judges have limited discretion in areas such as case management, discovery, evidentiary ruling and to some extent as provided by the language contained in the sentencing guidelines.

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

Chief Judge Jean Hamilton and Senior Judge George Gunn of the U.S. District Court for the Eastern District of Missouri have served as role models for me. Both judges have a tremendous amount of patience and respect for litigants and their cases when appearing in court. As a trial judge, I would strive to have the same patience and respect for those who appear before me.

5. Which law review article or book has most influenced your view of the law?

The Missouri Supreme Court from Dred Scott to Nancy Cruzan by Gerald t. Dunne.

6. What role do you think legislative history – by which I mean the various committee reports, hearing transcripts and floor statements – should play in the interpretation of the text of a statute?

I do not think legislative history should play an important role in interpreting statutes. I believe the plain language of the statute should be used to interpret statutes.

## ADDITIONAL QUESTIONS FOR JUDGE WHITE

1. As a result of interpretation, when the text of a statute directs one result, but legislative history clearly indicates that the drafters of the legislative history intended a different result, what weight do you think should be given to the legislative history?

I would still construe the plain language of the statute.

2. As a general matter, do you feel most federal statutes are written with sufficient clarity to obviate the need to rely on the legislative history?

I feel most federal statutes are written with sufficient clarity.

3. Should federal courts apply any greater or lesser deference in evaluating challenges to referenda or initiatives, as opposed to legislative enactments?

I think the federal courts should give equal deference to initiatives and legislative enactments.

4. Do you feel that the current body of standing law as developed by the Supreme Court provides clear direction to lower courts and sufficient guidance to litigants?

Yes, I think the current body of standing law as developed by the Supreme Court provides clear direction to lower courts and sufficient guidance to litigants.

5. I understand that while you served in the State Legislature you called an unscheduled vote that resulted in the defeat of a measure designed to limit abortions. Could you provide the details of this incident?

As chairman of the House Judiciary Committee, I promised the sponsor of the legislation that I would give him a hearing date that was convenient for the majority of the committee members. On the evening in question, the bill's sponsor repeatedly demanded that we hear his bill. I objected and stated we would hear the bill at a later time, after I had an opportunity to notify all of the committee members. The bill's sponsor continued to disrupt the committee by speaking loudly without being recognized by the chair. This conduct persisted for at least fifteen minutes.

Finally, I recognized a committee member who made a motion to bring up the bill. This motion was seconded and a vote was taken which defeated the measure by a tie vote. This drastic action only occurred as a result of the unruly behavior of the bill's sponsor. There was no attempt to deceive committee members not present by taking a vote behind their backs, however.

6. My understanding is that certain Committee members were not provided proper notice that votes would be taken at this meeting. Is that correct? If so, in light of the importance of notice as a component of due process, do you regret your decision to go forward with the vote?

I understand your concern about the importance of notice in due process. I fully expected to give notice; however, the bill's sponsor kept pressing for immediate action on his bill. Under this situation, it was, in my view, appropriate to go forward. The very sponsor of the bill made giving notice and having a hearing at a later date impossible.



- 7 I remain concerned about your opinion in the case of *Missouri v. Damask*. Although you suggested that your primary concern was with procedures involved and not the deprivation of rights enjoyed by the individual defendants, your decision necessarily would have had the effect of expanding the rights of the individual defendants and suppressing substantial quantities of narcotics. With a greater opportunity to reflect on the opinion, could you summarize the factors that lead you to part company with your colleagues?

My opinion, agreeing with the Southern and Eastern Districts of the Court of Appeals, and voting to affirm the judgments of the two trial courts, rested on a number of factors, as described in the opinion. To summarize, the question of whether proper procedures were in place to ensure the constitutionality of the checkpoints was a factually intensive determination. Because of this, and because of the trial courts' superior opportunity to judge the testimony of the witnesses, I felt it was necessary (as the case law cited in the opinion holds) to give great deference to the trial courts' ruling that these checkpoints were not conducted in accordance with constitutional standards announced by the U.S. Supreme Court for suspicionless searches. As noted in the opinion, the primary concern was with the possibility that the rights of law-abiding motorists would be impaired if these checkpoints were not conducted according to the standards announced by the U.S. Supreme Court.

- 8 Do you believe that federal courts possess an inherent authority to levy taxes?

The judicial power, as described in Article III, does not appear to me to include the inherent authority to levy taxes. However, as the U.S. Supreme Court held in *State of Missouri v. Jenkins*, 495 U.S. 33, 55-58 (1990), a federal court may, in certain limited circumstances, order a local government entity to levy taxes, and may enjoin enforcement of state laws that would prevent such a levy from being carried out.

- 9 I understand that in one or two instances opinions you have issued have been withdrawn and the reissued in an edited form. Is this correct? If so, could you explain the circumstances in which this occurred?

Yes, in one instance. I reissued an opinion in edited form in *State vs. Smulls*. The following are the circumstances in which this occurred.

I had only been on the Missouri Supreme Court a few months in the fall of 1995 when we heard the *Smulls* case. I drew the assignment in regular rotation to write the principal opinion for the majority who voted that the trial judge was biased and that the Rule 29.15 hearing should be conducted in front of another judge who would make the determination of whether the trial judge was biased.

When a majority opinion is written and circulated at our court, those judges who agreed will make suggestions, add language, delete words or phrases until there is a final opinion that expresses the views of the majority. Therefore, the final published opinion is the opinion of the majority even though one judge signs off as the principal writer.

There are seven judges on our court. Three other judges joined me in the principal opinion, one judge wrote a concurring opinion, and two judges joined in a dissenting opinion. Thus, there were four judges who agreed with the holding in the *Smulls* case.

After we handed down our first *Smulls* decision, I realized that we had behaved no differently than the trial judge by our use of strong language to criticize him as well as our use of his name in the opinion. Upon careful reflection, I came to believe that we could get our point across without the strong language and appear to be more judicious than we had been.

I believe that as members of the Missouri Supreme Court that we should lead by example and not just by written word. Therefore, I urged my colleagues to join me in modifying the first *Smulls* opinion by striking most of the offensive language while clearly stating our holding in the case. As a result, the writer of the concurring opinion withdrew his opinion and joined the majority for a total of five judges who concurred in the holding of *Smulls*.

10. In *White v. State*, 939 S.W.2d 887 (1997), a death penalty case, you filed a separate opinion disagreeing with your colleagues on the propriety of remanding for an evidentiary hearing. Did any of your colleagues join your opinion in that case? What was the basis for the disagreement with your colleagues? Would you approach this case any differently as a federal district court judge?

While I joined the Court in unanimously rejecting several claims of error offered by the defendant in this case, none of my colleagues joined my opinion as to the evidentiary hearing issue. As the opinion describes, my reasons for voting to require an evidentiary hearing on the claims of ineffective assistance of counsel turned largely on my interpretation of Missouri Supreme Court Rule 29.15. As expressed in the opinion, it was my feeling that the purpose of the Rule would be more surely and more swiftly carried out if the courts decided cases such as the one at issue there on the facts, instead of engendering an endless cycle of appeals that failed to consider the substance of defendants' claims. I would certainly approach this case differently as a federal district court judge. As I have noted, my opinion that an evidentiary hearing was required was based on state procedural, rather than federal constitutional grounds.

11. I remain curious as to why you would voluntarily leave the highest court in Missouri for the federal trial bench. Could you explain your reasons for making this move?

I believe that the federal court system has more of a variety of cases and issues to be decided. I look forward to the new challenges I would face in the federal system as a district court judge.

12. How would you contrast the roles of a Missouri Supreme Court Judge and a federal trial judge?

I think the roles are completely different. As a Missouri Supreme Court Judge, I review the law as applied by the appellate and trial court judges. While as a U.S. District Court Judge, I would apply the law as interpreted by the U.S. Supreme Court and U.S. Circuit Courts.

- 13 Is it your view that the will of the people and the consent of the governed is expressed only when the legislature acts?

It is my view that the will of the people and the consent of the governed are clearly expressed when the legislature acts. However, a court certainly cannot assume that the legislature has no interest, intent, or view on a particular subject, if the legislature has not acted. Accordingly, a court should not read the failure of the legislature to act as an invitation or opportunity for the court to act.

14. Do you believe that there is such a thing as constitutional right to privacy – not specifying if, for example, such a right includes the right to terminate a pregnancy – but, more broadly, is there a constitutionally-protected right to privacy?

Other than those rights contained in the Bill of Rights and expressed by the U.S. Supreme Court in case law there are no constitutionally-protected rights to privacy.

- 15 If so, which provision of the Constitution is the source of that right to privacy?

The Due Process Clause of the Fourteenth Amendment states that no state shall "deprive any person of . . . liberty." The Supreme Court, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992), stated: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." This realm of personal liberty includes a person's most basic family decisions. *Id*



**NOMINATIONS OF KIM McLANE WARDLAW  
AND JOHN D. KELLY (U.S. CIRCUIT  
JUDGES); RALPH TYSON, DAN POLSTER,  
ROBERT JAMES, AND RANER COLLINS (U.S.  
DISTRICT JUDGES)**

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**THURSDAY, JUNE 18, 1998**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.***

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl, presiding. Also present: Senators DeWine, Kohl, and Feinstein.

**OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR  
FROM THE STATE OF ARIZONA**

Senator KYL. The hearing will come to order. Welcome to this hearing of the Senate Judiciary Committee for the purpose of considering nominees to both the district and circuit courts of the United States.

The individuals who will be subject to consideration today are: for the circuit court, this for the eighth circuit court, John D. Kelly, of North Dakota; for the ninth circuit court, Kim McLane Wardlaw, of California; and for the district courts, first of all, from Arizona, Judge Raner Collins; from Louisiana, Robert James; for the Northern District of Ohio, Dan Polster; and for the Middle District of Louisiana, Ralph Tyson.

We will have a member of the minority, probably Senator Kohl, joining us briefly. I know that Senator DeWine is on the panel, so I will recognize Senator DeWine first.

Now, let me first set the procedure here. Given that Members of Congress are here, we will ask them to introduce nominees that they would like to introduce to the committee, and then, of course, the members are free to leave, although I suspect at least Senator DeWine, a member of the committee, might want to stay. Then after that is completed, we will have the circuit court nominees come forward, and they will be questioned and given an opportunity to introduce their families and friends who are here, and then following that, the nominees for the district court.

So, with that, let's begin with Senator Mike DeWine, a member of this committee.



**STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM  
THE STATE OF OHIO**

Senator DEWINE. Mr. Chairman, thank you very much. Let me thank you and also thank Senator Hatch for accommodating my request to have Dan Polster added to the list of nominees who will testify today.

I am pleased, Mr. Chairman, to be here today to introduce Dan Polster, who has been nominated to be the U.S. district judge for the northern district of Ohio. Dan's qualifications are clear from the numerous documents this committee has already received, so I will only mention just a few highlights from his very distinguished career.

He has been an assistant U.S. attorney for the economic crimes unit in the northern district of Ohio and, while in that position, prosecuted complex white-collar crime, fraud, and corruption cases. From 1976 to 1982, Mr. Polster was an attorney for the U.S. Department of Justice's Antitrust Division in Cleveland. He has also served as a law professor for the Cleveland Marshall School of Law.

Mr. Chairman, Dan Polster's civil and criminal law experience and the fact that he graduated with honors from Harvard Law School and Harvard College are not his only impressive credentials. He has also been active in serving the community. He serves on the legal committee and the board of trustees of a childcare resource and referral agency that helps many low- to moderate-income parents find affordable childcare so that they may work.

Dan Polster participates each year in the Jewish Welfare Campaign, which raises money for Jewish agencies in Cleveland and abroad to provide social services for those of all races and religions who cannot afford normal fees. He was on the board of trustees for the Jewish Community Federation, and before that he served as chairman to the board of governors at the Cleveland College of Jewish Studies.

Mr. Chairman, Dan Polster's legal experience and exceptional academic background make him very well qualified to serve as a U.S. district judge. I have received numerous letters from the greater Cleveland community, from northeast Ohio, as well as the rest of the State, in support of his nomination.

Let me just again thank you, Mr. Chairman, for holding this hearing, and I look forward to hearing his testimony.

Senator KYL. Thank you very much, Senator DeWine. I might also note that Senator Leahy has a statement for the record, which will include the record.

[The prepared statement of Senator Leahy follows:]

**PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY**

I began this year challenging the Senate to maintain the pace it set in the last weeks of the last session in which it confirmed 27 judicial nominees in 9 weeks. Instead, the Senate has confirmed only 30 nominees so far this year—instead of the 51 it should have if it had maintained last year's pace.

I reissue my challenge for the remaining 11 weeks of this session: The Republican Senate can confirm another 33 nominees by the end of the session if it will just work at the pace it achieved in connection with the President's radio address last year.

There are currently seven qualified nominees on the Senate calendar having been reported favorably by the Judiciary Committee weeks and months ago. The nomina-

tion held up the longest is that of Judge Sonia Sotomayor to fill a critical vacancy on the Second Circuit, a Circuit whose Chief Judge has declared an emergency situation, canceled hearings and taken the extraordinary step of proceeding with 3-judge panels including only one Second Circuit judge. Chief Judge Winter recently issued his annual report in which he notes that the Circuit now has the greatest backlog it has ever had, due to the multiple vacancies that have plagued that court.

In addition, there are 38 nominees pending before the Committee and more nominees being received from the President every week. I am delighted that we will be hearing from six outstanding nominees at this hearing this afternoon. I hope that the Committee will schedule sufficient hearings to give each of the 38 judicial nominees currently pending in Committee and the nominees we expect to be receiving over the next several weeks an opportunity to be considered by the Committee and confirmed by the Senate. At the rate of six nominees a hearing, that means that the Committee needs to schedule at least six more hearings this summer for currently pending nominees and even more as additional nominees are received over the summer.

The Senate continues to tolerate more than 70 vacancies in the federal courts with another 11 on the horizon—almost one in 10 judgeships remains unfilled, and, from the looks of things, will remain unfilled into the future unless we do better here in Committee and the Senate does better in considering these nominees. The Senate is not acting responsibly to end the judicial vacancies crisis. It has not kept up with normal attrition over the past two years. It is not even keeping up with Mark McGwire—who spotted us a 4-month headstart and still has proceeded to hit more homeruns this baseball season, 32, than the Senate has confirmed federal judges.

This is only the seventh judicial nominations confirmation hearing all year. I recall in 1994—the most recent year in which the Democrats constituted the majority—when the Judiciary Committee held 25 judicial confirmation hearings, including hearings to confirm a Supreme Court Justice.

Today we will hear from only two of the 12 nominees for vacancies on the Courts of Appeals around the country. Eight other nominees currently pending nominees for the Courts of Appeals need their hearings and need them promptly if they are to be considered and confirmed this year. I welcome Judge Wardlaw and Mr. Kelly and look forward to hearing from them.

We also will hear from four nominees to District Courts in Louisiana, Ohio and Arizona. I am sorry that another nominee from Louisiana was not included today. I do want to thank the Senator from Arizona for his commitment to chair this hearing and to commend all of the Senators who have sent statements and those who are attending this hearing today to support these nominees.

The Chief Justice of the United States Supreme Court has called the number of judicial vacancies “the most immediate problem we face in the federal judiciary.” I have urged those who have been stalling the consideration of the President’s judicial nominations to reconsider and to work with us to have the Judiciary Committee and the Senate fulfill its constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

The numerous, longstanding vacancies in some courts are harming the federal administration of justice. The people and businesses in these areas do need additional federal judges. Indeed the Judicial Conference of the United States recommends that in addition to filling the current vacancies, the Congress should authorize 55 additional judgeships throughout the country, as set forth in S. 678, the Federal Judgeship Act that I introduced last May. There is a clamor for us to fill these vacancies and there is harm by the Senate’s delay and failure to do so.

The Chief Justice of the United States Supreme Court pointedly declared in his 1997 Year End Report: “Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary.” Must we wait for the administration of justice to fail before the Senate will take this crisis seriously and act on the 45 judicial nominees pending before us? I hope not.

I trust that the Committee will proceed promptly to report these six fine nominees to the Senate and that the Senate will proceed to consider and confirm these nominees without delay. I hope the Committee will not delay in scheduling the additional hearings we need to hold to consider the fine men and women whom the President has nominated to fill these important positions.

Senator KYL. And I think what I might do is to pass for a moment on the two North Dakota Senators and allow you to introduce



your candidate. I will call that candidate to the dais. You can introduce the candidate at that time and actually begin the formal proceedings of our panel one, if that is satisfactory.

That would then take me to Senator John Breaux from Louisiana.

**STATEMENT OF HON. JOHN B. BREAU, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator BREAU. Thank you, Chairman Kyl, and thank the committee for the good work that you all have done in presenting for confirmation hearings two nominees from Louisiana. One of them is Judge Ralph Tyson. The average caseload in America for a district judge is around 400 cases per judge. In Baton Rouge, each judge has about 2,000 cases. This is four or five times more than the average district court anywhere in the United States. So it is very important to have someone appoint a judge capable of serving such a large number of cases.

Actually, what the committee did at our suggestion was to transfer a judge position from New Orleans eastern district to the middle district because the eastern district said they didn't need all of their judges, and we took that slot from New Orleans, with the help of the committee, and moved it to Baton Rouge, where it is very desperately needed. Judge Ralph Tyson is the type of person that can step in from the very first day and handle that type of caseload.

I have nothing against academicians and law professors becoming judges. We need those types on the bench as well. But we also need people who really understand people, because the district court is a people's court and that is where most of the business is done directly dealing with people and individuals. So it is my pleasure to join with Senator Mary Landrieu in supporting both of the nominees that we have before the committee today.

I would just point out that Judge Tyson, who is here with his family, brings over 25 years of legal experience to the bench. He has been an assistant district attorney, the chief city prosecutor, an assistant attorney general, and presently serves as an elected Louisiana district court judge in Baton Rouge on the State court. He has been noted for his outstanding work as a trial court judge and was named the chief criminal judge of the 19th Judicial State District Court. He brings all this experience and will start from day one with a wonderful record and career behind him.

I would like him just to stand. Judge, would you please stand? And your wife, Patricia, is here, and he has four children: Christopher, Todd, Ralph, Jr., and Cara; also a family friend, Terry Porter. We are glad to have them all here.

Senator KYL. We welcome you all to the committee. Thank you.

Senator BREAU. With that, we have one other nominee, Mr. Chairman, I would also like to bring to your attention. He is also a seated—a sitting—which is it?

Senator KYL. Sitting. You got it.

Senator BREAU. He is working right now in Louisiana as a judge. [Laughter.]

He is a sitting court judge in Louisiana, and his name is Judge Robert James—Robbie James, as we call Judge James.

There is a vacancy in the western district of Louisiana, and it has been vacant since November 15, 1996. So there is a real desperate need. We have been without a judge in that whole area and have had to rely on other judges to come and fill in, but the seat has been vacant since 1996.

Judge James has been a special assistant attorney general, serves as the chairman of the board of directors of his local bank, is very involved in local community affairs, and, of course, now serves as city court judge. He has been president of the State City Court Judges Association in Louisiana. He served as a juvenile judge and a special assistant attorney general and teaches law at the university.

So, again, in both these nominees you have quality, you have experience I think it is incredibly important to have those type of individuals added to the Federal bench. I would like to ask Judge Robbie James if he would please stand. We look forward to his confirmation hearing as well.

Senator KYL. And if you have other members of your family you would like to introduce, please do so.

Judge JAMES. Laurie Whitten. Also, I have three children that are all involved in commitments to internships, college, Ann, Adrian, and Andrew—I would like to mention their names—and my mother, Louise, who couldn't travel because of health, and my deceased father, Robert, whose name I would like to mention.

Senator KYL. It is good of you to mention all of them. Thank you. And I should have asked Dan Polster, introduced so well by Mike DeWine, to stand after Senator DeWine's introduction. Please feel free to introduce the members of your family who are here. We would like to know who all is here.

Mr. POLSTER. Thank you, Mr. Chairman. I have with me my wife, Deborah Coleman, and my mother, Elinor; my brother, Jonathan; three children, Joshua, Shira, and Ilana; my sister-in-law, Nancy—

Senator KYL. We are getting the staff back here saying, "Stand up." So please do.

Mr. POLSTER. My sister-in-law, Nancy Polster; my niece and nephew, Amanda and Jeremy Polster; my father-in-law, Louis Coleman—

[Laughter.]

Mr. POLSTER. My cousins, Steven and Caryn Wexler. And I'd also like to mention my dad, Louis Polster, who passed away 10 years ago but who is with me constantly.

Senator KYL. We appreciate all of you being here. Believe me, having practiced law for 20 years myself, I know it takes a strong family to support someone to get to this point. So we appreciate that very much. Thank you.

Senator BREAU. Mr. Chairman, I would just add that Senator Landrieu joins with me in this recommendation, and she may be coming.

Senator KYL. Yes, I understand that, and when she comes, we will call upon her, too. Thank you very much.

What I thought I would do next, since it is customary for the committee to consider the circuit court nominees first as a panel and then the district court nominees, since we have two circuit

court nominees and we have the four Senators representing the States of those two nominees, to hold their introductions for right now. And perhaps the way we could do it is this: I will call upon Senator Feinstein and Senator Boxer first to introduce their nominee, and then call upon Senator Conrad and Senator Dorgan to introduce their nominee. When you are called upon, please introduce the members of your family who are here or friends that you would like to introduce, and then come forward to the dais.

Let me begin with another member of the Senate Judiciary Committee, my colleague, Senator Dianne Feinstein, and I must say, by the way, when I saw Dianne Feinstein's nominee on here, I didn't ask any other questions about the quality of the candidate. I knew that that was good enough for me, and that really is the way that Senator Feinstein and I generally do business together.

So, Senator Feinstein, welcome to your committee, and the floor is yours.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Senator KYL. Senator Feinstein, could I ask you to hold for just one moment?

Senator FEINSTEIN. Of course.

Senator KYL. Since Senator Landrieu has just arrived and her nominee was just introduced by Senator Breaux, perhaps we could complete that introduction and then not break up the introduction of Ms. Wardlaw.

#### **STATEMENT OF HON. MARY L. LANDRIEU, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator LANDRIEU. Thank you, Mr. Chairman. Had I known I would have been first, I would have been here right on time.

Senator KYL. That is quite all right.

Senator LANDRIEU. I just knew I was on the first panel, so I apologize to my colleagues.

Senator KYL. Senator Breaux said you would be here shortly.

Senator LANDRIEU. Yes. And I know that Senator Breaux has already spoken, so I will just be brief. But I am very pleased to be here to put a good word in for Judge Tyson from Baton Rouge and Judge Robbie James from Monroe. Both are excellent candidates.

Judge Tyson for the middle district has served 25 years in the legal profession. Over the course of his professional career, he has gone from attorney in private practice to the district attorney's office, to his present position as the judge pro tem. This diverse experience will allow him to bring a unique perspective to the Federal bench. He is actively engaged in his community, just introduced into the Louis A. Martinet Legal Society Hall of Fame.

He is here with his mother, his wife, and his children, and one of his children—Chris—I am pleased to say, interned with me and has done a wonderful job, and I know that Chris is in the audience and want to acknowledge that.

For Judge Robbie James, from Monroe, 27 years of experience with the legal profession, he has been involved with both the study of law and teaching at Louisiana Tech University. He has just been awarded recently an outstanding award from Monroe, LA, the American Judges Association 1998 Public Official of the Year. So I am pleased—and his family is also here—to recommend both of



them for confirmation by this committee, Mr. Chairman, and I have other remarks I would like to submit for the record.

Senator KYL. Without objection, they will be included in the record. Thank you very much. They both have introduced their friends and family here, and we very much appreciate your support for them as well.

Senator LANDRIEU. Thank you.

Senator KYL. Thank you.

[The prepared statement of Senator Landrieu follows:]

PREPARED STATEMENT OF SENATOR MARY L. LANDRIEU

I am very pleased to offer my strong support to the nomination of Ralph Tyson, of Baton Rouge, Louisiana, nominee to the United States District Court for the Middle District of Louisiana.

It is most fitting that an individual of Judge Tyson's high standards and eminent qualifications be nominated for this very important position.

Judge Tyson comes to the committee with impressive credentials having served since March, 1993 as a judge for the 19th Judicial District Court, East Baton Rouge Parish, Louisiana and presently is the chief criminal judge of this court. He received a special appointment by the Louisiana Supreme Court as judge pro tempore for the Louisiana Court of Appeal, First Circuit, Baton Rouge, Louisiana, from May, 1997 to October 31, 1997. In addition, Judge Tyson served as a judge for the Baton Rouge City Court from November, 1988 to February, 1993 where he handled both civil and criminal cases. His distinguished 10 years of experience as a judge will serve him well as a Federal district judge.

Judge Tyson is a 1973 graduate of Louisiana State University Law Center. In addition, he has continued his active involvement in the study of the law by teaching administration of criminal justice at Southern University since 1989 and he was an adjunct professor teaching moot court at the Louisiana State University Law Center from 1989 to 1991.

Judge Tyson has a distinguished career in law and public service.

Among the professional associations to which Judge Tyson holds membership are the American Bar Association and the National Bar Association. Furthermore, Judge Tyson is a member of the Louis A. Martinet Legal Society and was inducted into the Louis A. Martinet Legal Society Hall of Fame on May 9, 1998.

It is important to note that during his career, Judge Tyson has also served with distinction in a number of responsible positions outside the legal profession. He has been very active in his community and currently serves on the board of directors for the Wesley Foundation at Southern University. In the past he has been a member of the board of directors for such civic service organizations as the Audubon Girl Scout Council, the Baton Rouge Food Bank and St. Joseph's Home.

Prior to serving as judge, Mr. Tyson was the chief city prosecutor for the city of Baton Rouge from 1979 to 1988 where he supervised all prosecutions on behalf of the city. Also, he held the positions of assistant district attorney for east Baton Rouge Parish from 1976 to 1979 and assistant attorney general for the Louisiana Department of Justice from 1974 to 1976. From 1973 to 1988 Judge Tyson maintained a general law practice with the law firm of Tyson, Avery & Cunningham in Baton Rouge.

Judge Tyson has been married for 25 years to Patricia Jordan Tyson and has four children: Christopher, Todd, Ralph and Cara. His wife, his four children and his mother, Theresa D. Tyson are in attendance today.

I have found Ralph E. Tyson to be very professional and competent as a judge and community leader. Moreover, I am confident he possesses the necessary judicial temperament to serve on the United States District Court for the Middle District of Louisiana.

In sum, I believe that Mr. Tyson possesses the integrity, appropriate demeanor and aptitude for legal scholarship that will enable him to serve with distinction if he is confirmed.

Mr. Chairman, Ralph E. Tyson is imminently qualified to serve as a judge to the United States District Court for the Middle District of Louisiana and I strongly urge the committee to act favorably on his nomination.

I am very pleased to offer my strong support to the nomination of Robert James, of Ruston, Louisiana, nominee to the United States District Court for the Western District of Louisiana.

It is most fitting that an individual of Judge James' high standards and eminent qualifications be nominated for this very important position.

Robert James comes to the committee with impressive credentials having served since 1985 as a judge for the Ruston City Court. He has served on the bench with distinction having been elected three times without opposition. In addition, he was recently recognized for 10 years of voluntary service as a juvenile judge for Lincoln and Union Parishes and was a special assistant attorney general. From 1971 to 1984 he maintained a general practice of law in Ruston, Louisiana. His distinguished 13 years of experience as a judge will serve him well as a Federal district judge.

Judge James is a 1971 graduate of Louisiana State University Law School. In addition, he has continued his active involvement in the study of the law by teaching business law at Louisiana Tech University.

Judge James has a distinguished career in law and public service.

Among the professional associations to which Judge James has held membership are the American Judge's Association where he was director from 1995 to 1996, the American Bar Association, the Louisiana City Judge's Association where he was director and the supreme court ethics committee.

It is important to note that during his career, Judge James has also served with distinction in a number of responsible positions outside the legal profession. He has been very active in his community such as his position as chairman of the board of directors for Dubach State Bank. He has received numerous honors and awards for his work in education and the prevention of domestic violence. He is a member of the board of directors of the Domestic Abuse Resistance Team, Inc. and has been recognized by the Mayor's Commission on Women for Work in the Field of Domestic Violence. In 1998, he received the Public Official of the Year Award from the National Association of Social Workers for the region of Monroe, Louisiana.

Judge James is the father of three children: Adrian, Andrew and Ann.

I have found Robert Gillespie James to be very professional and competent as a judge and community leader. Moreover, I am confident he possesses the necessary judicial temperament to serve on the United States District Court for the Middle District of Louisiana.

In sum, I believe that Mr. James possesses the integrity, appropriate demeanor and aptitude for legal scholarship that will enable him to serve well and with distinction if he is confirmed.

Mr. Chairman, Robert Gillespie James is eminently qualified to serve as a judge to the United States District Court for the Western District of Louisiana and I strongly urge the committee to act favorably on his nomination.

Senator KYL. Now, if I could ask the circuit nominee introducers to hold for just 1 more minute, Senator Glenn has joined us; and since the Ohio nominee has already been introduced also by Senator DeWine, perhaps, Senator Glenn, I could call upon you, in effect out of order, to introduce your nominee again.

#### **STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO**

Senator GLENN. Thank you very much, Mr. Chairman. I really am sorry I was not—I was in another meeting over there and was involved in a big conversation and couldn't get over here in time, so I am very sorry.

Thank you much, and it is a pleasure to be here to help introduce Dan Polster, an Ohioan who has been nominated by the President to serve as a Federal district court judge for the Northern District of Ohio. Mr. Polster is certainly worthy of appointment. He has had a very distinguished career as a prosecutor and was the unanimous selection of the Ohio Federal Judicial Review Commission, which was a bipartisan commission I established to recommend—they only have one instruction, and that is to get the



most highly qualified individuals to serve on the Federal bench. That is the only instruction I have given them.

Before I go on to describe Dan further, I want to take a moment to recognize some of the many—and I emphasize many—members of Dan's family. I don't know whether they were all introduced here.

Senator KYL. He introduced them all. It took a while, and we enjoyed it. [Laughter.]

Senator GLENN. I don't know whether—the Wexlers, were they introduced also?

Senator KYL. Yes.

Senator GLENN. Everybody was. I don't know who is minding the store in Ohio today, but we are glad everybody could be here, anyway.

Rather than trying to go through all of Dan's considerable accomplishments, I would just highlight some of the achievements that I believe make Dan an outstanding nominee to serve as a U.S. district court judge.

Dan Polster is a graduate of Harvard College and Harvard Law School. He has been a career Federal prosecutor for nearly 22 years, first with the Antitrust Division, and for the past 16 years with the U.S. Attorney's Office. He has prosecuted a wide range of complex and high-profile fraud and corruption cases.

He serves as the ethics officer for the U.S. Attorney's Office and also as the professional responsibility officer for the Criminal Division, providing guidance on delicate questions of legal ethics that arise during investigations and prosecutions. He is also chairman of the Ohio Insurance Fraud Task Force.

In addition, Dan has served as a neutral evaluator in the Federal District Court's Alternative Dispute Resolution Program and has been a panelist at continuing legal education programs in the areas of white-collar crime and legal ethics. Dan has been an instructor at the Cleveland Marshall School of Law and has lectured on various continuing legal education topics.

He has been very active in community service, particularly in the areas of Jewish education, early childhood development, childcare, and hospice care. He has chaired the boards of two educational institutions: the Cleveland College of Jewish Studies and the Agnon School. And Dan has received numerous professional and civic awards recognizing his excellence as a prosecutor and his commitment to his community. These awards include two special achievement awards and a special commendation from the Department of Justice, a commendation from the Department of Labor, the Jewish Community Federation's Kane Award for Young Leadership, as well as an honorary doctorate from the Cleveland College of Jewish Studies.

Mr. Chairman, I am very proud to be able to recommend Dan Polster to you. I think just from the things I have read here we really have an outstanding candidate, and so I make this recommendation without any reservation whatsoever. I believe he will make an outstanding judge, and I look forward to his swift confirmation.

Before I conclude, Mr. Chairman, I wanted to thank my colleague, Senator DeWine, who is here today, of course, for arranging

this hearing. Senator DeWine has done an extraordinary job on this committee in seeing to it that Ohio's judicial vacancies are filled, and I appreciate his efforts greatly.

Thank you, Mr. Chairman.

Senator KYL. Thank you. Thank you, Senator Glenn.

I should also note that leaves one Federal district judge nominee who hasn't been introduced. I have reserved that honor and pleasure to myself, since he is from my home State of Arizona, and I will do that at the time that all of the district court nominees are presented.

With that, Senator Feinstein, again, my apologies. The floor is yours.

### STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

I am very pleased to be here with my friend and colleague, Senator Boxer, to support the nomination of Judge Kim Wardlaw to the Ninth District Court of Appeals. Actually, we were both here in 1995 when I had the honor of recommending Kim Wardlaw, then not a judge, to the district court, and the President nominated her. Not only that, but she had one of the fastest confirmations that I know of before this body. She won the unanimous support of the Judiciary Committee and the entire Senate, and I hope that will be the case again.

Her record of service, both in the private and public community, is highly respected. She has spent 2½ years now on the Federal district court. For those of you who are not familiar with her background, she graduated summa cum laude from the University of California at Los Angeles. She was Phi Beta Kappa. She received the departmental highest honors.

She continued at UCLA Law School, where she graduated fifth in a class of 300. She served as an extern for Judge Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit. She was articles editor for the Law Review. In fact, she has been named Outstanding Graduate in the Class of 1979 by the UCLA Law School alumni.

From 1987 until the time she joined the U.S. district court in 1995, she served as a partner in the litigation department of the Los Angeles law firm of O'Melveny & Myers, where she has handled all phases of complex civil litigation, in both State and Federal courts.

For her work in that capacity, she has also won numerous honors. California Law Business named her as one of California's top 25 lawyers under the age of 45. I won't ask if she is still under the age of 45. The Los Angeles Business Journal named her one of the 100 most prominent business attorneys in Los Angeles County. And the Women Lawyers Association of Los Angeles awarded her the 1995 Member of the Year Award, partly in tribute for her tireless efforts as president of that association.

She has also served as a trustee of the Los Angeles County Bar Association, an active member of the State bar, and treasurer of the Association of Business Trial Lawyers.

Since joining the Central District Court on December 26, 1995, she has earned the respect of her colleagues on the bench and the Los Angeles legal community at large. She has strong, bipartisan support. I think she is going to make an outstanding member of the ninth circuit, which many have criticized, and with some justification.

Among her supporters, we have letters from Judge Dickran Tevrizian of the Central District of California, Los Angeles Mayor Richard Riordan, Dean Prager of the School of Law at UCLA, Dean Cowan of the Annenberg School for Communication at USC, His Eminence Cardinal Roger Mahony, the Archbishop of Los Angeles, as well as a host of others, and if I might ask unanimous consent that letters be entered into the record as well.

Senator KYL. Without objection.

[The letters follow:]

UNITED STATES DISTRICT COURT,  
Los Angeles, CA, February 5, 1998.

Re Judge Kim McLane Wardlaw, Ninth Circuit Nomination.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am taking the liberty of writing to you and the Committee to recommend my colleague, Judge Kim McLane Wardlaw, for United States Senate confirmation as a judge of the Ninth Circuit Court of Appeals. It is a privilege for me to be able to write to you on behalf of such a well-qualified and experienced individual.

I have personally known Judge Wardlaw and her husband, William, on both a personal and professional basis for some period of time. For the past two years, Judge Wardlaw has been a distinguished member of the bench for the United States District Court for the Central District of California. During that period of time, she has distinguished herself as an outstanding jurist and able administrator. Judge Wardlaw's professional experience and personal and professional reputation are exceptional and unimpeachable. Judge Wardlaw has earned and maintains a well-deserved reputation in the community for excellence. I know Judge Wardlaw to be a hardworking intelligent and competent judge. In addition, she has a very pleasant judicial demeanor.

When Judge Wardlaw was appointed to the United States District Court for the Central District of California, she was assigned a rather heavy caseload with many cases being unattended for a period of time due to the medical disability of the prior judge. Judge Wardlaw immediately went to work and within a short period of time brought the delinquent cases current and resolved most of them.

I was elated when the President nominated Judge Wardlaw to fill a vacancy on the Ninth Circuit Court of Appeals. When I was contacted by representatives of the Department of Justice and the American Bar Association performing the background check on Judge Wardlaw's proposed nomination, I commented that, as a "middle of the road", somewhat conservative Ronald Reagan appointee, I felt comfortable with Judge Wardlaw's nomination. Judge Wardlaw's tenure on the trial court has demonstrated to me that she decides cases on the basis of legislative intent and judicial precedent. Judge Wardlaw is not what has been referred to in the media as a "judicial activist."

I am of the opinion that Judge Wardlaw's elevation would be consistent with the stated objectives of appointing persons mindful of the separation of powers, judicial restraint and the rights of victims.

I respectfully urge you to consider Judge Wardlaw's nomination favorably.

Cordially,

DICKRAN TEVRIZIAN,  
*Judge, United States District Court.*



UNIVERSITY OF CALIFORNIA,  
LOS ANGELES,  
Los Angeles, CA, March 9, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,  
The U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am very pleased to recommend Ms. Kim McLane Wardlaw to you for a federal judicial appointment. I have known Kim for over eighteen years now, first as one of her professors while she was in law school and during the last 15 years in my capacity as Dean of the UCLA School of Law.

Kim is highly accomplished and warmly respected. She has all the qualities that combine to make a great judge. These include fine intellectual judgment, strong analytical skills and an ability to combine attention to technical detail with a broad perspective on the policies served by the particular area of law she is considering. Kim also combines toughness with compassion. She writes beautifully, has tremendous energy and enthusiasm, works relentlessly and with a high level of productivity.

Kim was a spectacular student in a highly competitive setting. Not only did she graduate 5th in her class of 286 students, but she served in the enormously demanding role of Articles Editor of the UCLA Law Review. In 1979, she received UCLA's campus-wide award, the Outstanding Graduate Award presented to a single graduate student annually by the UCLA Law Alumni Association. She earned the top grades in courses as disparate as Family Law and Business Associations. Apart from all this, she was not only respected but well-liked by faculty and by her fellow students. Never arrogant, Kim always communicated a strong personal concern for other human beings and, as her career has proceeded, she has reflected particular leadership for women.

I recently had the opportunity to observe Judge Wardlaw. I watched her wisely advise a small group of law students. It was a truly extraordinary session. She did the best job I have observed during all my years as Dean in delivering a terribly important message: "whatever you choose to do, do it well." She did so informally, in a highly nuanced way and with impressive force. Kim is a person who sets very high standards, lives them herself as well as articulating them.

Kim McLane Wardlaw will make an outstanding appellate judge, brilliant, thoughtful, cognizant of her role and thoroughly dedicated to it.

Sincerely,

SUSAN WESTERBERG PRAGER,  
*Dean, School of Law.*

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*Los Angeles, CA, February 5, 1998.*

Hon. ORRIN G. HATCH,  
*Senate Russell Building,  
Washington, DC.*

DEAR SENATOR HATCH: I hope all is going well with you and your family. I write today on a matter of great personal importance. I wish to voice my wholehearted support for the judicial appointment of Kim Wardlaw to the Ninth Circuit Court of Appeals.

I have known Kim for fifteen years. She served as Senior Advisor for my mayoral campaign, and was responsible for my televised debate preparation. During my campaign I relied on her extensively for input on numerous policy issues. More importantly, I am very close friends with Kim and her husband. I was pleased to be asked to become godfather to their daughter, Katie Ann at her baptism. Because of our close relationship, I have asked Kim to preside over my upcoming marriage ceremony.

I last wrote on Kim's behalf in support of her appointment to the District Court for the Central District of California. As I predicted, she has rapidly developed an outstanding reputation as a federal judge. She has been moderate, business-oriented, tough on crime, and carefully adheres to controlling legal precedent. As the enclosed articles note, her nomination has received high praise from all quarters. She has demonstrated she has the intellectual capacity for the job, and has handled numerous lengthy, high-profile cases. She is well-respected by colleagues appointed from both sides of the aisles, and has widespread support from prominent members of the Los Angeles business and legal communities.

Her academic and professional background will serve the Court of Appeals well. As a partner at O'Melveny and Myers, she represented many Fortune 500 compa-

nies. She had a reputation as an intelligent, fair minded, creative and high-skilled attorney. She was strong, but always collegial, advocate of her positions. Her extensive training and experience in numerous areas of federal legal practice, particularly business litigation, has contributed to her excellence as a federal judge. She has devoted much of her life to public service. She is active in both community and professional associations.

But, above all, Kim remains a trusted friend and confidant. She is a person of honesty and integrity. I have total and complete faith and confidence in her. With your prior support, she fulfilled her dream of becoming a federal district court judge. She now has been nominated for a well-deserved elevation. It is my sincere hope that the Senate Confirmation Hearings will be conducted with all due speed so that the Ninth Circuit might benefit from her moderating influence.

If you have any further questions about Kim or her appointment, please call me anytime. If there is anything I can do to further her confirmation, please let me know.

Sincerely,

RICHARD J. RIORDAN,  
Mayor.

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UNIVERSITY OF SOUTHERN CALIFORNIA,  
ANNENBERG SCHOOL FOR COMMUNICATION,  
Los Angeles, CA, February 17, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am delighted to send you the strongest possible letter of support for Judge Kim McLane Wardlaw of the United States District Court for the Central District of California who is now being considered for appointment to the United States Court of Appeals for the Ninth Circuit.

I have known Kim for almost 25 years, since her undergraduate days at UCLA. Even then, she was brilliant, driven, committed, and highly ethical, qualities that were then and remain tempered by a fine sense of proportion and humor. Not that it matters now, but she earned an outstanding "A" in a class that I taught in Communications Law, a fact that was no surprise since she earned an "A" in everything else, but that became relevant as I watched her spectacular career at UCLA Law School. While serving as Articles Editor of the Law Review and earning every award in sight, Kim managed to find time to do an outstanding job as my teaching assistant in an undergraduate course in First Amendment law. She was a superb teacher, combining love of the law with exceptional human skills.

In the years since then, I have known Kim in a number of capacities and have always been enormously impressed. As the hiring partner at O'Melveny, she played a very special role in the life of several UCLA Law School students whom I knew, encouraging them, mentoring them, hiring them, and promoting them, always with the same qualities that had made her such a great teacher. From time to time, we discussed her cases, and I always saw that same special mixture of brilliance and commitment.

More recently, while I was serving as Director of the Voice of America, I had the chance to witness Kim's emergence as a mature, thoughtful, respected jurist, and upon returning to Los Angeles in this new post, I found that she had earned an outstanding reputation for balance, maturity, good judgment, and intelligence—all qualities one would hope to have on an appellate court.

From every standpoint, I think that Judge Wardlaw would make an outstanding member of the U.S. Court of Appeals for the Ninth Circuit.

Sincerely,

GEOFFREY COWAN,  
Dean.

ARCHDIOCESE OF LOS ANGELES,  
OFFICE OF THE ARCHBISHOP,  
Los Angeles, CA, February 6, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to support the nomination of Federal District Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals for the Western States.

I have known Judge Wardlaw and her husband, William, for some twelve years now. When I was first installed as the Fourth Archbishop of Los Angeles, Mr. William Wardlaw was the General Counsel for the Archdiocese of Los Angeles, and I learned early on of the great integrity of him and his wife.

It was my privilege to baptize both of their children, Billy (age eight) and Katie Ann (age two and a half). They have been wonderful personal friends over the years, and we have worked closely together on many projects and efforts for the good of the City of Los Angeles and Southern California.

When I was elevated to the College of Cardinals in 1991, Bill and Judge Wardlaw were present in Rome for those very special ceremonies. I was so pleased to have them present with me and to share in the great honor bestowed upon the City of Los Angeles and the Archdiocese of Los Angeles.

The Wardlaw family is one of the finest Catholic families here in Los Angeles, and they are a family of very deep spiritual values as well as great integrity and commitment.

I was very pleased when Judge Wardlaw was appointed to the United States Federal District Court here in Los Angeles, and I continue to follow her career with great interest and approval. Judge Wardlaw has gained a tremendous reputation for her knowledge, expertise, integrity, and compassion while serving as a District Judge. Her rulings on the bench have been widely acclaimed as extraordinarily fair and just, and her writing abilities suit her for advancement to the Court of Appeals.

I wish to support the nomination of District Court Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals without reservation of any kind, and I am hopeful that you and the Senate Judiciary Committee will give her fair consideration at a hearing as early as possible. I realize that there are several vacancies on the Ninth Circuit Court of Appeals, and I can assure you that the Judiciary Committee could do no better than nominating Judge Wardlaw to that Court of Appeals.

Thanking you for the opportunity to offer my recommendation on behalf of Judge Wardlaw, and with kindest personal regards, I am

Sincerely yours,

His Eminence Cardinal ROGER MAHONY,  
*Archbishop of Los Angeles.*

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ADVANCED MICRO DEVICES, INC.,  
Sunnyvale, CA, March 2, 1998.

Re Judge Kim McLane Wardlaw (Ninth Circuit Nomination)

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am the General Counsel and a corporate officer of Advanced Micro Devices, Inc., a multi-billion dollar a year semiconductor company in the Silicon Valley. I began my legal career as a law clerk to a Ninth Circuit judge, and therefore know first hand what federal appellate jurisprudence entails and requires. I am writing to support the President's nomination of Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals. This nomination should draw applause from both sides of the aisle in the Senate. I believe I echo the sentiments of the entire Silicon Valley legal and business community in urging that your Committee act favorably and quickly on Judge Wardlaw's nomination.

I have known Judge Wardlaw from the beginning of her career. As you know from her nomination to the Central District of California, she graduated at the top of her law school class at UCLA. Following graduation, she had the great fortune of clerkship for one of the most respected Los Angeles federal court jurists, William Gray, Judge Gray, now deceased, would be indescribably proud of Judge Wardlaw's accomplishments on the same bench he served so well, and on her well-earned nomination to the Ninth Circuit.



I was a young trial lawyer at O'Melveny & Myers when Judge Wardlaw joined the firm. I know you are familiar with the firm and its quality. Judge Wardlaw and I practiced law together as trial lawyers for approximately 15 years. She distinguished herself greatly at O'Melveny—no small feat given the quality of the partnership—as a gifted legal intellect and writer. I will not belabor her accomplishments at O'Melveny, as I am sure some of the partners whom you know personally and regard highly will sing her praises directly to you.

Instead, I would like to focus on what Judge Wardlaw's nomination means to the technology community here in the Silicon Valley and generally in the West. The business of technological invention and related product development and marketing is singularly driving GDP growth. As technology pushes the economy forward, it also pushes the frontiers of the law. The issues facing the federal courts in the Ninth Circuit today in technology and intellectual property cases are extraordinarily complicated. As the Ninth Circuit is presently populated, there are few judges with significant experience in technology and intellectual property subjects. Judge Wardlaw, in contrast, is an expert in intellectual property law. I believe that is one of the reasons why she has been so successful and highly regarded as a federal district court judge in California. Her contribution to the quality of federal appellate jurisprudence in intellectual property cases will be considerable.

From the perspective of technology companies like AMD, we need federal judges who can understand the issues arising out of technology, and who can craft opinions based on a deep understanding of technical intellectual property law, the Congressional policies underpinning the law, and the practical implications of judicial decisions for the world of innovation and invention. We likewise need Ninth Circuit judges who understand that decisions in intellectual property disputes must be made very quickly in order to provide meaningful and fair dispute resolution; otherwise, the passage of time determines winners and losers regardless of the merits of the case. It is hard to conceive of a better Ninth Circuit nomination than Judge Wardlaw from the Silicon Valley perspective.

My Silicon Valley perspective aside, I assure you that, in all respects, Judge Wardlaw will be an excellent Ninth Circuit judge. She will pursue the law with academic excellence and objectivity, she will distinguish the Court with her intelligence and common sense, and she will work with the same feverish intensity that distinguished her career as a trial lawyer and trial judge. She will be a straightforward, moderate if not conservative appellate judge, precisely as she has distinguished herself on the District Court.

I urge that Judge Wardlaw's nomination be confirmed on the recommendation of your Committee as quickly as possible.

Respectfully,

THOMAS M. MCCOY,  
*Vice President, General Counsel and Secretary.*

WILLIAM E. SIMON & SONS,  
*Los Angeles, CA, April 13, 1998.*

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I write in strong support of the President's nomination of Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals.

I am the Executive Director of William E. Simon & Sons, a private investment firm with core activities which include real estate investment and management, private equity investments in leveraged buyouts, and later state venture capital and capital markets activities. The Firm has offices in Los Angeles where I am based, and in Morristown, New Jersey. In addition, I am a former Assistant United States Attorney for the Southern District of New York. I enclose a copy of my curriculum vitae for your reference.

I have known Judge Wardlaw and her husband, Bill, for approximately six years, principally on a social basis and through our mutual involvements in several philanthropic activities here in Los Angeles. From that perspective, I can state unequivocally that Judge Wardlaw is a person of the highest integrity and character, as well as highly intelligent and articulate.

From a professional perspective, I have had no experience with Judge Wardlaw. I have endeavored to become more familiar with her capabilities and reputation in the legal world so as to be able to frame a more comprehensive recommendation, rather than one based solely on personal judgment. I felt competent to undertake this inquiry in great part because of my background as a litigator for an outstanding

firm in New York City, and my experience in the public sector as an Assistant United States Attorney under Rudolph W. Giuliani.

In that regard, I have read every opinion written by Judge Wardlaw as well as interviewed numerous attorneys familiar with her work, including several of her former partners at O'Melveny & Myers, and partners at several other fine firms either who have appeared before her or who are personally familiar with her work while she was engaged in active practice.

The view expressed by her professional peers were unanimously favorable from the standpoint of her work ethic, judicial temperament, legal intellect, and writing skills. In my view, all these characteristics are critical to the profile of an outstanding jurist, particularly at the appellate level. I will note too that the opinions expressed by these individuals were wholly consistent with my own more personal experience.

In addition, I know from their remarks, as well as my own conversations with her, that Judge Wardlaw possesses a unique and important expertise in the area of intellectual property. I am told that this expertise is presently lacking on the Ninth Circuit.

As you no doubt are aware, intellectual property is one of the fastest growing areas in litigation, both at the trial and appellate levels. In light of the continuing revolutionary developments in technology, I can see no reason why the growth in cases involving questions relating to intellectual property will not also continue to increase. Therefore, I believe that Judge Wardlaw's recognized competence in this area will serve the Ninth Circuit well.

Finally, with respect to her written work, I can say that Judge Wardlaw clearly is a very talented and thoughtful writer with a genuinely gifted legal intellect. Her opinions are characterized by evenhandedness and thorough analysis. I can understand why attorneys with whom I spoke were very impressed by Judge Wardlaw even when she delivered decisions adverse to their own clients.

Overall, I can absolutely recommend Judge Wardlaw without any reservation whatsoever and would urge the Judiciary Committee to recommend confirmation.

Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

WILLIAM E. SIMON, Jr.,  
*Executive Director.*

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HARDEE CAPITAL PARTNERS, L.P.,  
*Santa Monica, CA, June 5, 1995.*

Hon. DIANNE FEINSTEIN,  
*U.S. Senator,  
Washington, DC*

DEAR DIANNE: I would like to add yet another very strong endorsement for making Kim Wardlaw a United States District Court Judge. Her qualifications are obvious to anyone who takes time to examine her record. Kim graduated top in her class in law school, has become a first rate lawyer in one of the most important law firms in the country, and she has the respect of all of her peers in the bar. She has the background, intelligence, and motivation to be a first rate jurist.

In addition, Kim has the legal experience to translate how her actions as a jurist would economically impact business and thus the local community. This common sense approach is a rare quality for those of her superior academic credentials, intellect and an important bridge with the real world.

Please keep pushing to have Kim made a District Court Judge as soon as possible. I believe this would be her first step up the judicial ladder and will hopefully lead to her being one of the nine in Washington.

With best wishes.

Respectfully yours,

DAVID W. HARDEE,  
*General Partner.*



AMGEN,  
 Thousand Oaks, CA, April 3, 1998.

Hon. ORRIN G. HATCH,  
*U.S. Senator, Russell State Office Building,*  
*Washington, DC.*

DEAR SENATOR HATCH: The President has nominated Judge Kim McLane Wardlaw for the Ninth Circuit Court of Appeals. I do not know her personally, however, she has an outstanding academic record at a fine law school, UCLA. In addition, prior to becoming a judge, she was a partner in one of the very best law firms in Los Angeles.

Several people whose judgment I value highly have provided strong recommendations to me for her promotion. I believe that she would be highly competent from a legal standpoint.

I would be grateful if the Judiciary Committee gave her nomination very careful and thorough consideration.

Sincerely,

GORDON M. BINDER.

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MARVIN M. LAGER,  
 JUDGE OF THE SUPERIOR COURT,  
 Los Angeles, CA, April 4, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to strongly recommend your prompt and favorable consideration of District Judge Kim McLane Wardlaw, who has been nominated for the United States Court of Appeals for the Ninth Circuit.

As a Superior Court Judge I preside over civil cases. Previously, I was a Judge of the Municipal Court, where I presided over criminal cases. Before my appointment to the bench by Governor Wilson, I was a business litigation attorney practicing at the trial and appellate levels, including the Ninth Circuit.

I have known Judge Wardlaw for about ten years. Over these years Judge Wardlaw and I have participated together in bar activities, worked on the election campaign of Richard Riordan, now Mayor of Los Angeles, and more recently interacted as judicial colleagues. Based on these experiences, it is obvious to me that she is extremely smart, knowledgeable about the law, even tempered, moderate in her views, and exercises common sense. She is well known and respected in the Los Angeles legal community. In addition to her service on the District Circuit, she has been a partner in a major Los Angeles based law firm, served as President of a large and active bar association, and sat by designation on the Ninth Circuit.

There is a concern, which I share, that some judges do not appreciate their limited Constitutional role. Judge Wardlaw is not such a judge. Her work on the Ninth Circuit—I am confident—will be appropriately constrained by accepted Constitutional doctrine and legislative will.

Judge Wardlaw would be an excellent addition to the Ninth Circuit.

Very truly yours,

MARVIN M. LAGER.

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MATTEL, INC.,  
 El Segundo, CA, April 3, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,*  
*Russell Senate Office Building, Washington, DC.*

DEAR SENATOR HATCH: I am writing to support the nomination of Judge Kim Wardlaw to the Ninth Circuit Court of Appeals.

I am President-Corporate Operations and General Counsel for Mattel, Inc., the worldwide leader in the design, manufacture and marketing of children's toys. I joined Mattel 20 years ago as a Senior Attorney, and have served as the company's General Counsel for the past four years. Like other growing consumer products and high-technology companies, Mattel faces a number of cutting-edge legal issues—from laws governing intellectual property rights to those regulating electronic commerce and the Internet. With nearly two decades of experience in intellectual property law, Judge Wardlaw understands the issues facing out nation's high-tech companies as we prepare to enter the 21st Century. She has earned a strong reputation

on the Federal bench and has positioned herself as a moderate, business-oriented jurist. She has impressed the Los Angeles legal community with her intelligence, integrity and writing ability, and has attracted strong bipartisan support.

As your distinguished Committee proceeds with its nomination hearings, I urge you to move quickly to confirm Judge Wardlaw's selection. Thank you very much for your consideration.

Sincerely,

NED MANSOUR.

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HUGHES ELECTRONICS,  
Los Angeles, CA, February 20, 1998.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing in support of Judge Kim Wardlaw, who was recently nominated to a seat on the Ninth Circuit Court of Appeals. I have known Judge Wardlaw for many years, and have the highest respect for her both professionally and personally.

Judge Wardlaw has proven herself to be a fair and temperate jurist during her tenure on the district court. Her 16 years of experience as a business litigator with O'Melveny and Myers, one of the most prestigious law firms in the country, has given her a solid grounding in the kind of complex legal issues that can significantly impact a large company such as Hughes Electronics. From a business perspective, it is vital that judges apply the law in a consistent, balanced and intelligent manner. Judge Wardlaw has demonstrated not only the intellectual ability to grapple with complex business litigation, but also the savvy understanding that can only be gained from experience with the business world.

I have perhaps, a unique perspective on Judge Wardlaw's judicial abilities since my husband, Alex Kozinski, had the opportunity to work with her when she sat by designation on a Ninth Circuit panel. He confirmed that Judge Wardlaw is not only serious and hard-working, but that she is committed to faithful application of the law. I know that he shares the enormous respect I have for Judge Wardlaw.

On a more personal note, I know Judge Wardlaw as a warm, kind and generous person. She is a woman of integrity and honesty as well as charm and grace. She is a devoted wife and mother, who has a firm commitment to traditional family values.

While there are many who will attest that we need more judges confirmed, my own view, particularly as general counsel for a major Southern California company, is that more is not always better. We do, however, need more judges like Kim Wardlaw, particularly on the Ninth Circuit. I strongly urge that she be confirmed as expeditiously as possible.

Sincerely,

MARCY J.K. TIFFANY.

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THE CITY OF LOS ANGELES,  
LOS ANGELES CITY COUNCIL,  
Los Angeles, CA.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I was delighted to learn that U.S. District Judge Kim McLane Wardlaw has been nominated for a seat on the 9th U.S. Circuit Court of Appeals and would like to take this opportunity to offer my strong recommendation on her behalf.

Judge Wardlaw has gained wide respect during her service on the federal bench, where she has earned an outstanding reputation as an intelligent, fair-minded judge who is moderate, careful, business-oriented and tough on crime. She's known as someone who follows the law, with no ideological or activist agendas.

I have known Judge Wardlaw for a number of years and have found her to be a thoughtful person of high integrity, honesty and good humor. She has a strong academic and professional background as well as a distinguished record of community service, civic contributions and volunteer work for the City of Los Angeles.

I appreciate your giving these comments your consideration and hope that you will schedule a prompt hearing date for her Senate Confirmation Hearings.

Sincerely,

JOHN FERRARO,  
Councilman, 4th District.

O'MELVENY & MYERS, LLP,  
Los Angeles, CA, February 11, 1998.

Re Judge Kim McLane Wardlaw

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write to urge you and the members of the Senate Judiciary Committee to consider, as promptly as possible, President Clinton's nomination of Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals.

As one who practices regularly in the U.S. District Courts and the Ninth Circuit, I can state from personal knowledge the urgent need to fill existing vacancies. I cannot think of a better selection for the Ninth Circuit than Judge Wardlaw. Judge Wardlaw's tenure on the District Court has earned her the respect and praise from all corners of the California legal community as a thoughtful, considerate and careful judge.

As a Republican, I am very concerned about the quality of the Federal judiciary and its impact on my clients, which are primarily businesses that do not always feel they are treated fairly by our judicial system. I am extremely confident that Judge Wardlaw would, as she has been on the District Court, be fair to all those appearing before her, including business interests.

I have known Judge Wardlaw for more than 10 years. I first worked for her when I was an associate at O'Melveny & Myers, and later as her partner. During her 17 years at O'Melveny & Myers, Judge Wardlaw has served as a role model for several lawyers. But perhaps more important than my working relationship with Judge Wardlaw is the personal joy I take from her friendship. My family and I value our several years of friendship with Judge Wardlaw and her husband and children. I can say without question that she has the personal integrity and character to improve our Ninth Circuit.

I thank you and the Committee for your favorable consideration of Judge Wardlaw.

Very truly yours,

SETH ARONSON.

Senator FEINSTEIN. So I am just very pleased to be here again on behalf of Judge Wardlaw, and I hope this distinguished committee would view her with the same alacrity you did in 1995.

Thank you very much.

Senator KYL. Thank you, Senator Feinstein.

Senator BOXER.

# **STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you very much and, Senator Feinstein, I am delighted to be here with you. This is wonderful.

This committee said yes to this nominee once before, and we hope very much that you will say yes again. Your judgment was good, and it has been validated.

I wanted to say that Judge Wardlaw today is here with her husband, Bill, who is a very prominent person in his own right. We are very happy to see him here.

Rather than repeat, I will be very brief, Mr. Chairman, in the interest of time and because I thought Senator Feinstein went over it and hit all the high points. So I would ask unanimous consent that my statement be placed in the record.



Senator KYL. It will be placed in the record.

Senator BOXER. Mr. Chairman, let me simply quote just a few people to tell you what they think about this fine judge.

Richard Burge, the president of the Association of Business Trial Lawyers, had this to say about Judge Wardlaw:

Her expertise with business cases can make a real contribution to the ninth circuit, and business trial lawyers and their clients will welcome her confirmation by the Senate. Because the court of appeals is effectively the court of last resort, the intellectual ability to understand the legal precedent and the courage to apply it are critical attributes for a court of appeals judge. Judge Wardlaw has both.

And in a letter to Chairman Hatch, former ninth circuit Judge William Norris praised Judge Wardlaw's abilities and supports her nomination.

As was stated, Mayor Richard Riordan, who has known the judge for 15 years and who appreciated her service as his senior advisor, expresses his unwavering support.

Bernard Parks, the chief of police for Los Angeles, also supports Kim and says, "I have always been impressed with Judge Wardlaw's deliberative interpretation of the legal matters with which she is presented."

Republican district court judge for the central district of California, Judge Waters, says, "I believe that Judge Wardlaw would be a splendid addition to the Ninth Circuit Court of Appeals, and I would have complete confidence in her integrity, knowledge of the law, and intellectual ability."

J.W. Marriott, Jr., chairman of the board and CEO of Marriott International, was kind enough to convey the support of Joseph Ryan, Marriott's executive vice president and general counsel, for her elevation to the ninth circuit.

It goes on and on. I wanted, Mr. Chairman, just to speak of a few, because I think they show her strong, bipartisan support. And with that, I wish you very well, Judge Wardlaw, and I hope the committee will respond to you as they did the first time.

Senator KYL. Thank you very much, Senator Boxer. I would note the committee received many, many other recommendations as well, and I am well aware of them.

[Letters of Senator Boxer follow:]

DEWEY BALLANTINE LLP,  
Los Angeles, CA, February 23, 1998.

Re Judge Kim McLane Wardlaw

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to offer the highest recommendation possible for Judge Kim McLane Wardlaw for appointment to the Ninth Circuit Court of Appeals, and to urge you and the Senate Judiciary Committee to recommend confirmation of her nomination to the full Senate. Not only do I believe her to be exceptionally well qualified for the position, but she also has demonstrated the intellect, courage and compassion that will make her an outstanding addition to that bench.

Because, as a sitting United States District Court Judge, Judge Wardlaw has a track record that is open for review by the Committee, you certainly do not need my comments to add to that record. However, you may not be familiar with how high a regard the members of the practicing bar have for her talents as a judge. Suffice it to say that although the local bar will miss having her as a sitting trial judge should her appointment be confirmed, they will be more pleased for her to be a member of the Ninth Circuit Court of Appeals.

In particular, those of us who try business and commercial cases will welcome her on the Ninth Circuit because of her expertise in handling business cases. In June,

I will become the President of the Los Angeles Chapter of the Association of Business Trial Lawyers ("ABTL"), an organization that primarily provides educational programs for lawyers who try business cases. As such, our members mainly come from the larger law firms and handle those cases, including antitrust, securities and patent cases, that are commonly tried in the federal courts. Our members represent both plaintiffs and defendants, individuals and some of the largest corporations and financial institutions. Judge Wardlaw has served on the ABTL Board of Governors, both when she was in private practice and since she has been on the bench. She is highly respected within our organization and in the commercial bar in general for her understanding of complex business litigation. While in private practice, she handled some extremely complex business cases, and she has had her share as a sitting District Court Judge. Her expertise with business cases can make a real contribution to the Ninth Circuit, and business trial lawyers and their clients will welcome her confirmation by the Senate.

I would feel remiss, however, if I did not disclose a personal bias I have for Judge Wardlaw. She and I have been close friends for more than twenty-one years, beginning when we found ourselves in all our first-year law school classes together. We studied for our law exams together, we were on the Board of Editors of the UCLA Law Review together, and we both litigated business cases for "big" firms in downtown Los Angeles. Most importantly, over the years our families have shared a mutual friendship that is very important to all of us. Her commitment to her family and to her friends and their families is yet another indicator of her character.

As a trial lawyer, I understand the importance of excellence in the Court of Appeals. For most cases, it is the last realistic chance for trial court errors to be corrected. In a case in which the law has not been applied properly, it is important for the litigants to have that opportunity to have those mistakes corrected. Because it is effectively the court of last resort, the intellectual ability to understand the legal precedent and the courage to apply it are critical attributes for a Court of Appeals Judge. Judge Wardlaw has both. Equally important is the ability to articulate decisions carefully and clearly in writing, for those written opinions are the law that we all work with in the trial courts. In that area as well, Judge Wardlaw has distinguished herself in every level of her career.

In short, I can think of no one that I could recommend more highly for the position.

Sincerely yours,

RICHARD J. BURDGE, JR.

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FOLGER LEVIN & KAHN LLP,  
Los Angeles, CA, February 19, 1998.

Re Judge Kim McLane Wardlaw

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR ORRIN: I am writing in support of Judge Kim Wardlaw's nomination to fill one of the vacancies on the Ninth Circuit. First, I must declare my personal bias because both my wife Jane and I are close friends of Kim. Jane, who is a financial services consulting partner with KPMG Peat Marwick, shares my high regard for Kim both personally and professionally.

Before I retired from the Ninth Circuit a few months ago, Judge Kozinski and I had the good fortune of having Judge Wardlaw sit with us on a panel by designation. At conference we agreed unanimously that a bankruptcy question was controlled by a prior Ninth Circuit case, but that the case had been wrongly decided. Judge Wardlaw graciously volunteered to take the writing assignment and produced an opinion that Judge Kozinski and I readily concurred in. *See* 110 F.3d 1470. Although she followed our prior case because it was controlling precedent, she went on to explain why we thought it had been wrongly decided. In this way, she made a contribution to the law of the circuit by identifying an important issue of bankruptcy law that warranted en banc review. Based on Judge Wardlaw's opinion, the full court voted to take the case en banc (122 F.3d 1250), and it is now under submission following reargument.

Judge Wardlaw and I share a common professional background. Both of us were complex business litigators before going on the bench. I would like to think that this background enabled me to make a special contribution to the law of the circuit in important, if not glamorous, areas of federal law such as securities, antitrust and tax. I believe that my background as a business litigator was appreciated by my



former colleagues on the Ninth Circuit, and that they would also appreciate the special contribution Kim could make to the commercial law of the circuit.

On a personal note, Jane and I recently shared a delightful weekend at our home in Deer Valley with two old friends of yours, Nancy McGregor and Neil Manne. As you may know, Neil has established himself as a superstar trial lawyer at Sussman Godfrey in Houston. Neil was one of my original law clerks in 1980-81 before moving on to Washington where he served on the staff of the Senate Judiciary Committee and later as chief of staff for Senator Specter.

More importantly, while he was in Washington, he met Nancy McGregor, who was then fresh out of Harvard Law School. Nancy, as you have known much longer than I, is the daughter of Jack McGregor, your old law school friend. Incidentally, Neil recalls that someone told him that you were Jack's campaign manager when he was elected to the state senate in Pennsylvania while still a law student at Pitt. Nancy has a different recollection but admits that her credibility is suspect because she was only five at the time. Perhaps you or Jack should settle this family dispute.

Perhaps we can schedule Neil and Nancy's next visit to Deer Valley when you are back home so that we all can have dinner together.

Sincerely,

WILLIAM A. NORRIS.

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CITY OF LOS ANGELES,  
Los Angeles, CA, February 5, 1998.

Hon. ORRIN G. HATCH,  
*Senate Russell Building,*  
*Washington, DC.*

DEAR SENATOR HATCH: I hope all is going well with you and your family. I write today on a matter of great personal importance. I wish to voice my wholehearted support for the judicial appointment of Kim Wardlaw to the Ninth Circuit Court of Appeals.

I have known Kim for fifteen years. She served as Senior Advisor for my mayoral campaign, and was responsible for my televised debate preparation. During my campaign I relied on her extensively for input on numerous policy issues. More importantly, I am very close friends with Kim and her husband. I was pleased to be asked to become godfather to their daughter, Katie Ann at her baptism. Because of our close relationship, I have asked Kim to preside over my upcoming marriage ceremony.

I last wrote on Kim's behalf in support of her appointment to the District Court for the Central District of California. As I predicted, she has rapidly developed an outstanding reputation as a federal judge. She has been moderate, business-oriented, tough on crime, and carefully adheres to controlling legal precedent. As the enclosed articles note, her nomination has received high praise from all quarters. She has demonstrated she has the intellectual capacity for the job, and has handled numerous lengthy, high-profile cases. She is well-respected by colleagues appointed from both sides of the aisles, and has widespread support from prominent members of the Los Angeles business and legal communities.

Her academic and professional background will serve the Court of Appeals well. As a partner at O'Melveny and Myers, she represented many Fortune 500 companies. She had a reputation as an intelligent, fair minded, creative and highly-skilled attorney. She was a strong, but always collegial, advocate of her positions. Her extensive training and experience in numerous areas of federal legal practice, particularly business litigation, has contributed to her excellence as a federal judge. She has devoted much of her life to public service. She is active in both community and professional associations.

But, above all, Kim remains a trusted friend and confidant. She is a person of honesty and integrity. I have total and complete faith and confidence in her. With your prior support, she fulfilled her dream of becoming a federal district court judge. She now has been nominated for a well-deserved elevation. It is my sincere hope that the Senate Confirmation Hearings will be conducted with all due speed so that the Ninth Circuit might benefit from her moderating influence.

If you have any further questions about Kim on her appointment, please call me anytime. If there is anything I can do to further her confirmation, please let me know.

Sincerely,

RICHARD J. RIORDAN,  
*Mayor.*

LOS ANGELES POLICE DEPARTMENT,  
Los Angeles, CA, February 19, 1998.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: It has recently come to my attention that Judge Kim McLane Wardlaw of the United States District Court has been nominated for appointment to the Ninth Circuit Court of Appeals. Experience has taught me to exercise discretion when offering a declaration or acting as a reference on behalf of a colleague. However, in this case, I am compelled and feel a strong sense of responsibility to lend my support in favor of this gifted jurist.

Having been a law enforcement practitioner for well over three decades, I am acutely aware of the urgent need for thoughtful and reflective representatives on the bench. For it is these magistrates who help to define the manner in which we live and lend credibility and purpose to the judiciary process. I have had the distinct pleasure of knowing Judge Wardlaw for many years. During that period, she has time and again demonstrated a reverence and love for the law that is unsurpassed by few. That she has served faithfully and with dignity during her tenure in the District Court system is powerful evidence of her commitment to the ideas of the equitable enforcement of the law. I have always been impressed with Judge Wardlaw's deliberative interpretation of the legal matters with which she is presented. Her knowledge and command of constitutional issues is near encyclopedic and gives those who appear before her Court the satisfaction of knowing that they were the recipient of just and uncompromising deliberation.

On the local front, Judge Wardlaw has distinguished herself on countless occasions through her active participation in governmental and municipal affairs. It was a result of her personal involvement that the City of Los Angeles was successful in securing the necessary funding to hire additional police officers and technical support for the Los Angeles Police Department. She has made numerous contributions to our City, most notably helping to elect a Mayor who has been a true ally in our continuing effort to remain tough on crime. I am also grateful because, unlike others, she has a thorough understanding of and sensitivity to issues that are of utmost importance to law enforcement. In my personal dealings with Judge Wardlaw, I have always found her counsel to be wise, her manner temperate, offering a sense of balance that at its core yields fairness and objectivity. The success of those who sit in seats of judicial prominence depends upon the approbation of those for whom they serve. In the case of Judge Wardlaw, she has indeed garnered the acceptance and respect of colleague and community alike. She truly embodies the integrity and commitment needed to succeed in this important post. She has indeed earned the right to take the next step on the ladder of increased responsibility.

Please know that my endorsement for Judge Wardlaw transcends any personal or partisan support and speaks graphically to the need of appointing a jurist to this Appellate Court who has a clear understanding of the needs of the people. I would therefore urge you to recommend Judge Wardlaw for nomination to the Ninth District Court of Appeals and that she receive the Committee's highest signature of support.

Thank you in advance for allowing me to express my advocacy.

Very truly yours,

BERNARD C. PARKS,  
Chief of Police.

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U.S. DISTRICT COURT,  
CENTRAL DISTRICT OF CALIFORNIA,  
Los Angeles, February 11, 1998.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing you in support of the appointment of District Judge Kim McLane Wardlaw to the Ninth Circuit Court of Appeals. While I will deeply regret the loss of Judge Wardlaw as a colleague on this Court as well the loss of her advice and counsel, I am persuaded that she will bring all of the necessary skills to the Ninth Circuit Court of Appeals and her appointment will enhance that bench. Her appointment will be a significant loss to this Court.

I have come to know Judge Wardlaw since her appointment to this Court and have had the opportunity not only of observing the end result of her judicial work,



but also have developed a personal friendship with her. In our Court, we have a lunchroom for the judges where we gather informally and have the opportunity to discuss mutual problems or to explore unique situations that develop in our individual courtrooms from day to day. Through these meetings, therefore, we are able to develop a more personal relationship as well as to come to understand the thinking and abilities of the members of our Court. So it is based upon this knowledge as well as my knowledge of cases which she has handled (a number of them quite high profile) that I have been able to assess her judicial endeavors. She has become a very solid member of the Court, is moderate in her views and has no discernible agenda other than to resolve cases based on the facts consistent with the applicable law. She has displayed marked intellectual skills as a judge and has shown diligence in preparing herself for her calendars in Court. Since we park in the same garage, I have seen her on a Monday morning returning to work with many heavily laden briefcases which encompass her weekend preparation for her calendar that week. As a senior judge, I know what this workload entails and am delighted that I no longer have as heavy a responsibility.

Judge Wardlaw has willingly and effectively participated in the administrative business of the Court. Her remarks are thoughtful, efficient and always constructive.

I am mindful, of course, of the dispute that has been swirling around the question of filling judicial vacancies for the past couple of years and I believe I understand the reasons for it. This recommendation of approval of her appointment is, therefore, not given lightly.

To the extent that political credentials may be of any weight, I would like to state that I was elected to four terms of the Assembly of the California Legislature as a Republican candidate, that I was appointed as United States Attorney for two terms by President Eisenhower, that I have served as State Chairman and Vice Chairman of the Republican State Central Committee and that I was appointed to the position that I now hold by President Gerald Ford.

I believe that Judge Wardlaw would be a splendid addition to the Ninth Circuit Court of Appeals and I would have complete confidence in her integrity, knowledge of the law and intellectual ability in grading my papers or appeal. I wholeheartedly urge approval of her nomination to the Ninth Circuit Court of Appeals.

Thank you for your courtesy.

Sincerely,

LAUGHLIN E. WATERS,  
Senior Judge.

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MARRIOTT INTERNATIONAL, INC.,  
CORPORATE HEADQUARTERS,  
Washington, DC, February 4, 1998.

Hon. ORRIN G. HATCH,  
U.S. Senate, Washington, DC.

DEAR ORRIN: In September of 1995 I wrote you with respect to Kim McLane Wardlaw. That letter, a copy of which is enclosed, was sent in support of Kim's nomination for the United States District Court for the Central District of California. You were supportive and Kim was confirmed by the Republican Senate in December of 1995. During the time Kim has been on the Federal bench she has demonstrated that she is not a judicial activist, but has followed precedent as a moderate, business oriented judge.

Kim is being proposed for elevation to the 9th Circuit. For the reasons given in our September 1995 letter, Joe Ryan, our Executive Vice President and General Counsel, continues to be quite supportive of her appointment. This letter is really to convey his thoughts to you.

As always, if you have any questions, please feel free to call Joe at (301) 380-7553.

Best personal regards,

J.W. MARRIOTT, JR.

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SEPTEMBER 7, 1995.

Hon. ORRIN G. HATCH,  
U.S. Senate, Washington, DC.

DEAR ORRIN: Recently, President Clinton sent the name of Kim McLean Wardlaw, to the Senate for confirmation as a United States District Judge for the Central Dis-

trict of California. I understand that Kim's nomination could come to the Judiciary Committee early this month. Joe Ryan, our new Executive Vice President and General Counsel, was formerly the managing partner of O'Melveny & Myers, where Kim was also a partner. We thought it would be useful for you to have a little more background on her.

For your information, Joe was the best man at Kim and her husband Bill's wedding, and is the godfather of their son. The families have been close personally and professionally for over 20 years. Although Kim is a Democrat, in Joe's opinion she is not doctrinaire. She and her husband are close personal advisers to Richard Riordan, the Republican Mayor of Los Angeles. Kim is a very bright, extremely energetic, young woman who would improve the quality of the Federal bench in Los Angeles. Joe feels she can do the job and her nomination should be favorably considered. If you have any questions, you can call Joe at 301-380-7553.

Tom and Don Ladd are trying to arrange a meeting where they can introduce Joe to you. However, we thought it might be useful for you to have this letter in advance.

Best personal regards,

J.W. MARRIOTT, JR.

Senator KYL. Senator Kohl, you have arrived. Do you have any opening statement you would like to make before proceeding with the nominee.

Senator KOHL. No. Thank you, Mr. Chairman.

Senator KYL. OK. Thank you.

Then, in that case, let me turn to our two North Dakota Senators, Senator Conrad and Senator Dorgan. Who would like to proceed?

Senator CONRAD. I will go ahead.

Senator KYL. Senator Conrad.

#### **STATEMENT OF HON. KENT CONRAD, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA**

Senator CONRAD. Senator Kyl, Mr. Chairman, thank you very much for holding this hearing, and thank you even more for including John Kelly's nomination for the Eighth Circuit Court of Appeals in the hearing order.

John is here and accompanied by his family, and maybe we could introduce them. I would ask John to stand, his wife, who we all know as Tish Kelly, the former Speaker of the North Dakota House of Representatives; their sons, David, Peter, and Dan. I might add that Dan until recently was on my staff here in Washington. Their family members, Genny Matthews, a niece; Matt Greeley, a cousin; and Bill Scouton, who is a friend of the family. In addition, Kim Copeland, who is on Senator Dorgan's staff, is also a friend of the family and is here as well.

Senator KYL. We welcome you all. Thank you all for being here.

Senator CONRAD. Mr. Chairman and members of the committee, John Kelly is one of the most distinguished members of the bar of the State of North Dakota. He is a North Dakota native, graduated from one of the Nation's preeminent law schools. He has had a distinguished career in the law, rising to the presidency of the Vogel law firm, which is among the most prominent in the State of North Dakota.

John is widely recognized as one of the outstanding practitioners of law in our State. He has a wealth of experience as a counsel for both plaintiffs and defendants. He has practiced in State and tribal courts. He has ably represented clients in Federal courts before the eighth circuit and in the U.S. Supreme Court.

John Kelly has earned the respect of people across the State of North Dakota for his distinguished service. Since the President submitted his nomination, we have had just an outpouring of support. I want to make part of the record this list of letters of people who have written saying John Kelly is the man for this position. Let me just hit the highlights of people who have written.

Alan Olson, former Republican Governor of the State of North Dakota, and former attorney general of the State of North Dakota; Robert Wefald, another former Republican attorney general for the State of North Dakota; Steven Easton, a former Republican U.S. attorney for North Dakota and a former Republican national committeeman; the majority and minority leaders for both houses of the North Dakota Legislature; the Republican chairman of the State Senate Judiciary Committee; the Republican president of the State Public Service Commission; and many others from across our State.

Senator KYL. I didn't know you had that many Republicans in North Dakota. Things are looking up. [Laughter.]

Senator CONRAD. Let me tell you, Mr. Chairman, a lot of Democrats as well.

Senator KYL. I am well aware.

Senator CONRAD. We are very proud of the support that he has received from both sides of the political fence.

Senator KYL. That entire document will be included in the record.

Senator CONRAD. We appreciate that very much.

[The letters follow:]

U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT,  
Little Rock, AR, March 13, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: We now have one vacancy on the United States Court of Appeals for the Eighth Circuit out of eleven active judgeships. We are blessed with seven Senior Circuit Judges, all of whom work, and our ten judges in regular active service are more than holding up their end, but we hope that the existing vacancy will be filled as promptly as possible. There is no dissent on that proposition in this Circuit. All members of the Court of Appeals believe that the vacancy should be filled.

The President has nominated John Kelly of North Dakota for this position, and his nomination is now pending before the Senate Judiciary Committee. If his nomination is confirmed by the Senate, Mr. Kelly would succeed Frank Magill, also of North Dakota. Mr. Kelly is a practicing lawyer of long service and great distinction. To my knowledge, there is nothing controversial in his record that would make confirmation problematic, though of course the decision on that question is for the Senate to make.

Last September, at the request of Chairman Grassley, I testified on the need for filling this vacancy. A copy of my testimony is enclosed. Statistical and other information about the caseload of our Court and our need to be at full strength is contained in the testimony. At the hearing in September, no one suggested that the vacancy on our Court should not be filled. I hope very much that your Committee will schedule an early hearing on this nomination, always of course acting consistently with the duty of the Senate to consider nominations with the care that appointments of such importance deserve.

It was a real pleasure to hear you at the meeting of the Judicial Conference on Tuesday. You have always been a champion of the public interest in the administra-



tion of justice, and a defender of the proper independence of the Judicial Branch. We are grateful for your consistent support.

Respectfully yours,

RICHARD S. ARNOLD,  
*Chief Judge.*

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U.S. COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT,  
Fargo, ND, March 18, 1998.

Senator ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I wish to enthusiastically support John Kelly as my successor on the United States Court of Appeals for the Eighth Circuit. Although we have a history of representing opposing clients for over thirty years, I have the highest regard for John. He will be a good judge and will serve with distinction. I know nothing controversial about him.

Sincerely,

FRANK MAGILL,  
*Circuit Judge.*

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MARCH 30, 1998.

Hon. ORRIN G. HATCH,  
*U.S. Senator,  
Chairman, Senate Judiciary Committee,  
Washington, DC.*

DEAR SENATOR HATCH: I strongly support John Kelly of North Dakota to fill the current vacancy on the United States Court of Appeals for the Eighth Circuit. I have been a federal circuit judge for more than thirty years serving as a judge on my own circuit, the Eighth, and a visiting judge on many of our sister circuits and as a visiting federal district judge on several occasions. I am well aware of the qualifications necessary for a fair and able federal judge.

I have known Mr. Kelly for thirty-five years. For five years he served as an associate and then partner in my law firm in Fargo, North Dakota. After I left the firm in 1968, I have been aware of Mr. Kelly's work as a lawyer. He is a fine lawyer, one of the best in this state, a man of great character and a person highly regarded in his community and in the State of North Dakota. I have no doubt that he will be a great judge. His appointment will be looked upon with great favor by the citizens of this state.

I urge his early appointment. Our court, the Eighth Circuit, has great need for another active judge to replace Frank Magill, my successor, who has taken senior status.

Sincerely,

MYRON H. BRIGHT,  
*U.S. Senior Circuit Judge.*

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MARCH 31, 1998.

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to extend my enthusiastic support for the nomination of Mr. John Kelly to the Eighth Circuit Court of Appeals. Mr. Kelly was nominated by President Clinton on January 27th of this year. I believe he is an ideal candidate for the federal bench and so, I urge you to schedule a confirmation hearing.

Over his 20 year tenure as President of Vogel Law Firm in North Dakota, Mr. Kelly has developed a solid reputation for accurate, fair and thorough representation of his clients at both the trial and appellate levels. His expertise is widely acknowledged and respected throughout the Upper Midwest. His eight years of service as President of the North Dakota Bar Board and his current position as state chair of the American College of Trial Lawyers are testament to his widespread bipartisan support.

Senator Hatch, North Dakota has been unrepresented at the appellate level in the Eighth Circuit for over a year. I believe Mr. Kelly possesses the ideal qualifications and expertise to fill this void and I urge you to schedule a hearing so that review of his nomination can be advanced.

Again, I hold Mr. Kelly in the highest regard and believe he would make an outstanding federal jurist. I highly recommend his worthy nomination for your consideration.

Sincerely,

EARL POMEROY,  
*Member of Congress.*

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HOUSE OF REPRESENTATIVES,  
*Washington, DC, February 27, 1998.*

Hon. ORRIN G. HATCH,  
*Chairman, Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR ORRIN HATCH: I am writing to offer my full and enthusiastic support of John Kelly's nomination to the 8th Circuit Court Bench.

I have known John for several decades as he was my family's attorney back in North Dakota for many years. I know, firsthand, of John's impressive skills and his vast understanding of the law and its evolution.

In addition to John's sterling record of professional excellence in private practice, he served as President of the North Dakota Bar Board for eight years and is the current North Dakota State Chair of the American College of Trial Lawyers.

John Kelly is clearly one of our nation's best and brightest legal minds by any measure of merit.

John has established a distinguished record of professional excellence and achievement. I know he would make a great judge and a tremendous addition to the 8th Circuit. Thank you very much, Senator Hatch, for your kind consideration of John Kelly's most deserving credentials. Please let me know if I can ever be helpful in any way.

Sincerely,

JIM RAMSTAD,  
*Member of Congress.*

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MARCH 31, 1998.

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: As you are aware, the nomination of John D. Kelly to serve on the United States Court of Appeals for the Eighth Circuit is currently pending before the Judiciary Committee. I would like to take this opportunity to endorse his nomination and strongly encourage his confirmation.

John is from my hometown of Fargo, North Dakota, and I am well-acquainted with his considerable talents as a lawyer. I have been friends with John and his wife Tish for over 30 years. John is well-respected in North Dakota and I hold him in the highest esteem.

I urge your prompt and favorable consideration of his nomination. John will make an excellent appellate court judge.

Very truly yours,

JOCELYN BURDICK,  
*Former U.S. Senator for North Dakota.*

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KIRKPATRICK & LOCKHART, LLP,  
*Washington, DC, March 16, 1998.*

Hon. ORRIN G. HATCH,  
*Senate Judiciary Committee,*  
*Washington, DC.*

DEAR ORRIN: I hope that the Judiciary Committee will consider the nomination of John D. Kelly to serve on the Court of Appeals for the Eighth Circuit at the earliest possible date. Mr. Kelly enjoys support from both sides of the aisle in his home

state of North Dakota and I am confident that you will find him to be a man of integrity and intellect who will well-serve the federal judiciary.

Similar correspondence is being directed to your committee colleagues. I look forward to the committee's hearing regarding Mr. Kelly.

Sincerely,

DICK THORNBURGH.

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PEARCE & DURICK,  
ATTORNEYS AT LAW,  
Bismarck, ND, February 19, 1998.

Senator ORRIN G. HATCH,  
Chairman, Judiciary Committee,  
Washington, DC.

DEAR SENATOR HATCH: Please consider this letter an endorsement of the nomination of John Kelly to the U.S. Court of Appeals for the Eighth Circuit.

As a Republican activist and an attorney who practices in federal court, I was very interested in the President's selection of a judge to fill the substantial shoes of Judge Frank Magill. [I currently serve as the Republican National Committeeman for North Dakota. In the past, I have served as State Republican Treasurer and as a Republican candidate for state office. In President Bush's administration, I served as United States Attorney for the District of North Dakota.] Frankly, I was concerned by several of the potential nominees. This concern was lifted when President Clinton announced that he selected John Kelly for this position.

Mr. Kelly enjoys a strong reputation among the North Dakota bar. He is a hard working, intelligent attorney. He has that most important element of character for judges, fairness. I am confident that he will serve North Dakota, the Eighth Circuit, and the United States with distinction.

I urge the committee to forward Mr. Kelly's nomination to the full Senate as expeditiously as possible.

If I can provide any additional information, please contact me. Thank you for considering my views.

Sincerely,

STEPHEN D. EASTON.

P.S. to Senator JEFF SESSIONS:

As I noted in an earlier letter, I believe that the Senate's consideration of judicial nominees is an important function and that each nominee should be thoroughly reviewed. Following such a review, I believe that you will conclude that John Kelly should be confirmed for the Eighth Circuit. If I can provide any additional information (or if you find the time to just call to chat), I would enjoy hearing from you.

Keep up the good work. You are a source of great pride among the "has-been U.S. Attorneys" gang!

STEVE.

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ROBERT O. WEFALD, P.C.,  
ATTORNEY AND COUNSELOR AT LAW,  
Bismarck, ND, February 27, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to give my unqualified endorsement to the nomination of John D. Kelly of Fargo, North Dakota, for appointment to the United States Court of Appeals for the Eighth Circuit. John Kelly is an outstanding attorney and a tenacious advocate for his clients. He respects the Constitution and the law. As a judge on the Court of Appeals, he will always keep the Constitution of our great nation at the center of his decisions. He will not be a judge who attempts to create new law through his decisions, nor will he be swayed by social arguments. The law and its proper application to the facts of the case before him will always be his guiding principal.

I have known John Kelly since I began to practice law in North Dakota in 1970, and I have had the opportunity of working with him on the opposite sides of several matters. He has always been a worthy and respectful opponent. I have always been proud of the fact that we are both graduates of the University of Michigan Law School. Since I have known him, he has always been a very respected member of



one of North Dakota's leading law firms. His reputation among the members of the North Dakota bar and the bar of the Federal Court is of the highest order.

I am aware of the concern that has been reported about the social and political agendas of many of those nominated by President Clinton for positions on the Federal bench. I can assure you that no one I know has any such concern about John Kelly. North Dakota is a conservative state and the vast majority of our politicians and attorneys, whether they be Republicans or Democrats, are rather conservative in their fiscal and social views. John Kelly is not known for being an advocate of liberal social causes, rather he has a reputation of simply being an outstanding lawyer who skillfully marshals the facts of his cases and applies the law to them.

I served as North Dakota's last Republican Attorney General, and I appreciate the politics necessarily inherent in any appointment to the Federal bench. Certainly President Clinton has the right to nominate qualified attorneys based on political considerations. I can assure you, however, as a life long Republican and the husband of a Republican elected state official, Public Service Commissioner Susan E. Wefald, that I would not for a moment support the nomination of John Kelly if I thought he would be inclined in any way whatsoever to do anything other than apply a strict interpretation of the Constitution and the law to the facts of the case before him. He has no hidden social or political agenda. He is too bright, too capable and he has too much integrity for anything other than fair treatment of all those who cases are before him in accordance to the justice they deserve under the Constitution and the law as applied to the facts of their cases, regardless of the social or political outcome.

John D. Kelly will be an outstanding member of the United States Court of Appeals for the Eighth Circuit. I urge you and your committee to act favorably on his nomination. This is a nomination you can set apart from those about which the Senate may be concerned. There is no need to delay this nomination. This is a nomination the Senate can act on with confidence. This is a nomination that is good for North Dakota, good for the United States Court of Appeals for the Eighth Circuit, and good for the United States of America!

Please contact me if you have any questions or comments.

Very Respectfully,

ROBERT O. WEFALD.

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REPUBLICAN NATIONAL COMMITTEE,  
West Fargo, ND, March 3, 1998.

DEAR SENATOR HATCH: I am writing to express my support for the nomination of John D. Kelly to the Eighth Circuit Court of Appeals.

Mr. Kelly is a highly respected member of the North Dakota Bar Association and a highly respected member of our state. He is viewed by his peers with a great deal of respect and admiration. Mr. Kelly's nomination to the Eighth Circuit Court of Appeals would serve the court and our country well.

Thank you for your consideration of Mr. Kelly, and thank you, Senator Hatch, for your service to our country.

Sincerely,

BERNIE L. DARDIS,  
*Former National Committeeman for North Dakota.*

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FEBRUARY 27, 1998.

Senator ORRIN HATCH,  
*Chmn, Senate Judiciary Committee,*  
*Washington DC.*

DEAR SENATOR HATCH: You have before your committee the nomination of Mr. John D. Kelly, an attorney from Fargo, for the 8th Circuit Court.

This man is one of the finest and brightest people I have ever known. He has, for many years, been the one person from whom I have sought advice and counsel on critical issues, both legal and of a public policy nature.

His advice has always been superb. I was governor of North Dakota when your friend and one of my best friends, Norm Bamgerter, was governor of Utah. Those were tough years in production oriented states like Utah and North Dakota. Public leaders could not be influenced by personal or partisan prejudices. We had to do our utmost to do what was best for all of the people of the state. John Kelly was always there to help me see what was phony or short-sighted and to help me do what was right.



His appointment will be applauded by everyone who knows him. And he will be a credit to the court and to all that is fundamental to American democracy.

I ardently hope that his confirmation can move quickly, and if there is anything that I can do to help the process, please let me know.

Sincerely,

GEORGE A. SINNER.

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INDEPENDENT COMMUNITY  
BANKERS OF MINNESOTA,  
Eagan, MN, March 12, 1998.

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I write in support of U.S. Senate confirmation of John D. Kelly's nomination to the U.S. Court of Appeals for the Eighth Circuit. My service as the Republican Attorney General (1972-1980) and Governor (1980-1984) of North Dakota and admission to practice before the United States Supreme Court, Federal District Courts and Court of Military Appeals and the Supreme Courts of the States of North Dakota and Minnesota are the specific context of my unqualified and enthusiastic support of Mr. Kelly's nomination.

I have known John personally and professionally since approximately 1967 when my service as a U.S. Army Judge Advocate was completed and my family and I returned to my native state where I began my professional career with the North Dakota Legislative Council, later practiced law and then was elected Attorney General in 1972. While I moved to Minnesota in 1986 to practice law and later accepted my present position as an industry association executive here, I remain in frequent contact with family, friends and former professional and business associates in North Dakota to the extent that my knowledge of John Kelly's high qualifications for this appointment extends to the present date.

As to his qualifications for the Federal bench, I know him to be one of the region's better trial counsel with the experience, judgment and patience to excel as an appellate judge. Related to legal matters, he identifies, prioritizes and communicates issues quickly and well. High on my order of his personal attributes are both a good "Irish" sense of humor and the ability to hold but also keep firm political beliefs in perspective.

In short, John Kelly is an excellent nominee and deserves U.S. Senate confirmation.

Sincerely,

ALLEN I. OLSON,  
*President.*

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ARTHUR A. LINK,  
*Bismarck, ND, March 2, 1998.*

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: John D. Kelly, of Fargo, North Dakota, has been appointed to the 8th Circuit Court of Appeals and I am pleased to urge his confirmation by your committee and the United States Senate.

My thirty-four years of elective office in North Dakota has afforded me the opportunity to become acquainted with and observe the qualifications of many North Dakotans, both in the private and public sector.

I have personally known John Kelly for most of his years of professional service. His education, military service, professional qualifications and his personal demeanor all stand beyond reproach. His thirty-five years of experience and admissions to practice in district courts and the U.S. Supreme Court will stand him in good stead to serve the 8th Circuit Court of Appeals.

Justice for the people in the 8th Circuit and the nation will be well served by John D. Kelly.

Thank you for the opportunity to present my recommendation.

Sincerely,

ARTHUR A. LINK,  
North Dakota Governor—1973–1981.  
United States Congress—1971–1973.  
North Dakota Legislature—1947–1971.

Fargo, ND, March 3, 1998.

Hon. ORRIN G. HATCH,  
Chairman, Senate Judiciary Committee,  
Washington, DC.

DEAR SENATOR HATCH: I am pleased to support the nomination of John D. Kelly to the 8th District Court of Appeals, and I urge you and your committee to fill the vacancy in that court as soon as possible.

I have known John Kelly for forty years and during the period 1961 to 1973 as Governor of North Dakota I had a number of occasions to evaluate his work. He is a low profile, even handed and very able lawyer who will make a fine judge.

Respectfully,

WILLIAM L. GUY.

STATE OF NORTH DAKOTA,  
OFFICE OF ATTORNEY GENERAL,  
Bismarck, ND, March 25, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I write to you requesting that the Judiciary Committee give prompt and favorable consideration to the nomination of John D. Kelly of North Dakota to serve as a judge on the U.S. Court of Appeals for the Eighth Circuit. This nomination should not be controversial.

Mr. Kelly enjoys strong support on a bipartisan basis here in North Dakota. He has a well-earned reputation as a person of ability and integrity. He is a forceful but fair advocate for his clients.

I am confident that as an appellate judge, John Kelly will render his decisions in accordance with applicable law.

Sincerely,

HEIDI HEITKAMP,  
Attorney General.

DEPARTMENT OF INSURANCE,  
STATE OF NORTH DAKOTA,  
March 6, 1998.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR CHAIRMAN HATCH: I am writing you today regarding the nomination of John Kelly, a well-respected attorney from Fargo, North Dakota, to serve on the Court of Appeals for the Eighth Circuit. I would like to take this opportunity to urge Mr. Kelly's confirmation and to try and introduce you to a man who I am sure will make an extremely thoughtful and thought provoking member of the bench.

I was personally very excited to hear that President Clinton had nominated Mr. Kelly to serve on the Court of Appeals for the Eighth Circuit. I have known John both personally and professionally for the past twenty years and hold him in the highest regard. He is a man possessed of great personal integrity, a keen intellect, and an even temperament. These qualities, along with the vast legal experience he has gained in nearly four decades of practicing law, will serve him well on the federal bench.

Finally, John is uniquely qualified to represent North Dakota at the appellate level. He is a native of North Dakota who returned home after completing his education and a stint in the military. He and his wife Tish, who, incidentally, served as a member of North Dakota's Legislative Assembly for twenty years, raised three

sons here. He will bring a perspective to the court grounded in the values born of being a North Dakotan.

It is my sincere hope that the Senate Judiciary Committee will confirm the nomination of John Kelly as quickly as possible. I have no doubt that, if confirmed, Mr. Kelly will prove a credit to himself and the federal judiciary. He has my unqualified support.

Sincerely,

GLENN POMEROY,  
*ND Commissioner of Insurance.*

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PUBLIC SERVICE COMMISSION,  
STATE OF NORTH DAKOTA,  
*February 24, 1998.*

Senator ORRIN HATCH,  
*U.S. Senate,  
Washington, DC.*

DEAR SENATOR HATCH: May this letter serve as a strong endorsement of Mr. John D. Kelly to be appointed to the Eighth Circuit Court of Appeals.

I have known Mr. Kelly for over two decades and he has been practicing law in the great state of North Dakota for more than three decades. During the 17 years that I have served as an elected member of the North Dakota Public Service Commission, Mr. Kelly has appeared before our Commission on many occasions.

This letter is to inform you that we as a Commission enjoy Mr. Kelly's work and we look upon his presentations and his principles with a great deal of respect and admiration.

John's appearances before the Public Service Commission have always been guided by a good deal of common sense and basic good judgment. These "down-to-earth" attributes will serve him well during his tenure as a circuit court judge.

Any attention and priority that you might extend to the consideration of Mr. Kelly's nomination would be much appreciated.

I wholeheartedly endorse Mr. John D. Kelly as a nominee for appointment to the Eight Circuit Court of Appeals.

Sincerely,

LEO M. REINBOLD,  
*President, North Dakota Public Service Commission.*

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STATE OF NORTH DAKOTA,  
OFFICE OF THE STATE TREASURER,  
*March 6, 1998.*

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: It has been brought to my attention that President Clinton has nominated John Kelly, a Fargo, North Dakota, attorney to serve on the Court of Appeals for the Eighth Circuit.

I understand that this important seat has been vacant for well over a year. That would leave North Dakota the only state in the Eighth Circuit unrepresented at the appellate level. I am encouraging you to schedule a hearing in March for the confirmation of John Kelly.

John is professionally and personally very competent and reliable, and would bring instant credibility and recognition to this position. Honesty, integrity and loyalty are but a few words to describe John's character.

I strongly urge you to schedule John Kelly's confirmation hearing in March. Once you review his qualifications, I know you will agree that the Senate should proceed with the nomination of John Kelly to the Eighth Circuit.

Sincerely,

KATHI GILMORE,  
*State Treasurer.*



NORTH DAKOTA  
DEPARTMENT OF AGRICULTURE,  
Bismarck, ND, March 27, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I was very pleased when President Clinton nominated John Kelly, a prominent Fargo, North Dakota, attorney to serve on the Court of Appeals for the Eighth Circuit. His nomination has widespread bipartisan support in North Dakota.

John Kelly has focused his practice on trial work, handling state and federal matters at both the trial and appellate levels. He has tried more than 150 cases to completion, representing both plaintiffs and defendants. He has argued at least 50 appeals, including one before the United States Supreme Court, and at least 12 before the Eighth Circuit. In addition to his trial work, he has maintained a substantial business practice. Kelly has been active in civic affairs and has provided his services pro bono to many North Dakotans.

By this time, I am sure that you and the other members of the Judiciary Committee have received information detailing John Kelly's qualifications. I am confident that you would agree with me that there should be no controversy about his confirmation, given his qualifications, experience, and professionalism. And since North Dakota is the only state in the Eighth Circuit without representation at the appellate level, I urge you to schedule a hearing on John Kelly's confirmation in early April.

Thank you,  
Sincerely,

ROGER JOHNSON,  
Commissioner of Agriculture.

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NORTH DAKOTA SENATE,  
Bismarck, ND, March 6, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing this letter to express my support for the approval of the nomination of Mr. John D. Kelly to serve on the Eighth Circuit Court of Appeals. His name is before your committee for confirmation.

I have known Mr. Kelly for a number of years. I have found him to be fairminded, and I believe he is very qualified for this position. I am sure you will have a copy of his resume and experience and can judge his qualifications for yourself.

He understands the appropriate role of the judiciary and the basic separation of powers. I would not expect him to legislate through the judiciary. I also believe that if Mr. Kelly is confirmed, his will be an appointment that will not embarrass you and that you will not regret. I am pleased to add my support to his nomination.

Sincerely,

Senator GARY J. NELSON,  
Majority Leader.

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NORTH DAKOTA SENATE,  
Bismarck, ND, March 1, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This is a letter of support for John D. Kelly who has been nominated to serve on the Eighth Circuit Court of Appeals.

John is a man of family commitment. He has remained dedicated to his wife and family from the time of their marriage 37 years ago. Not only has John kept his family intact during a busy career, he was often the main care provider during his wife's years of legislative service. We need more people like this in positions where they are role models to others.

John is a bright experienced lawyer at the height of his capacity and energy. It would be a shame if he wasn't put to work as a judge immediately. So many people complain to me about the inordinate delays in the judicial system. You've heard



about the North Dakota work ethic; well John is its poster child! Please act quickly in his appointment. The people need your attention to this as soon as possible.

Beyond John's impeccable law credentials, John is a stable, thoughtful man. He is committed to doing an excellent job in a judicial career in the same way he is with his family and law practice. I recommend him without hesitation.

If you care to call me, feel free to do so at my work, Catholic Family Service.

Sincerely,

Senator TIM MATHERN.

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NORTH DAKOTA  
HOUSE OF REPRESENTATIVES,  
*Bismarck, ND, March 13, 1998.*

Senator ORRIN HATCH,  
*U.S. Senate,  
Washington, DC.*

DEAR SENATOR HATCH: I am writing to recommend to you Mr. John Kelly of Fargo, North Dakota to serve on the 8th Circuit Court of Appeals. Mr. Kelly is a well respected attorney and well qualified for this position.

I served with Mrs. Kelly in the North Dakota House of Representatives before she moved to the North Dakota Senate. My association with her and Mr. Kelly although of different political parties was cordial and respectful.

Thank you for your consideration.

Sincerely,

Representative JOHN DORSO.

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NORTH DAKOTA  
HOUSE OF REPRESENTATIVES,  
*Bismarck, ND.*

Senator ORRIN HATCH,  
*Chairman, U.S. Senate Judiciary Committee,  
Washington, DC.*

DEAR SENATOR HATCH: The Senate Judiciary Committee will be reviewing the confirmation of John D. Kelly, the President's appointment, to fill the open position on the 8th Circuit Court of Appeals. In my letter I would like to commit my support for Mr. Kelly's confirmation.

John D. Kelly has a long and distinguished career in the legal profession. His experience includes federal and state trial and appellate litigation representation for individual and corporate clients. Included in his professional experience portfolio is work with Native-Americans, specifically with the Turtle Mountain Band of Chippewa Indians. As an attorney, he has dealt with the unique jurisdictional issues that cross federal, state, and sovereign tribal jurisdictions. This is very valuable experience for a judge serving on the bench of a circuit court of appeals.

Mr. Kelly has, in addition to his broad and distinguished career as an attorney, been involved with numerous professional organizations. He served as President of the North Dakota Bar Association from 1983 through 1991. Currently he is the North Dakota State Chair for the American College of Trial Lawyers. His list of professional memberships also includes being a member in good standing with the Minnesota Bar Association and the American Bar Association.

As a citizen John Kelly is highly regarded in his community and across the state of North Dakota and the upper-midwest region. He is a person with high professional qualifications and an individual of impeccable personal integrity. It is with great confidence that I endorse John B. Kelly's confirmation to serve as judge on the 8th Circuit Court of Appeals.

Sincerely,

Representative MERLE BOUCHER,  
*Minority Leader, North Dakota House of Representatives.*

NORTH DAKOTA SENATE,  
Bismarck, ND, February 25, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This letter is sent in support of confirmation by the U.S. Senate of the nomination of Mr. John D. Kelly of Fargo, North Dakota to serve on the 8th Circuit Court of Appeals. I understand that his nomination is currently before your committee for consideration.

Mr. Kelly is a member of a prestigious Fargo, North Dakota law firm—one of the largest in the state of North Dakota—with which he has been associated for 35 years. I can state from personal knowledge that over the years Mr. Kelly has earned a reputation within North Dakota and beyond as a hardworking, capable and highly ethical practitioner of the law. He is known for possessing a wide ranging knowledge of the law and the legal process, which will most certainly serve the residents of this circuit well should his appointment be confirmed.

Additionally, I have personal experience in working with Mr. Kelly on the opposite side of at least one recent case, and can assure you that while he represented his client with the zeal and enthusiasm his client had every reason to expect, at the same time he did so in a manner that was of the highest integrity and professionalism.

I respectfully ask that your committee favorably consider the nomination of Mr. Kelly to this important post and that you recommend his appointment to the full Senate as soon as your schedule permits. If you have any further questions, or desire any further information from me, I invite you to contact me at any time.

Thank you for your attention to this recommendation.

Sincerely,

WAYNE K. STENEHJEM,  
Chairman, North Dakota Senate Judiciary Committee.

NORTH DAKOTA SENATE,  
Bismarck, ND, March 6, 1998.

Re John D. Kelly, nominee for the Eighth Circuit Court of Appeals.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am pleased to recommend to you John D. Kelly for the appointment to the Eighth Circuit Court of Appeals.

I have known John for many years. We have been courtroom opponents. I have always found him to be very courteous to all parties and at all times to have a professional demeanor which is a credit to the bar association. John is an extremely intelligent individual who in my opinion would make an excellent appellate judge. Even though John and I are of different political persuasion, he has never let that interfere with our personal friendship nor with our professional relationship.

Not only is he an outstanding individual in his chosen profession, but he has also taken the time to be active with many bar association professional groups. His resume will attest to that.

I feel extremely confident recommending John to you inasmuch as he truly is an individual with all of the attributes necessary to serve diligently on the Eighth Circuit Court of Appeals.

Sincerely,

DAVID E. NETHING.

DALRYMPLE FARM,  
Casselton, ND, February 27, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am writing to add my support for John Kelly to serve on the Eighth Circuit Court of Appeals. I believe his name is now before the Senate Judiciary Committee.

I have known John Kelly for many years. Although he argued before our State Supreme Court against the postponement of the special election in which I ran for

the United States Senate in 1992 (the postponement unfortunately didn't help me), I have nonetheless found him to be an intelligent, diligent, and most fair individual.

Of course, John is not a member of my political party, but under the circumstances it is only fair to say that he has represented a wide range of clients over the years and enjoys an excellent reputation. In my experience, he has been generally moderate in his views and promotes no particular agenda.

I can think of no reason why John Kelly would not make an outstanding Judge on the U.S. Eighth Circuit Court of Appeals.

Sincerely yours,

Representative JACK DALRYMPLE,  
*Chairman, ND House Appropriations Committee.*

NORTH DAKOTA SENATE,  
*Bismarck, ND, March 8, 1998.*

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR: It is with great pleasure that I am recommending that you consider the name of John D. Kelly of Fargo, North Dakota to serve on the 8th Circuit Court of Appeals. I have known Mr. Kelly and his wife, Tish, for many years and have had the opportunity to serve with her in the North Dakota Legislature during all of her legislative career.

I have met Mr. Kelly on several occasions and have the utmost respect for him. His credentials are excellent and he has been a credit to the legal profession in our state. I am a life long Republican, but in this case, I believe your consideration of him should go beyond party lines. I hope you agree.

I have served in the North Dakota Senate for 28 years and have learned much about the world of politics and appointments.

Please give this your most serious consideration.

Sincerely yours,

RUSSELL T. THANE,  
*State Senator, 25th District.*

FIRST INSURANCE AGENCY OF BISMARCK,  
*Bismarck, ND, February 25, 1998.*

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to you recommending that the Judiciary Committee of the United States Senate confirm the appointment of John D. Kelly to serve on the 8th Circuit Court of Appeals.

John received his law degree from the University of Michigan and his Broad practice involving Federal, State and Appellate civil litigation certainly qualifies him to serve as a Judge on the 8th Circuit Court of Appeals.

Our judicial system would benefit from John's honesty and good judgment.

I would give him, without hesitation, the highest recommendation. He is an outstanding citizen of our State and you would be proud of the decisions he would make in this position.

Yours very truly,

EVAN E. LIPS,  
*Republican Senator, District 47,*  
*Bismarck, ND.*

NORTH DAKOTA SENATE,  
*Bismarck, ND, February 26, 1998.*

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: John D. Kelly has been nominated to serve on the Eighth Circuit Court of Appeals. Because I believe that he will be a truly outstanding judge, I am writing to express the strongest possible support for his confirmation.



I have known John Kelly for fifteen years, since 1983. His reputation as an attorney-at-law is beyond reproach. As a result, John Kelly has emerged with the ongoing respect of his colleagues and peers and as a leader within the profession. He served as President of his law firm for twenty years; as President of the North Dakota Bar Board for eight years; and, currently, he serves as the North Dakota State Chair of the American College of Trial Lawyers.

I also admire John Kelly for his commitment to and support of his family. John's spouse, Tish, served in the North Dakota Legislature for many years and was away from home for three to four months every other year. During the sessions, he willingly took on extra responsibility at home and with their three sons, thus supporting Tish in her important public service work. John's commitment to his sons seems equally strong and to be built on solid relationships, developed over time.

It is with admiration and great confidence that I most highly recommend John D. Kelly to you.

Sincerely,

JUDY L. DEMERS,  
State Senator, District 18, and Associate Dean,  
University of North Dakota, School of Medicine & Health Sciences.

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NORTH DAKOTA SENATE,  
Bismarck, ND, February 24, 1998.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SENATOR: I am writing this letter as a recommendation to appoint John D. Kelly of Fargo, North Dakota to serve on the 8th Circuit Court of Appeals. I encourage your committee, and the Senate, to approve his appointment.

John D. Kelly has the experience of practicing in State and Federal trial and appellate civil litigation. His resume shows a broad range of legal practice and a thorough education in the practice of law.

John D. Kelly is a fair and common sense attorney with an excellent knowledge of the law. I have known and respected Mr. Kelly for over 20 years. All of my experiences with him have been great and rewarding. He is a true professional.

The 8th Circuit Court of Appeals would greatly benefit from Mr. Kelly's knowledge and experience.

Sincerely,

HARVEY TALLACKSON.

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NORTH DAKOTA  
HOUSE OF REPRESENTATIVES,  
Bismarck, ND.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR SIR: I understand that John D. Kelly has been nominated to serve on the 8th Court of Appeals and that his nomination is now before the Senate Judiciary Committee.

I am writing this letter to support John's nomination and hope you will give serious consideration to his appointment for this position. John's practice areas and background make him very well qualified to serve in this capacity.

I have known John for over 25 years and I have great respect for his intelligence, his moral values and the dignity he brings to his profession. John is well known in North Dakota and is held in high regard by fellow citizens as well as his peers.

Sincerely,

ROY HAUSAUER.



UNIVERSITY OF NORTH DAKOTA,  
SCHOOL OF LAW,  
*Grand Forks, ND, February 17, 1998.*

Re Confirmation of John D. Kelly to the Court of Appeals for the Eighth Circuit.

Hon. ORRIN HATCH,  
*Chair, Senate Judiciary Committee,*  
*Washington, DC.*

DEAR SENATOR HATCH: I write in support of John D. Kelly of Fargo, North Dakota for confirmation to the bench of the Court of Appeals for the Eighth Circuit. Mr. Kelly's nomination has been forwarded to the Senate Judiciary Committee by the President; I urge the Committee's positive action for confirmation as soon as possible.

It is my privilege to have known John Kelly for many years as a fellow member of the Bar and a professional colleague. As the long-time Dean of our state's only law school, I am acquainted with nearly all of the lawyers and judges in this state, and have had the opportunity to work with many of them. I know personally and by reputation that John Kelly is a person of high integrity and trust. His intelligent, thoughtful, and patient demeanor will serve us well as he assumes his place on the Court of Appeals.

Mr. Kelly's nomination has received Circuit-wide and national endorsement. I join with my many colleagues in recommending his speedy confirmation.

Sincerely,

W. JEREMY DAVIS,  
*Dean and Professor of Law.*

Senator CONRAD. Mr. Chairman, I would like to close by offering an excerpt of a letter from the former Attorney General of the United States, Richard Thornburgh. Attorney General Thornburgh writes about John Kelly, "I am confident that you will find him to be a man of great integrity and intellect who will well serve the Federal judiciary."

Let me just say I agree wholeheartedly with Attorney General Thornburgh. Our country will benefit from the contributions that John Kelly will make on the Court of Appeals for the Eighth Circuit. I could not be more proud than to offer as North Dakota's choice for the eighth circuit somebody of John Kelly's outstanding reputation, intellect, and integrity.

I thank the Chair and I thank the members of the committee.

Senator KYL. Thank you, Senator Conrad.

Senator DORGAN.

#### **STATEMENT OF HON. BYRON L. DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA**

Senator DORGAN. Mr. Chairman, thank you very much. I am one of those Norwegian Lutherans from the Northern Plains, and I must confess that I have difficulty overstating anything. In fact, when we say "he's OK" about someone, that means that he is the very finest there is. So I am here to say John is OK, and he is the very finest there is.

John Kelly is someone who I think will make a wonderful addition to the eighth circuit court. He is someone who has had a breadth of experience: legal education at one of our country's pre-eminent law schools, 36 years of experience in trial and appellate experience, both State and Federal courts, and as Senator Conrad just indicated, he has support from virtually every direction. I have not seen an appointment that we have been involved in making as a delegation or in recommending as a delegation that has received that kind of support from every part of the political spectrum. And that is because John Kelly has worked with so many people on so

many things for so long a time and has impressed virtually everyone he has worked with and met.

He will not only bring impeccable credentials, experience, and I think a formidable legal mind to the eighth circuit; he will bring, I think importantly, a judicial temperament and a healthy dose of North Dakota commonsense. And I think you can feel confident he will be a jurist who understands the importance of the rule of law to society and the judiciary's proper role within this constitutional system of ours.

He has this delegation's enthusiastic and complete support, and we urge the committee to report him positively and quickly, and we think that he will contribute well to this country.

I must finally say that in a day and age when there seems to be so much cynicism about public service, I am really heartened that people like John Kelly with his experience will step forward and say I am available to serve my country. This country is in good hands with John Kelly.

Senator KYL. Thank you, Senator Dorgan.

We are also joined by Representative Earl Pomeroy.

#### **STATEMENT OF HON. EARL POMEROY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA**

Representative POMEROY. Thank you, Mr. Chairman.

The position of being a justice on the Eighth Circuit Court of Appeals is a very significant position within our Nation's judiciary, and the candidacy of John Kelly for this spot truly does represent one of our State's most accomplished and most esteemed jurist, or members of the legal profession, soon to be jurist, we hope: intellect, integrity, reputation, and experience. I think those four things really capture the background that John Kelly represents and would offer to this position.

I used to practice law in the town of Valley City, my hometown, 60 miles from Fargo. Even at that time, several years ago, John was one of the most highly regarded members of the legal profession in North Dakota. Later I went on to serve as the State's insurance commissioner in a widely different capacity. I again had a chance to observe the significant legal talent of John Kelly.

I really do think that what we look for in the judiciary—intellect, integrity, experience, and reputation—based upon the other three, John Kelly is—we couldn't do better for the Nation's judiciary than advancing John Kelly. And I urge your speedy confirmation.

Thank you.

Senator KYL. Thank you very much, Representative Pomeroy. We appreciate your presence here.

Now, if I could ask John D. Kelly, of North Dakota, and Kim McLane Wardlaw, of California, to come forward, please. Before you are seated, could I ask you to take the oath with me?

Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WARDLAW. I do.

Mr. KELLY. I do.

Senator KYL. Thank you very much.

Well, you have been well introduced, as you have heard, but I would afford you at this time the opportunity to make any opening remarks that both of you would like to make.

Ms. Wardlaw, Would you like to begin?

**TESTIMONY OF KIM McLANE WARDLAW, OF CALIFORNIA, TO  
BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

Judge WARDLAW. I have no opening remarks. However, I would like to introduce two more people who traveled with me from California: my judicial assistant, Judy Flowers, and my law clerk, Amy Nemko. If they would stand?

Senator KYL. Would you both please stand? Welcome. It is a pleasure to have you here, too.

Judge WARDLAW. Also, I would just like to mention for the record that my two children, Katie Ann, who is 3, and Billy, who is 8, couldn't be here. They are in Hawaii with their grandmother, my mother, who also wishes she could be here. But I think they are all having a good time there.

Senator KYL. I am sure they are.

Judge WARDLAW. I just wanted to mention them for the record, so they won't look back and be upset about this.

Senator KYL. That is right. I wish—well, I guess this may be carried, so maybe they are able to watch it right now.

John Kelly, would you like to make any opening remarks, please?

**TESTIMONY OF JOHN D. KELLY, OF NORTH DAKOTA, TO BE  
U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT**

Mr. KELLY. I do not have an opening statement. I just want to point out to the committee that my youngest son, Daniel, is here. He just started law school at the University of Iowa, and I want to assure everybody that he did it on the merits. It was not an effort to influence Senator Grassley at all. [Laughter.]

**QUESTIONING BY SENATOR KYL**

Senator KYL. Well, thanks very much. We had a little meeting this morning of the Judiciary Committee. I indicated that we would be holding this hearing this afternoon. We had a little discussion about filling judicial vacancies, and I made the comment that we had a great panel this afternoon that we should be able to move quickly through the committee if all goes well. And I hope that with that announcement that all of you who might be perhaps a little bit concerned about the committee's intentions can rest at ease.

Obviously, people may have questions, and we may want to go into matters, but the fact of the matter is this is a terrific panel, in both the district and circuit court nominees.

I would like the people in the audience to know at the outset that from now on it may appear to be a bit perfunctory because the questions that we will ask are not long and involved and get into a lot of history of the background of the nominees. There is a little bit about judicial philosophy, adherence to precedent, things of that sort that we want to ensure is on the record. But you should not take from the fact that all of the committee is not present or that we don't take 6 or 8 hours in this hearing as an indication that



there is a lack of interest or a lack of concern in obtaining the quick confirmation of these nominees. Rather, the fact that the hearing is done relatively quickly, without a great deal of time or involvement, should be a suggestion that these nominees have performed so well in their background and that enough people have already looked at their background to assure many of us that the confirmation process should go fairly quickly and fairly well.

So we hope that that is the case, and, again, I don't want you to take from the speed with which we do this any suggestion that the members of the committee do not care to go into more detail.

Now, with that, let me ask a couple of questions of our two nominees, and then I will turn first to Senator Kohl and then to Senator DeWine for questions that they may have. And I will rotate. Since I am going to ask both of you the same questions, perhaps, Mr. Kelly, I will ask you the first question.

Are you committed to following Supreme Court precedent and the rulings of the Federal Circuit Court of Appeals for your circuit faithfully and giving them full force and effect even if you might personally disagree with the precedent or the rulings?

Mr. KELLY. Yes, I would do that.

Senator KYL. Ms. Wardlaw.

Judge WARDLAW. Absolutely.

Senator KYL. And, Ms. Wardlaw, what would you do if you believed that the Supreme Court or perhaps previously your circuit had seriously erred in rendering a decision? Would you nevertheless apply that decision? Or would you apply your own best judgment of the merits? Take, for example, the Supreme Court's recent decision in the *City of Bourne v. Flores* case where the Court struck down the Religious Freedom Restoration Act. A pretty difficult question, I might add.

Judge WARDLAW. Well, Mr. Chairman, I certainly would follow the law even if I disagreed with it. In fact, sitting on the ninth circuit by designation, I recently wrote an opinion in which the panel disagreed with the existing ninth circuit law. We nevertheless followed it, invited en banc review. It was reviewed, and it was overruled by the ninth circuit itself in the appropriate way.

Senator KYL. Thank you.

Mr. Kelly.

Mr. KELLY. I would apply the law regardless of whether or not I as a personal matter had some problem with it.

Senator KYL. Thank you. And, finally, Mr. Kelly, under what circumstances do you believe it appropriate to declare a law of Congress unconstitutional?

Mr. KELLY. I think that the presumption is that the law is constitutional, and if the precedents of the Supreme Court and the body of law that would be available mandated a determination that a particular law be ruled unconstitutional, I would do it. But I think clearly as a starting point, I would proceed on the basis that the law is constitutional and that it is within the power of Congress to adopt the law.

Senator KYL. Thank you.

Ms. Wardlaw.

Judge WARDLAW. Such a circumstance would be extremely rare. There is the presumption of constitutionality, and the court is obli-



gated to construe it as constitutional if at all possible. But if clearly established precedent indicated otherwise, then I would be obligated to follow that.

Senator KYL. Thank you. I may have some more questions later.  
Senator KOHL.

#### QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you very much, Senator Kyl.

Mr. Kelly and Ms. Wardlaw, in the past few years, there has been a growth in the use of so-called protective orders in product liability cases. Critics of this trend believe that these orders sometimes prevent the public from learning about health and safety hazards. The issue has been debated repeatedly by the Judicial Conference.

Let me ask you this question. Should a judge balance the public's right to know against the litigant's right to privacy when the information sought to be sealed could keep secret a public hazard?

Mr. KELLY. I think that the—and I assume that this is something that the district judge would be confronted with. There are, I think, some standards and rules that apply to when it is appropriate to seal a record or to permit a matter to be—remain confidential. And I think that is an exercise of discretion.

If we are talking about a situation where the lawyers, the officers of the court, are engaged in some kind of an effort to keep the public in the dark, I would think an appropriate exercise of discretion would be to not approve it. But I know there are many reasons why some records are sealed and that may—and that are legitimate, I think. I have not, of course, had any experience in sealing records, and to my knowledge, I have never been involved in a case—and I have been involved in many cases in State and Federal Court—where all settlement records were—remained sealed.

Senator KOHL. Ms. Wardlaw.

Judge WARDLAW. Senator Kohl, I think that is a very serious question. I think the balancing analysis that you laid out is the appropriate analysis. One must weigh the needs of the litigants to obtain a speedy resolution and fair resolution of their case and avoid costly litigation against the public interest and possible harm to persons that might occur by sealing that information.

I would just also note that the Supreme Court wrestled with that sort of a secrecy order last term in the *Baker* case.

Senator KOHL. All right. Folks, could you cite two Supreme Court cases in this century that you believe to be the most significant?

Mr. KELLY. The most significant case, I think one of them is the school desegregation case, *Brown v. Topeka*. And I think another case that was significant certainly was the decision of the U.S. Supreme Court that permitted Japanese Americans to be kept in basically concentration camplike circumstances. It was a significant decision, and we are still living with the repercussions.

Senator KOHL. OK. Ms. Wardlaw.

Judge WARDLAW. Well, I take it by your question, Senator, and by Mr. Kelly's answer that it can be significant for either the better or the worse.

Senator KOHL. Whatever.

Judge WARDLAW. Whatever. All right. I would say that *Brown v. Board of Education* is the most significant case of this century because it made racial segregation of school children unthinkable. And I would agree that as far as the worst case of this century, I would say *Dred Scott* and the *Korematsu* cases because they took away rights of U.S. citizens.

Senator KOHL. All right. Let me ask you this hypothetical question: Say you were called upon to review a case involving a school voucher program which allowed a city to spend taxpayer money to send students to parochial or other religious schools. Without saying which way you might decide the case, please describe the methodology you would apply and the factors you would consider most important in reaching your decision.

Mr. KELLY. I think from my standpoint, and being at least aware from the press reports of the Wisconsin case involving, I think, the Milwaukee School District, that is something that I think will get to the Supreme Court, and obviously in making an analysis of whether a voucher system passes constitutional muster, the Supreme Court is, I think, ultimately going to make that determination, and I would expect that they would not leave it up to the circuits to determine that kind of an issue. I think there will be a definitive answer, and it will be provided by the Supreme Court.

In the absence of such a binding precedent, I would look at the Supreme Court cases for primary guidance in terms of determining whether that kind of a program violates the Constitution of the United States.

Senator KOHL. All right.

Mr. KELLY. And I would proceed on the basis, the assumption that it doesn't, until I was satisfied that it did. But I don't think that that is the kind of decision that I would be called on to make other than to implement Supreme Court—

Senator KOHL. OK. Ms. Wardlaw.

Judge WARDLAW. I believe that fact question calls for an analysis under the establishment clause, and the Supreme Court has recently reaffirmed in the *Agostini* case that the three factors from *Limon v. Kurtzman* would apply. So one would have to apply the law of the Supreme Court, and three factors are whether or not there is a secular purpose, whether or not religion is advanced, and whether or not there is excessive entanglement with religion by the State to the particular factual circumstances that are before it.

Senator KOHL. Thank you.

Thank you, Mr. Chairman.

Senator KYL. Senator DeWine.

#### QUESTIONING BY SENATOR DEWINE

Senator DEWINE. Thank you, Mr. Chairman.

Judge Wardlaw, I noticed in your resume here or the papers that we have had a chance to look at that you received the BUDDY Award. What is that?

Judge WARDLAW. The BUDDY Award is given by the NOW Legal Defense Fund to a woman and her family to reward success by an entire family—BUDDY stands for Bringing Up Daughters Differently, so success by a family in bringing up a daughter to par-

participate in a profession that maybe is not 100 percent accessible to all women.

Senator DEWINE. Thank you very much.

Judge Wardlaw, could you explain or describe what you think were the significant cases in which the Women's Lawyers Association of Los Angeles filed amicus briefs during the time that you were the president from 1993 to 1994 and, also, what role you played during that time in the selection of the cases?

Judge WARDLAW. During that year, I can only recall one case in which there was an amicus brief filed. I, of course, was the president. There was a separate amicus brief committee that would take in requests for writing briefs. They would then bring them to the board, and the board would vote on them.

The one case that I recall where the organization wrote an amicus brief was a case where a judge had excluded a housewife from sitting on a jury, saying that her life experiences were not sufficient to give her an understanding of ruling in a criminal case.

Senator DEWINE. That was a pretty easy one.

Judge WARDLAW. Yes. [Laughter.]

We were for homemakers.

Senator DEWINE. You would remember that one, I think.

Judge WARDLAW. I remember that one.

Senator DEWINE. Any others that you can recall?

Judge WARDLAW. I really don't recall any others.

Senator DEWINE. And tell me again—you had this committee. Did you sit on the committee?

Judge WARDLAW. No, I did not.

Senator DEWINE. Did the president sit on the committee?

Judge WARDLAW. No.

Senator DEWINE. As a member of the American Bar Association, do you believe it is appropriate for the ABA to take positions on issues such as abortion?

Judge WARDLAW. Well, I am an inactive member of the ABA. I belonged to it for mostly educational reasons and for reasons—before I became a judge, professional advancement. But I actually would prefer that the ABA did not take positions on other than issues that are central to the legal profession.

Senator DEWINE. Thank you, Mr. Chairman. Thank you, Judge.

Senator KYL. Thank you. If I may ask both of you just one other question, do either of you have any legal or moral beliefs which would inhibit you or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge? Mr. Kelly.

Mr. KELLY. I have none. It is constitutional. As long as it met the standards that the Supreme Court has set, I would follow the law and proceed accordingly?

Senator KYL. Ms. Wardlaw.

Judge WARDLAW. No, and I have issued rulings in a capital habeas corpus case that had the effect of upholding the death penalty.

Senator KYL. All right. Let me ask you just one more question. The general subject here is affirmative action or preferences.

Mr. Kelly, would you state in detail your best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th amendment and



the Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions—hiring, firing, promotions and so on—college admissions and scholarship awards, and the awarding of governmental contracts? What is your understanding of the lawfulness under the equal protection clause of the use of race and gender and national origin for those purposes?

Mr. KELLY. I think that it has to be strictly scrutinized, and I would apply the law that the Supreme Court has developed in the area. I am not in a position to evaluate a particular program and say this would pass or that wouldn't. That wouldn't be appropriate at all for me to do. I don't as a judge intend to tell people how I am going to rule before the hearing starts, before I have read the briefs or anything. So I think under the circumstances a judge in the court of appeals has guidance and direction from the U.S. Supreme Court, and I would use that as a basis for evaluating affirmative action programs. If they didn't pass muster, they didn't pass muster.

Senator KYL. Thank you.

Ms. Wardlaw.

Judge WARDLAW. The Supreme Court has held that racial classifications are unconstitutional unless they are narrowly tailored to meet a compelling governmental interest. That is the strict scrutiny standard, and that is the highest standard that the Court would apply to such cases.

Senator KYL. And that is the test you would presumably apply?

Judge WARDLAW. That is the test I would apply.

Senator KYL. All right. Thank you.

Well, let me thank both of you for being here, for your cooperation. If there is anything further that you wish to submit to the committee, I don't think we have a time limit for doing that. Please feel free to do that, and, of course, the committee will correspond with you with respect to further proceeding on your nominations. Thank you very much, and congratulations.

Judge WARDLAW. Thank you, Mr. Chairman. May I just say thank you on the record to both Senators Feinstein and Boxer as well for having been here?

Senator KYL. Absolutely.

Judge WARDLAW. All right. Thank you very much.

Senator KYL. Thank you.

Mr. KELLY. Of course, that goes for Senator Conrad—

Senator KYL. All three of your representatives.

Mr. KELLY [continuing]. Senator Dorgan and Representative Pomeroy.

Senator KYL. You bet. Thank you, Mr. Kelly.

Mr. KELLY. I appreciate the opportunity to come and present myself to the committee.

Senator KYL. You are very welcome. Thank you very much.

Now, in calling forth the four district court nominees, I reserved for myself, as I said, the pleasure of formally introducing the nominee from Arizona, and I will introduce him at this time and ask him to come forward, then, after I have introduced him. Let me allow the room to be cleared here a little bit.



From my State of Arizona, nominated for the district court of the District of Arizona is Judge Raner Collins. Judge Collins is a member of the superior court bench in Arizona where he has been serving since 1985, first as superior court judge pro tem and then as superior court judge. Before that, he served as a city magistrate in the city of Tucson and twice in the Pima County Attorney's Office, the county in which the city of Tucson is located.

Judge Collins is a graduate of the University of Arizona College of Law. He has a distinguished record of community service in the State of Arizona, a lot of it focused on families and kids, and perhaps in his introduction of his family, he will note that he and his wife, Theresa, have two children.

I should note that during the time that the State Bar Association of the State of Arizona has kept surveys of the members of the bar and bench of the qualifications of the members of the bench, there have been rankings in the State of Arizona. And Judge Collins has uniformly ranked first among all of the judges in the Pima County Superior Court. He has also ranked extraordinarily high in the poll of all of the judges within the State of Arizona, and since that poll is now a little bit dated, I won't disclose the results. But I can tell you that he is one of the most popular judges in the State of Arizona, and that popularity is based on a whole variety of factors, primarily the quality of judicial service that is performed.

So when Congressman Ed Pastor from Arizona and I sat down to determine which candidates for the position, the vacant position for the Arizona district court, could best meet the objectives that we had, it became clear after considering a large number of very qualified candidates that Judge Raner Collins would be our recommendation to the President of the United States, and he has seen fit to follow that advice and nominate Judge Raner Collins for this position.

I am just extraordinarily proud to introduce him to all of you. We have now been able to nominate and have confirmed some very high quality members to the district court and one representing Arizona in the U.S. circuit court since I have been on the Judiciary Committee. And Judge Raner Collins is in that tradition, and I know that when my service in the Senate is judged, part of it will be by the quality of the candidates that I have brought forward to serve on the Federal bench, and I know that Judge Collins will help my reputation in that regard.

Judge Raner Collins, would you introduce your wife, please?

Judge COLLINS. Thank you, Senator. This is my wife, Theresa Collins. We have two children, Tameron and Candice, who couldn't be with us because of school and work obligations. As I saw everybody else around the room, I wish I had a bigger family.

But my mother, because of health reasons, can't be here. But in her honor, you see I use my middle name, which I didn't learn how to spell until the third grade on all the paperwork.

Senator KYL. Tell everyone what that is.

Judge COLLINS. It is Christercunean.

Senator KYL. Well, thank you, Judge Collins. Why don't you take your seat at the table and let me call the other nominees: Robert James, Dan Polster, and Ralph Tyson, all of whom have been previously introduced.

Before you sit down, actually, could I ask all of you to stand and repeat the oath with me, please? Do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge TYSON. I do.

Judge COLLINS. I do.

Judge JAMES. I do.

Mr. POLSTER. I do.

#### QUESTIONING BY SENATOR KYL

Senator KYL. Thank you very much.

Now, again, let me ask the four of you some questions relating to precedent. Of course, as judges on the district courts, you will be considering both precedent of the U.S. Supreme Court and the circuit courts of appeals of your circuits. So let me ask the three of you the same questions that I asked the circuit court judges. Ralph Tyson, let me begin with you, and then if each of you could simply answer the questions seriatim.

Are you committed to following Supreme Court precedent and the rulings of the Federal circuit court of appeals for your district faithfully and giving them full force and effect even if you may personally disagree with the precedent or the rulings?

#### TESTIMONY OF RALPH E. TYSON, OF LOUISIANA, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF LOUISIANA

Judge TYSON. Yes, sir, Mr. Chairman, I am.

Senator KYL. Thank you.

Mr. Polster.

#### TESTIMONY OF DAN A. POLSTER, OF OHIO, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

Mr. POLSTER. Yes, I am, Mr. Chairman.

Senator KYL. Mr. James.

#### TESTIMONY OF ROBERT G. JAMES, OF LOUISIANA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

Judge JAMES. Mr. Chairman, I have always done that, and I would always intend to do that.

Senator KYL. Thank you. And Judge Collins.

#### TESTIMONY OF RANER CHRISTERCUNEAN COLLINS, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge COLLINS. Mr. Chairman, yes, I will.

Senator KYL. Thank you.

Let me start, Judge Collins, with you. What would you do if you believed that the Supreme Court or the court of appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision, or would you try to make your own judgment on the merits of the case? Take, for example—and I mentioned this case before, a really tough case—the *City of Bourne v. Flores* case where the Court struck down the Religious Freedom Restoration Act?

Judge COLLINS. Mr. Chairman, my role as a trial court judge would be to follow the law of precedents set before me, and that

is what I would do. Irrespective of how I feel about the Supreme Court's case or not, I will follow the law.

Senator KYL. Thank you.

Mr. James.

Judge JAMES. I would do the identical thing.

Senator KYL. Thank you.

Mr. Polster.

Mr. POLSTER. Mr. Chairman, I would faithfully follow the precedents of the Supreme Court and the decisions of my circuit, regardless of my personal beliefs.

Senator KYL. Thank you.

Mr. Tyson.

Judge TYSON. I would do the same, Mr. Chairman.

Senator KYL. Thank you. I hope we don't have to go vote here. Quorum, thank you.

And, finally, starting, Mr. Tyson, with you, under what circumstances do you think it is appropriate to declare a law of Congress unconstitutional?

Judge TYSON. Mr. Chairman, as a district judge, I would begin with the presumption of regularity and constitutionality of any statute that was challenged before me and move from that presumption to, of course, consider whatever the arguments are, consider whatever controlling precedent there is, and then decide accordingly. But I would begin with the presumption of regularity and constitutionality.

Senator KYL. Mr. Polster.

Mr. POLSTER. I would also begin there is a strong presumption of constitutionality and regularity, and I would only strike down a statute if there was no reading of that statute that conformed with binding precedent of the Supreme Court and the Sixth Circuit Court of Appeals.

Senator KYL. Thank you.

Mr. James.

Judge JAMES. As a trial court judge, I feel that first we would always assume that the statute would be constitutional. I would be hard pressed to think of a circumstance where I could find a statute to be unconstitutional. I would always, as Mr. Polster said, try to interpret the statute reading its plain language in a way that would give it effect.

Senator KYL. Thank you.

Judge COLLINS.

Judge COLLINS. Mr. Chairman, I also agree with my colleagues. I would begin with the presumption that the statute is constitutional and go from there.

Senator KYL. Thank you.

Let me ask a question finally about capital punishment, starting, Judge Collins, with you. Do you have any legal or moral beliefs which would inhibit or prevent you from imposing or upholding a death sentence in any criminal case that might come before you as a Federal judge?

Judge COLLINS. Mr. Chairman, no, I do not.

Senator KYL. Mr. James.

Judge JAMES. I do not.

Senator KYL. Mr. Polster.



Mr. POLSTER. I do not.

Senator KYL. And Mr. Tyson.

Judge TYSON. I do not, Mr. Chairman. I have had occasion to do that on three separate occasions.

Senator KYL. Thank you.

Senator Kohl.

#### QUESTIONING BY SENATOR KOHL

Senator KOHL. Thank you very much, Senator Kyl.

Gentlemen, I would like to ask this hypothetical question again. If you were called upon to review a case involving a school voucher program that allowed a city to spend taxpayer money to send students to parochial or other religious schools, without saying which way you might decide the case, please describe the methodology you would apply and the factors that you would consider most important in reaching your decision. Judge Collins.

Judge COLLINS. Senator Kohl, first I would begin, again, with the presumption that the statute was constitutional, and then look at precedents that have been set by the circuit, by the Supreme Court, and go from there, weigh the things that have been said before, have been done before, and then make the best choice I could about that.

Senator KOHL. Judge James.

Judge JAMES. Senator, I, of course, would also assume that the law would be constitutional. I would evaluate any relevant precedent that might be available, look at the plain language of the statute, and work in any way I could to make the statute effective rather than find it unconstitutional.

Senator KOHL. Mr. Polster.

Mr. POLSTER. Senator, I believe the Supreme Court precedent is *Limon v. Kurtzman*, and I would look to see if the statute had a clear secular purpose, if it was promoting a particular religion, or if it created an impermissible entanglement between the secular and religious function. Then that would be the analysis I would use.

Senator KOHL. OK. Judge Tyson.

Judge TYSON. Senator Kohl, that obviously implicates the establishment clause, so you would begin with the constitutional provision, of course. You look to the controlling precedent, and you make your best decision from there.

Senator KOHL. All right. Gentlemen, well-respected judges are commonly credited with having "a sound judicial temperament." What, in your opinion, defines a sound judicial temperament, and how important is it for judges to possess such demeanor? Judge Tyson.

Judge TYSON. Senator, I am reminded of a quotation from Socrates that goes, "Four things belong to a judge: to consider courteously, to answer wisely, to decide soberly, and to rule impartially." I think that those have been the guideposts that I have tried to abide by.

Judicial temperament, of course, is important. It is important for the judge to control himself and to control the litigants in his courtroom. I have always endeavored to do that and will continue to do so.



Senator KOHL. Mr. Polster.

Mr. POLSTER. Judge Tyson has probably said it more eloquently than I, but I have always tried to treat people with courtesy and respect when I am a prosecutor. I would try to do the same as a judge, and I don't think that a judge can expect the lawyers and the parties to treat each other with courtesy and respect if he or she doesn't do the same.

Senator KOHL. All right. Judge James.

Judge JAMES. Well, first, I guess it would be hard now to do Socrates as in his response, and I would agree with what Judge Tyson has had to say. I think temperament is probably the most important quality that a judge has. I think it is very important that judges be courteous, that they are fair. Quite often, judges have quite a bit of power over people, and I think in some respects the more power you have, the more you are called upon to be courteous and treat people fairly and decently. And I would try to always do those things.

Senator KOHL. All right. Judge Collins.

Judge COLLINS. Senator Kohl, I happen to agree with all my colleagues. You must have a great judicial temperament and be patient and kind to people. Always remember to treat people the way you yourself would like to be treated, and I do that.

Senator KOHL. All right, gentlemen. I would like to ask each of you how important you regard pro bono work in the legal profession, and if you have done that, would you describe one or two cases of that?

Judge James, we might start with you.

Judge JAMES. Sure. I think that all attorneys have an obligation to perform pro bono work, and I have always done that as an attorney.

I guess one of the most significant things I have done is to work for a number of years with an agency which provides legal and other assistance to women who have been the victims of domestic abuse.

Senator KOHL. All right. Mr. Polster.

Mr. POLSTER. Senator, there have been limitations as a government attorney as to what I could do outside of practice, but I have provided legal advice to our food community co-op in Cleveland and a few other organizations. And, of course, I guess I could say that my work for the U.S. Government for the last 20 years, I'd certainly count that as for the public. At least I hope it has been.

Senator KOHL. All right. Judge Tyson.

Judge TYSON. Senator, I haven't, of course, practiced for the last 10 years I have been on the bench, but prior to that I did during my practice have occasion to provide pro bono services, both voluntarily and involuntarily, so to speak, with some clients that did not fulfill their end of the obligation. But I feel that it is an important—

[Laughter.]

An important aspect of a legal career and legal service, and I think it is very important to the system and to the administration of justice.

Senator KOHL. All right. Judge James. Collins, I'm sorry. Judge Collins.

Judge COLLINS. Senator, I have to also agree with Mr. Polster. Because of my government work, I haven't had the chance to do real pro bono work in that sense. But what I do now to take care of that is I go out into the schools and talk to kids. That is where one of my passions is, and I want to make sure that they know that they can make it in life, and I try and give them that message.

Senator KOHL. All right. Thank you very much, gentlemen. Thank you very much, Mr. Chairman.

Senator KYL. Senator DeWine.

#### QUESTIONING BY SENATOR DEWINE

Senator DEWINE. Let me ask each of you the same question. Judge Collins, I will start with you, if I could.

Can you describe for me what you think the role of the Federal district judge is in regard to the settlement of cases, both civil and criminal? Please describe each role.

Judge COLLINS. Well, I think in both—

Senator DEWINE. Obviously after the case has been filed, we are in court, we are moving.

Judge COLLINS. I think, Senator, that in both cases the judge can be available and help settle certain cases. You want to make sure that the parties know the judge is available for that type of help if they want it. You don't want to force it upon anyone in that particular vein, but you want to be available so that they can get it. You can set sort of settlement conferences, pretrial conferences, and give them that opportunity to get together and talk about the cases. And I think a judge can be very available in doing those type of things.

Judge JAMES. I—

Senator DEWINE. Excuse me. If each one of you could also relate, the three of you that are on the bench now, and, Mr. Polster, you can do it based on your experience with judges. But in your answer, relate to your own experience and what you have done in the past, for the three judges, at least. Judge Collins, if you could just add to that.

Judge COLLINS. Senator, I have had the chance to do both criminal and civil cases as a judge, and on various occasions, I have had a chance to be involved in some settlement negotiations. And what I do is bring the parties in, when they have asked me to do so, and talk to them both about what I think the pros and cons are of the case, and I never force a settlement on anyone. But I certainly want to make sure that each side understands what the pros and cons are. I have had a great deal of success and been able to settle cases that way.

Judge JAMES. Like Judge Collins, I try to remember that people are entitled to their day in court, and they are not obligated to settle cases. On the other hand, I think a judge is in a unique position to bring hopefully an unbiased view to situations that can be helpful to attorneys in evaluating their cases and giving information to their clients that helps them to decide whether to compromise the case or not compromise.

It is my policy on all civil and criminal cases that go to trial that I hold pretrial conferences, and that is one purpose of the pretrial conference.

Senator DEWINE. Mr. Polster.

Mr. POLSTER. Senator, I would draw a distinction between the criminal and civil. I will start with the criminal where I have the most experience. Under rule 11, a judge's role is very carefully circumscribed, and I think I have always been sensitive as a prosecutor if I felt that a judge leaned too hard to impose a plea bargain in a particular case. I have deep respect for the Attorney General and the U.S. attorney's role in deciding what cases to prosecute and how to prosecute them. And so my role as a judge would be to make sure I make any preliminary decisions necessary and certainly facilitate settlement, but respect very carefully the role of the U.S. attorney and the right of the defendant if either of them choose to go to trial.

A civil case is dramatically different, and I think a good judge needs first and foremost to make the prompt decisions on those matters that will facilitate settlement and then get very actively engaged, and I plan to do that because most individuals and certainly most businesses, organizations, want first and foremost a fair resolution but a prompt resolution and to put whatever the dispute is behind them so they can go on with their lives or their businesses. And I would do whatever I could to facilitate a settlement of those issues.

Senator DEWINE. Judge Tyson.

Judge TYSON. Senator, that is an area that a judge has to be careful in approaching because of the necessity of remaining a detached and neutral referee in the event that things fall apart.

Having said that, however, I am one of those judges that likes to let lawyers lawyer, and I like to be there to listen, to give some input, but I like for the impetus to come from the lawyers. I have found that oftentimes just getting the lawyers to talk to each other is a big step toward getting matters resolved. So I endeavor to do that. After that, I let the lawyers do their thing, and then I am there if they desire any input from me.

Senator DEWINE. Let me ask each one of you one last question. What do you think a Federal court judge, district court judge in this case, can do to facilitate an understanding among the public about both our criminal and civil justice system, particularly the Federal courts? And, in particular, what role, if any, can a Federal district judge play in facilitating this understanding among young people of the country? Judge Collins.

Judge COLLINS. Well, Senator, what I would like to do and what I do now is I go out and talk to people about what the system is all about, and I intend to continue doing just that, schools, civic functions, whatever. I think judges have an obligation to explain to people what is happening, why things happen, and be available to do those type of things. I will always do that.

Senator DEWINE. Judge James.

Judge JAMES. I have also done what Judge Collins has done. I have tried to speak to young people when I could about the process, let them actually come to court and observe court proceedings, explain—and after court, explain to them what has occurred to try to help them understand the process better. And I would hope to be able to continue to do that.

Senator DEWINE. Mr. Polster.



Mr. POLSTER. Senator, I think a judge has an important responsibility there. I have tried to do that as a prosecutor. I would continue as a judge both to get out into the community, the legal community and the general community as much as possible, and invite as many school classrooms as I could fit into my schedule to come in and see firsthand what a judge does and how great our system is.

Senator DEWINE. Thank you.

Judge Tyson.

Judge TYSON. Senator, as my colleagues, I have participated with our local bar association in moot court programs. I have had school groups into my courtroom to observe proceedings. I have judged moot court competition between the different schools and also gone out to schools to speak to students about our system and about their responsibilities as citizens. And I would think that that is something that is appropriate for a judge to do, and I would like to continue doing that.

Senator DEWINE. Well, I appreciate your answers. I think it is very important, and you would have a unique opportunity as a Federal district judge to really have an impact on young people. Thank you very much.

Mr. Chairman, thank you.

Senator KYL. Thank you. Just two other areas of inquiry, if I could. Let me start, Judge Tyson, with you. Again, this has to do with the affirmative action, preferences issue generally.

Could you state in detail your best independent legal judgment on the lawfulness under the Equal Protection Clause of the 14th amendment and Federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions, college admissions and scholarship awards, and the awarding of government contracts?

Judge TYSON. Mr. Chairman, my understanding of the *Adarand v. Pena* decision is that such racial classifications, while not per se unconstitutional, are subject to the strictest of scrutiny that must be narrowly drawn to address a specific State or governmental need, and that is the controlling law, as I understand it. As a judge, I would follow that law.

Senator KYL. Thank you.

Mr. Polster.

Mr. POLSTER. Mr. Chairman, Judge Tyson has accurately summarized the controlling Supreme Court standard. That is the one I would follow, highest, strictest scrutiny, and be sure that the program was narrowly tailored to meet a compelling State need.

Senator KYL. Thank you.

Judge James.

Judge JAMES. As a district court judge, of course, I would be bound by precedent, and the precedent in that area is the *Adarand* case. And basically any government program would be subject to the strictest of scrutiny to see if it met constitutional muster.

Senator KYL. Judge Collins.

Judge COLLINS. Mr. Chairman, again, *Adarand* would be the controlling case in this area. I would apply strict scrutiny, have to find a compelling government interest, and also make sure it was nar-



rowly tailored to make sure it did no more than what it was supposed to.

Senator KYL. Thank you. The last comment or question I would like to make, really, has to do with victims' rights. Senator DeWine and I and Senator Feinstein and others are sponsors of a proposed constitutional amendment to provide certain rights to victims of crime. It is particularly important in the district court context where the cases are actually being tried for the first time. And I should add, by the way, Senator Kohl is also supportive in our committee of moving this proposed amendment forward.

We have, of course, State constitutional and statutory provisions in many States providing for some of these rights. There are two Federal statutes that bear on the protection of these rights as well. Whether or not a Federal constitutional amendment is adopted, I guess my question to you is whether you will work as hard as you can within the context of protecting the accused's rights, working with prosecutors and all the difficult decisions they have in bringing a case to trial, but work as closely as you can with the victims of the crimes so that their rights as human beings, if not constitutionally protected yet, to fair treatment in our judicial process are protected as much as possible, and that they are notified of proceedings and given an opportunity to be heard or participate when that is appropriate to the absolute extent practicable.

Judge COLLINS, let me begin with you.

Judge COLLINS. Mr. Chairman, as you know, in our State of Arizona, our State has a constitutional provision for victims' rights, and I follow that now, and I would intend to do so if the Federal system does the same thing.

Senator KYL. Actually, if I could—and, again, this is not really a question so much as a comment on my part, but I would like to have you respond to it. What I am really seeking from you is a statement of commitment beyond what may be required of you, because as the person in charge of the court, it is really going to be up to you to make sure that everybody is treated right. And there may not be—and I am very familiar with the Arizona requirements, and I know that they have been faithfully applied. But there may not be a requirement for that to be done in the Federal judicial system. And the prosecutor wants to do this, and the accused is arguing that.

I guess what I am just asking all of you to do—and then please do comment on it, if you would like—is to be as solicitous as you possibly can toward the rights of those people who society has already failed to protect at least once, and who many times feel that they are victimized again by a criminal justice system that provides a lot of rights to defendants but in this equilibrium provides none, at least constitutionally, to the victims and, therefore, they have to rely upon the judge, first and foremost, to help them through the ordeal and ensure that their interests are protected, again, consistent with the defendant's constitutional rights.

I didn't mean to give a speech there, but, Judge Collins.

Judge COLLINS. I agree with you, Senator, and I would do just that. I would make sure that the victims have a right and feel that they came in a courtroom and they got justice also. It is not just about one side or the other side. It is about both sides coming into

the courtroom and feeling that justice was done on their behalf. And I will swear to do those type of things.

Senator KYL. Thank you.

Judge James.

Judge JAMES. Our State also has a statute providing for victims' rights, but before that statute existed, it was the policy of our court to always take into consideration the victims, to try to communicate with them concerning the dispositions of cases.

It has been my experience that most victims just want to know what is going on, and if you can keep them informed, explain to them why the decisions that were made were made, generally they are satisfied. It is the lack of communication, I think is where we mess up so often.

Senator KYL. Thank you very much.

Mr. Polster.

Mr. POLSTER. Well, Mr. Chairman, I am very familiar with the two Federal statutes, and I, in fact, was the first victim witness coordinator in our office before the Department funded special positions, and I have seen firsthand the kind of pain and anguish that victims of crime suffered. So I am very sensitive to that, and I would do whatever I could to make sure that the victims and witnesses in my courtroom are treated with courtesy and respect and that they feel, although they can't be happy about having to be there, that at least the time they are spending will convince them that their rights were considered, too.

Senator Kyl. Thank you.

Judge Tyson.

Judge TYSON. Senator, Mr. Chairman, as Judge James has already indicated, while Louisiana does not have a constitutional provision, there is statutory authority addressing victims' rights. I have always endeavored to be solicitous of and considerate of the rights of the victims that are involved in cases in my courtroom. As the chief criminal judge in my district, I also have occasion to field the complaints or the concerns of victims of crimes. So I take pride in my record of being solicitous and considerate of the victims of crime, and I intend to continue to be so.

Senator KYL. Thank you very much, and I certainly share Senator DeWine's concern for it, and I know Senator Kohl feels the same way for the role that a judge can play in the community, as a role model, as an educator. It is not necessary, once you are on the Federal district bench, to check out of society and put yourself in a cocoon. I know some of my judge friends sometimes think that is what has happened. But there is much that can be done within the parameters of retaining your clear position as a judge to be out in the community, educating, and, as I say, acting as a role model. I know that Judge Collins does that, and you have all indicated to one degree or another you do. And I certainly encourage you to do that.

It is very, very important in helping a society to get a handle on some of the basic causes that bring people to the criminal justice system in the first instance, and you can play a very large role in that. You don't have to check out just because you are now on the bench. In fact, in some respects, you have an even greater capability of advancing that position in our society.

I commend the four of you and those who have been involved in your nominations. I think this is an excellent panel. As I said to the circuit court nominees, we will be communicating with you. I should tell you that our record will remain open until the close of business Friday, so there may be additional questions submitted to you, and if they are, be sure and get back to us as quickly as possible in answer to those questions. But other than that, we will communicate to you about the next process. And, again—yes, sir, Judge?

Judge TYSON. Mr. Chairman, I would like to thank the committee for the courtesy of a hearing, and I would also like for the record to thank Senators Breaux and Landrieu for their nomination and their support.

Also, if I could, there were a couple of people that were with me that were not introduced: my mother, Ms. Teresa Tyson.

Senator KYL. Oh, you better have your mother stand. Mother, thank you for being here.

Judge TYSON. And her friend, Ms. Mildred Diggs, and not present but I would also like to acknowledge for the record my mother-in-law, Ms. Lula Williams, who was not able to be here, and also my deceased grandmother, Ms. Mary Hartnett, and my aunt, Ms. Thelma Parham.

Thank you very much.

Senator KYL. We appreciate their strong support for you, I am sure.

Mr. POLSTER. Mr. Chairman.

Senator KYL. Yes, Mr. Polster.

Mr. POLSTER. I would also like to thank both of my fine Senators, Senator DeWine and Senator Glenn, for their wonderful and gracious remarks and their support through this process. I would also like to recognize a few people I didn't get a chance to before.

Senator KYL. Surely.

Mr. POLSTER. Some old and dear friends from college, Robert Dreier and Deborah Nyprus and Clifford Hendler. My sister, Laurie, was not able to be here with us, but our exceptional nanny, Joelle Osborne, was able to come in, and she is the one who helps us juggle two careers and three children.

Senator KYL. Would you raise your hands? Great. Good to have all of you with us as well.

Judge JAMES. Mr. Chairman, I would also like to thank the committee for the opportunity to have this hearing, and in particular thank Senators Breaux and Landrieu for their support in this process.

Senator KYL. Judge James, you are welcome.

Judge COLLINS. Mr. Chairman, I also want to thank you as well as members of the committee. I want to thank also Congressman Pastor for being involved in the nomination process, and I also mentioned my in-laws, who have been very faithful and behind me in this process and couldn't be with us, Annie Ollison and Raymond Ollison. And thank you again, sir.

Senator KYL. Well, you are very welcome, and welcome to you all, and if there is nothing further to come before the committee, the committee will stand adjourned.

[Whereupon, at 3:27 p.m., the committee was adjourned.]



## SUBMISSIONS FOR THE RECORD

## UNITED STATES SENATE

Questionnaire for Judicial Nominees

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Name: Kim Anita McLane Wardlaw  
Former Name: Kim Anita McLane

2. Address: List current place of residence and office address(es):

Residence: Pasadena, California

Office: 255 E. Temple, Suite 730  
Roybal Federal Building  
Los Angeles, CA 90012

3. Date and place of birth.

Date of birth: July 2, 1954  
Place of birth: San Francisco, California

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married.  
Date of Marriage: September 8, 1984  
Spouse: William Michael Wardlaw, Sr.  
Occupation: Businessman  
Employer's Name: Freeman Spogli & Co.  
Business address: 11100 Santa Monica Blvd., Suite 1900  
Los Angeles, California 90025

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

- a. Santa Clara University  
500 El Camino Real  
Santa Clara, California 95053  
Dates of Attendance: September 1972-June 1973  
No degree received.



- b. Foothill Community College  
12345 El Monte Road  
Los Altos Hills, CA 94022  
Dates of Attendance: September 1973-June 1974  
No degree received.
- c. University of California, Los Angeles  
405 Hilgard Avenue  
Los Angeles, California 90024  
Dates of Attendance: September 1974-June 1976  
Degree received: A.B. Communication Studies 1976
- d. University of California, Los Angeles, School of Law  
405 Hilgard Avenue  
Los Angeles, California 90024  
Dates of Attendance: September 1976-June 1979  
Degree received: J.D. 1979

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

- a. Dates: Summer, 1976  
Employer: University of California, Los Angeles  
Position held: Reader for Undergraduate Classes in "Legal Communication" and "Persuasive Theory of Communications"
- b. Dates: Summer, 1977  
Employer: University of California, Los Angeles  
Position held: Research Assistant for Dr. Paul I. Rosenthal; researched history of law of libel for book by Dr. Rosenthal
- c. Dates: October 1, 1977-December 31, 1977  
Employer: University of California, Los Angeles, Communication Studies Department  
Position held: Teaching Assistant for Undergraduate Class on Communications Law

- d.     Dates:                 January 1978-April 1978  
        Employer:            U.S. Court of Appeals, Ninth Circuit  
        Position held:       Legal Intern for the Hon. J.T. Sneed, Ninth Circuit Court of Appeals
  
- e.     Dates:                 June 1978-July 1978  
        Employer:            Rosenfeld, Meyer & Susman  
        Position held:       Law Clerk
  
- f.     Dates:                 July 1978-August 1978  
        Employer:            O'Melveny & Myers  
        Position held:       Law Clerk
  
- g.     Dates:                 August 1979-August 1980  
        Employer:            United States District Court for the Central District of California  
        Position held:       Law Clerk
  
- h.     Dates:                 December 1980-February 1987  
        Employer:            O'Melveny & Myers  
        Position held:       Associate
  
- i.     Dates:                 1988-October 1994  
        Organization:        Director  
        Position held:       Women Lawyers Public Action Grant Foundation, a non-profit corporation
  
- j.     Dates:                 1988-present  
        Organization:        Association of Business Trial Lawyers  
        Position held:       Board of Governors
  
- k.     Dates:                 February 1987-January 3, 1996  
        Employer:            O'Melveny & Myers  
        Position held:       Partner
  
- l.     Dates:                 December 1992-January 1993  
        Employer:            Department of Justice, Presidential Transition (Clinton-Gore)  
        Position held:       Justice Team I
  
- m.     Dates:                 June 1993  
        Employer:            City of Los Angeles  
        Position held:       Mayor-elect Richard J. Riordan's Government Liaison, Mayoral Transition Committee for the City of Los Angeles

- n.     Dates:                 1993-1994  
        Organization:       St. James Parish School Parents Association, a non-profit corporation  
        Position held:       Board of Directors
- o.     Dates:                 1994-present  
        Organization:       UCLA Center for Communications Policy  
        Positions held:       Board of Governors; Vice Chair
- p.     Dates:                 January 3, 1996-present  
        Employer:            United States District Court  
        Position held:       Judge, Central District of California

7.     Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8.     Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

a.     University of California, Los Angeles

- 1.     A.B. Communications studies, *summa cum laude*
- 2.     Phi Beta Kappa
- 3.     UCLA Honors Program
- 4.     Departmental Highest Honors  
        Honors Thesis: "Government Regulation of Broadcasting: The Family Viewing Hour"

b.     University of California, Los Angeles, School of Law

- 1.     Third year class ranking -- fifth out of approximately 300;  
        second year class ranking -- fourth in class
- 2.     Order of the Coif
- 3.     Award for the Outstanding Graduate in the Class of 1979 given to one graduate annually by the UCLA Law School Alumni Association

4. UCLA Law Review 1977-78; Articles Editor 1978-79
  5. American Jurisprudence Awards: Business Law; Family Law
  - c. Named by **California Law Business**, a supplement to the San Francisco Daily Journal and the Los Angeles Daily Journal one of the State of California's top 25 lawyers under the age of 45, July 1993
  - d. Named by the **Los Angeles Business Journal** as one of the 100 most prominent business attorneys in Los Angeles County, February 1995
  - e. Recipient of NOW Legal Defense and Education Fund 1995 BUDDY AWARDS (in honor of ethnically diverse families who have encouraged their daughters to pursue success)
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

United States District Court

1. Automation Committee (1996-1997)
2. Education Committee (1996-1997)
3. Jury Committee (1996-present)
4. Space Committee (1997-present)
5. Ad Hoc Committee Regarding Attorney Disciplinary Procedures (1997-present)
6. Attorney Admissions Fund Board of Trustees (1997-present)

United States Court of Appeals for the Ninth Circuit

1. Circuit-wide Library Committee (1997-present)

National Association of Women Judges, member

1. Judicial Opportunities and Selection Committee (1997-present)

Federal Judges Association, member

American Bar Association, member, Judicial Division; formerly member of Litigation and Tort and Insurance Practice Sections

Federal Bar Association, honorary member, Los Angeles Chapter



The State Bar of California, member (until January 1996)

1. California Legal Corps Task Force
2. Executive Committee of the Intellectual Property Section (1993-94)
3. Intellectual Property and Litigation Sections

Los Angeles County Bar Association

1. Trustee (1993-94)
2. Los Angeles County Bar Homeless Committee (1988)
3. Trial Lawyers Section, member (until January 1996)

Women Lawyers Association of Los Angeles. WLALA, a Los Angeles County Bar Affiliate, is the largest local bar association the principal purpose of which is to advance women in the legal profession.

1. Conference of Delegates and Legislation Committees (1983-84)
2. Delegate to 1984 California State Bar Convention
3. Publicity Committee Chair (1984-85)
4. Appointive Office Committee Co-Chair (1985-86) (this committee evaluates candidates for judicial office)
5. Scholarship Committee Chair (1986-87)
6. Amicus Briefs Committee Chair (1987-88)
7. Treasurer (1988-89)
8. Secretary (1989-90)
9. Second Vice President (1990-91)
10. First Vice President (1991-92)
11. President-Elect (1992-93)
12. President (1993-94)
13. Advisory Council (1994-95)
14. Chair of the 1995 Nominations Committee to select slate of 1995-96 officers
15. 1995 WLALA "Member of the Year" Award given by the National Association of Women Business Owners.

Women Lawyers Public Action Grant Foundation. (PAGF) Founding member and officer of PAGF, a non-profit benefit corporation created in 1985 to respond to the lack of state and federal funding for projects benefitting the disadvantaged. Since then, the PAGF has funded at least 20 law students who have undertaken public interest summer projects rather than employment in the private sector.

1. Secretary (1984-85)
2. Vice President (1985-86)
3. President (1986-87)
4. Advisory Council (1987-1995)
5. Director (1988-October 1994)

Association of Business Trial Lawyers (ABTL). The ABTL is a statewide organization of business litigators committed to continuing professional education of the bench and bar.

1. Board of Governors (1988 to present)
2. Membership Chair (1991-92)
3. 20th Annual Symposium Program Chair (1993)
4. Treasurer (1994-95)
5. Secretary (1995-96)

California Women Lawyers

1. District 7 representative (1986-87) (served on Judicial Evaluations Committee)

Other Professional Affiliations:

Member, Mexican-American Bar Association of Los Angeles County; Organization of Women Executives; Downtown Women Partners; The Breakfast Club (lawyer's association that meets on a voluntary basis to discuss issues affecting the legal profession and to endorse candidates for the California State Bar Board of Governors); Ninth Circuit Historical Society

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

- a. Organizations active in lobbying before public bodies:

1. None

## b. Other Organizations:

1. The Trusteeship, An Affiliate of The International Women's Forum (1996-present) (By-laws enclosed)
2. UCLA Center for Communication Policy, Vice Chair, Board of Governors (1994-present) (no By-laws exist)
3. Member, The Blue Ribbon of the Los Angeles Music Center (1993-present) (no By-laws exist)
4. Chancery Club of Los Angeles (honorary group of leaders of the Los Angeles legal community) (no By-laws exist)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

- |    |                   |  |
|----|-------------------|--|
| a. | December 4, 1979  | Supreme Court of the State of California   |
| b. | December 17, 1979 | United States District Court for the Central District of California                            |
| c. | November 12, 1982 | United States District Court for the Southern District of California                           |
| d. | August 20, 1985   | United States District Court for the District of Nevada (Pro Hac Vice)                         |
| e. | October 28, 1992  | United States District Court for the Northern District of California                           |
| f. | April 6, 1993     | United States District Court for the District of Montana, Great Falls Division (Pro Hac Vice)  |
| g. | March 7, 1994     | United States District Court for the District of Minnesota (Pro Hac Vice)                      |
| h. | May 16, 1994      | State of Minnesota District Court, County of Hennepin, Fourth Judicial District (Pro Hac Vice) |

- i. July 13, 1994 United States District Court for the Northern District of Alabama, Western Division (Pro Hac Vice)
  - j. February 1, 1995 Circuit Court of Marion County, State of Mississippi (Pro Hac Vice)
  - k. February 24, 1995 Court of Barbour County Alabama, Clayton Division (Pro Hac Vice)
  - l. March 20, 1995 United States District Court for the Southern District of Mississippi, Hattiesburg Division (Pro Hac Vice)
12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.
- a. Published Material I have written or edited:
    - 1. Comment, "Access to State-Owned Communications Media -- The Public Forum Doctrine," 26 UCLA L. Rev. 1410 (1979) (copy attached)
    - 2. Contributing Author, *The Encyclopedia of the American Constitution* (K. Karst and L. Levy, ed.), Macmillan Publishing Co., Inc. (1986) (copies of contributions attached)
    - 3. Consultant, California Continuing Education of the Bar -- *Civil Procedure During Trial*, 1992, 1995 editions.
  - b. Speeches on issues involving constitutional law or legal policy:
 

June, 1996, "A View from the Bench -- Tips for the Federal Practitioner," Federal Bar Association (press report enclosed). While this speech focused on advice to the federal practitioner, it also cited with approval the remarks of Chief Justice William Rehnquist to the Washington College of Law of the American University on the Future of the Federal Courts, April 9, 1996. The Chief Justice there spoke on the independence of the judiciary, concluding that independence is essential to the judiciary's proper functioning and should be retained.



13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.

Date of last physical examination: May 30, 1997.

14. Judicial: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
1.
    - a. United States District Judge, Central District of California
    - b. Appointed.
    - c. The District Court in the Central District of California has federal jurisdiction over cases filed in the California counties of Los Angeles, Ventura, San Bernadino, Orange, San Luis Obispo, Riverside and Santa Barbara.
  2.
    - a. I was designated to sit on the United States Court of Appeals for the Ninth Circuit in November 1996 and on August 4, 1997. I have been designated to do so again on June 11 and 12, 1998.
    - b. Appointed.
    - c. The Ninth Circuit has federal jurisdiction over cases appealed from federal courts in the nine Western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington and the Territory of Guam and the Commonwealth of the Northern Mariana Islands.
15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Citations for the ten most significant written opinions:

1. *Greenpeace, Inc. (U.S.A) v. State of France*, 946 F. Supp. 773 (C.D. Cal. 1996)

2. *Vasquez v. City of Bell Gardens*, 938 F. Supp. 1487 (C.D. Cal. 1996)
  3. *Unsecured Creditors Committee v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co., Inc.)*, 110 F.3d 1470 (9th Cir. 1997)
  4. *Barry v. BA Properties, Inc. (In re Barry)*, 201 B.R. 820 (C.D. Cal. 1996), adopted in *Mason-McDuffie Mortgage Corp. v. Peters (In re Peters)*, 101 F.3d 618 (9th Cir. 1996)
  5. *Los Angeles News Services v. Reuters Television International, Ltd.*, 942 F. Supp. 1265 (C.D. Cal. 1996); *Los Angeles News Services v. Reuters Television International*, 942 F. Supp. 1275 (C.D. Cal. 1996) (Findings of Fact and Conclusions of Law)
  6. *Gould v. Harris*, 929 F. Supp. 353 (C.D. Cal. 1996)
  7. *ADO Finance, AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711 (C.D. Cal. 1996); *ADO Finance, AG v. McDonnell Douglas Corp.*, 938 F. Supp. 590 (C.D. Cal. 1996) (related sanctions motion)
  8. *Gospel Missions of America v. Bennett*, 951 F. Supp. 1429 (C.D. Cal. 1997)
  9. *L. Jeffrey Selznick, et al. v. Turner Entertainment*, Case No. CV-96-5025-KMW(MCx) (C.D. Cal. Nov. 3, 1997) (unpublished Memorandum of Decision and Order)
  10. *Federal Deposit Insurance Company v. Jackson*, 1998 WL 1158 (9th Cir. Jan. 5, 1998)
- (2) Summary of and citations for all appellate opinions where (a) decisions were reversed or (b) judgment was affirmed with significant criticism:

a. Reversal:

*Pension Benefit Guarantee Corp. v. Carter and Tillery Enterprises*, 1996 WL 444012 (C.D. Cal. June 25, 1996), *rev'd*, 1998 WL 4442 (9th Cir. Jan. 9, 1998).

In *Pension Benefit Guarantee Corp. v. Carter and Tillery Enterprises*, this Court dismissed without prejudice the complaint of the Pension Benefit Guarantee Corporation ("PBGC") on the grounds that the PBGC had not satisfied both the statutory and regulatory prerequisites to filing suit for unfunded benefit liabilities after the distress termination of a pension plan. The rationale was that Section 1368 of the Employee Retirement Income Security Act (ERISA") provided the exclusive remedy for collecting unfunded benefit liabilities under 29 U.S.C. § 1362(b), and as a result, the PBGC was required to first obtain a lien before filing a district court action, which it did not do. In addition, the PBGC had failed to exhaust its administrative remedies pursuant to 29 C.F.R. § 4003 before filing suit for premiums owed under 29 U.S.C. § 1307.

The Ninth Circuit reversed, holding that § 1368 does not provide the exclusive mechanism for collecting § 1362 liabilities, but that § 1303 provides an alternative mechanism. Under the latter section, the parties are not required to first secure a lien, and thus dismissal on this ground was improper. Additionally, the Ninth Circuit held that the district court had three options for permitting completion of the administrative review process, including dismissal of the action pending exhaustion of the administrative review process, but that this Court erred by dismissing the action instead of granting PBGC's request for a stay in view of the statute of limitations.

- b. This Court has been affirmed, but no affirmance contained any criticism.
- (3) Citations for significant opinions on federal or state constitutional issues:
- 1. *Vasquez v. City of Bell Gardens*, 938 F. Supp. 1487 (C.D. Cal. 1996)
  - 2. *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, Case No. 96-4125-KMW(SHx), Order Denying Defendant's *Ex Parte* Application for Temporary Restraining Order, and Granting *Ex Parte* Application for Order to Show Cause re Preliminary Injunction, June 19, 1996 (unpublished) (attached)

3. *USA v. Duffus, et al.*, Case No. CR-156-KMW, Order Denying Defendants Johnson and Duffus' Suppression Motions, July 22, 1996 (unpublished) (attached)
4. *USA v. Morales-Perez*, Case No. CR-96-671-KMW, Order Denying Motion for Discovery re: Selective Prosecution, September 26, 1996 (unpublished) (attached)
5. *Luparello v. Gomez*, 1996 WL 341572 (C.D. Cal. 1996)
6. *Gospel Missions of America v. Bennett*, 951 F. Supp. 1429 (C.D. Cal. 1997)
7. *City of Hope National Medical Center v. Blue Cross of California*, 928 F. Supp. 1001 (C.D. Cal. 1996)
8. *Frierson v. Calderon*, Case No. 92-6251-KMW, Decision re: Cross-Motions for Partial Summary Judgment (unpublished) (attached)
9. *USA v. Camaro Ramirez*, Case No. CR-95-1172-KMW, Order re: Motion for Discovery on Claim of Selective Prosecution (unpublished) (attached)
10. *Tesfu v. City of Bell Gardens*, Case No. 95-7429-KMW(AJWx), Memorandum of Decision and Order Granting Defendants' Motions for Summary Judgment (unpublished) (attached)
11. *Carson Harbor Village, Ltd. v. Unocal Corporation, et al.*, Case No. 96-3281-KMW(VAPx), Order Denying Defendant Van Loben Sels' Motion to Dismiss (unpublished) (attached)
12. *Platas v. USA*, Case No. 96-2604-KMW, Order Denying Plaintiff's Rule 41 Motion for Return of Seized Conveyance (unpublished) (attached)
13. *Gospel Missions of America v. Bennett*, Case No. 93-1684-KMW(JGx), Order Granting In Part and Denying In Part the County Defendants' Motion for Partial Summary Judgment; Order Granting In Part and Denying In Part the City Defendants' Motion for Partial Summary Judgment (unpublished) (attached)



16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was elected as a delegate on behalf of then Governor Bill Clinton from the 27th United States Congressional District to the 1992 Democratic National Convention.

I was appointed by the then Mayor-elect Richard J. Riordan to serve on the City of Los Angeles Mayoral Transition Committee in 1993.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Following graduation from law school, I served as a law clerk to the Honorable William P. Gray, United States District Court for the Central District of California, from August 1979 through August 1980.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I joined O'Melveny & Myers, 400 South Hope Street, Los Angeles, California 90071, where I had previously worked as a summer law clerk in 1978, after my district court clerkship. I worked at O'Melveny & Myers as an associate from December 1980, and then as a partner of the firm, effective February 1, 1987 until January 3, 1996.

During my tenure at O'Melveny & Myers, I took two leaves of absence from the firm. In December-January 1992, I joined the Presidential Transition in Washington, D.C., preparing briefing memoranda in the Justice/Civil Rights Cluster on urgent and critical

issues requiring the Attorney General designates' immediate attention. I also reviewed and edited the report of Justice Team One, which was chaired by Anne K. Bingaman, former Assistant Attorney General, Antitrust Division, Department of Justice.

In June 1993, I served as Los Angeles Mayor-elect Richard J. Riordan's Government Liaison on the Mayoral Transition Committee for the City of Los Angeles at the city, state and national levels.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my practice was consistent over time. I have handled all phases of complex civil litigation in the state and federal courts, typically involving complicated, sophisticated or novel procedural and/or substantive issues. I also have handled administrative proceedings and government investigations and negotiations. Over time my responsibilities for clients and matters increased. After I became a partner of the firm in 1987, I had or shared lead responsibility for strategic decisionmaking, management, coordination and supervision of major cases for the firm, including trials, appeals, and nationwide class action and multidistrict litigation. Throughout my career, I had extensive writing experience, both drafting papers for all phases of litigation, as well as opinion letters and other materials for internal review, and supervising, reviewing and editing the work of others. I also had significant experience in sensitive and difficult settlement negotiations.

I had experience in many substantive areas of the law within the jurisdiction of the federal courts. These predominantly included copyright, trademark, and patent litigation. I also counseled clients in these fields, including one (confidential) representation which involved legal and factual analyses of worldwide production and distribution activities and their intellectual property implications in various media, including motion pictures, television, home video and books. Other areas of my substantive federal law practice included constitutional and media defense litigation, including defamation, access and shield laws, and securities, antitrust, unfair competition, and RICO litigation.

My practice frequently involved federal court litigation of state law claims including insurance, contract and business law. These actions involved challenging jurisdictional and other federal questions.

During my last two years in private practice, I acted as lead counsel in several federal and state class action lawsuits involving allegations of false advertising and consumer fraud claims under the laws of the fifty states. These presented complex and significant questions of class action law under Rule 23 of the Federal Rules of Civil Procedure and the parallel state law provisions, choice of law, and issues of standing, jurisdiction, comity, and the res judicata implications of possible settlements, among others.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

The firm's clients tended to be large corporations and some individuals engaged in national and international businesses in a variety of fields, including insurance companies, public utilities, governments, manufacturers, retailers, publishers, television and radio stations and networks, real estate developers and operators, wineries, stock brokerages, professional firms, motion picture producers and distributors and others. Clients for whom I personally performed services included a personal consumer product manufacturer and distributor in the defense of advertising, RICO and consumer fraud class action litigation; the City of Los Angeles in a lawsuit questioning the constitutionality of a change in actuarial accounting methods in its police and fire pension plan; insurance corporations in several coverage matters in federal and state courts and advice concerning the constitutionality of then newly-enacted Proposition 103, and other companies in the pursuit of insurance coverage; and a public utility in merger proceedings before the California Public Utilities Commission. I have worked on media defense litigation for and provided legal advice to several publishing and broadcasting corporations; given First Amendment advice to clients, including a real estate developer; litigated intellectual property matters and provided advice to corporations in a variety of industries, including a motion picture producer and distributor; defended product liability actions against a personal products manufacturer and securities actions against publicly traded corporations.

My areas of specialty or emphasis included intellectual property, particularly copyright and trademark litigation, First Amendment law, media defense, and class action litigation, principally securities and consumer fraud.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Throughout my career, I regularly appeared in court as my practice demanded, principally in connection with pretrial proceedings, arguing motions ranging from discovery to dispositive in state and federal courts, participating in pretrial status and settlement conferences, and making one-time appearances, primarily on behalf of media defendants. From 1988 through 1992, I was co-lead counsel in three lengthy (ranging from five weeks to three months) trials of complex business matters. These entailed daily appearances over an extended period.

2. What percentage of these appearances was in:
- (a) federal courts: approximately 50%
  - (b) state courts of record: approximately 25%
  - (c) other courts: approximately 25%
3. What percentage of your litigation was:
- (a) civil: approximately 95%
  - (b) criminal: approximately 5%
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Three, as chief or co-chief counsel.

5. What percentage of these trials was:
- (a) jury: 33-1/3%
  - (b) non-jury: 66-2/3%



18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
1. **Eileen A. Roddenberry vs. Eugene W. Roddenberry, et al.; Eugene A. Roddenberry, Norway Corporation, and Majel Roddenberry, vs. Eileen A. Roddenberry, Case No. C672436, Superior Court of the State of California for the County of Los Angeles.**

We represented Paramount Pictures Corporation ("PPC") in this action, which included an array of claims, including negligence, breach of fiduciary duty, constructive fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, accounting, conversion, interference with contractual relations and conspiracy to do so by plaintiff Eileen Roddenberry and other co-defendants. The case arose out of Gene and Eileen's 1969 divorce decree and their division of Gene's interest in PPC's premiere intellectual property, "STAR TREK". The trial of this action was bifurcated. In Phase I, which began on May 11, 1992, and lasted through June 26, 1992, I was co-counsel with Lesley Andrus of Goldberg & Andrus, a family law specialist, jointly representing PPC's interests. Each of us had lead responsibility for separate subject areas, but we jointly developed strategy and managed the case. Specifically, I prepared for trial, drafted papers, handled discovery, negotiated with plaintiff's counsel concerning dismissal and post-trial proceedings. I also advised PPC concerning its rights and obligations pending the appeal and/or resolution of the dispute among the other parties. PPC won judgment on all but two claims, which were then voluntarily dismissed by plaintiff's new counsel, ending PPC's involvement after Phase I.

(a) Date of Representation: November 1990-November 1994

Trial Dates: May 11-June 26, 1992

(b) Court and Judge:

Superior Court of the State of California for the County of Los Angeles, the Honorable Macklin Fleming, Judge Pro Tem

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2. **In The Matter Of The Application Of SCECorp and Its Public Utility Subsidiary Southern California Edison Company and San Diego Gas & Electric Company For Authority to Merge San Diego Gas & Electric Company Into Southern California Edison Company, Application No. A. 88-12-035, California Public Utilities Commission.**

This action involved the proposed merger of Southern California Edison Company and San Diego Gas & Electric Company. The application for merger was filed December 16, 1988. As one of three

O'Melveny partners with lead responsibility for the entire case, I managed the O'Melveny team, which included at times thirty-five plus lawyers and paralegals, worked with the Southern California Edison and San Diego Gas & Electric Merger Task Forces, and coordinated with Edison's Washington counsel who were handling parallel federal proceedings before the Federal Energy Commission. I also had specific substantive responsibility for developing and presenting areas of the case, including the non-regulated affiliates and related competitive issues and the existence and extent of net benefits. We developed Edison's case-in-chief and wrote the direct testimony of our witnesses, percipient and expert, which we filed in April of 1989. This involved 26 witnesses and over 2,000 pages of testimony (excluding exhibits and work papers).

Thereafter, in March and May 1990, rebuttal and additional testimony were filed, involving twenty-three witnesses and 1259 pages. During this time, we responded to the Division of Ratepayer Advocates' and other parties' over 4000 data requests and produced almost 200,000 documents, comprising 3.2 million pages. Four pre-hearing conferences and thirteen public hearings were held. Sixty-one days of evidentiary hearings took place from May 14 to August 4, 1990. Over 710 trial exhibits were submitted; testimony was presented by 116 witnesses; the hearing transcripts comprised over 9600 pages. There were sixty-one appearances of record and twenty-one active parties presenting or cross-examining witnesses. I served as one of SCE's lead counsel during the trial and coordinated with the other parties' counsel. Opening Briefs were filed on September 10, 1990, and Reply Briefs on September 24, 1990. We submitted a post-trial brief of over 1,000 pages. I oversaw the filing of each of our briefs and was responsible for coordinating among all parties the development of a common briefing outline.

During the pendency of the hearings, Public Utilities Code Section 854 was amended, requiring the Commission to find that the proposed merger would provide net benefits to ratepayers in both the short and long-term, that the proposal included a ratemaking method to ensure that ratepayers would receive the forecasted benefits, and that the merger did not adversely affect competition. The proceedings were submitted October 9, 1990; oral argument before the Commission took place on March 20, 1991; supplemental briefs were filed, and a final decision by the CPUC was announced May 8, 1991. While the Administrative Law Judge's opinion recommended denial based solely on competitive grounds, the Commission denied the proposed merger on all grounds. The 138-page decision is reported at 122 P.U.R. 4th 225 (May 8, 1991).



- (a) Date of Representation: December 1988-May 1991

Trial Dates: May 14-August 4, 1990

- (b) Court and Judge:

California Public Utilities Commission, the Honorable Brian T. Cragg, Administrative Law Judge, the Honorable Lynn T. Carew, Administrative Law Judge

- (c) Co-Counsel:

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3. **Glenfed Development Corporation and Five Point Court Associates vs. Fidelity & Deposit Company of Maryland, Case No. 513275, Superior Court of the State of California for the County of Orange; G007777, Court of Appeal, State of California, Fourth Appellate District.**

In this action we represented Glenfed Development Corporation and Five Point Court Associates in their unsuccessful effort to obtain reimbursement from Fidelity and Deposit Company of Maryland under a course of construction insurance policy following destruction of its building project by fire. The case involved alleged breaches of the duty of good faith and fair dealing and violations of the California Insurance Code. A key issue was whether the insurance company had an affirmative duty to call to the insured's attention the requirement of a guard on the premises because such a requirement was contrary to the insured's reasonable expectations. A twelve-week jury trial was held in the Superior Court for the County of Orange, and the jury verdict for Fidelity was affirmed by the Court of Appeal for the Fourth Appellate District, Division Three, in an unpublished memorandum opinion. I represented from the investigation of the claim by the insurance company beginning in January 1987 through the trial and appeal, actively participating in every phase, including conducting discovery, drafting and arguing motions, selecting the jury, preparing and presenting witnesses at trial, arguing the jury instructions, and working on the appellate briefs.

- (a) Date of Representation: January 1987-December 1991

Trial Dates: August 8-October 26, 1988

- (b) Court and Judge:

- (1) Superior Court of the State of California for the County of Orange, the Honorable James K. Turner;
- (2) Court of Appeal, State of California, Fourth Appellate District

(c) Co-Counsel:

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4. **Martin v. Dahlberg**, 156 F.R.D. 207 (N.D. Cal. 1994).

In August 1993, I was asked by Bausch & Lomb Incorporated to serve as lead counsel for its recently acquired subsidiary, Dahlberg, Inc., the manufacturer of the Miracle-Ear hearing aid with the Clarifier option, and several of its present and former officers, in two putative class actions (later consolidated) in the United States District Court for the Northern District of California. The consolidated complaint alleged that Dahlberg materially misrepresented the capability of its Clarifier option to reduce unwanted background noise in noisy or group environments. Several legal theories of recovery were advanced, including civil RICO violations, and common law claims for fraud, negligent misrepresentation, negligence, unfair business practices and false advertising. The significant issue presented was whether class treatment was appropriate given the predominance of individual issues, particularly that of reliance — an essential element of the RICO, common law fraud and negligent misrepresentation claims. The district court denied class certification, and the case was dismissed on July 14, 1994, pursuant to the parties' stipulation.

As a result of the decision in this case, the RICO claims (with their treble damage exposure) were never reasserted, even though some eleven putative class action lawsuits were filed in California, Pennsylvania, Minnesota (state and federal) and Alabama and individual actions were filed in Alabama and Mississippi.

- (a) Date of Representation: August 1993-July 1994

No trial date was set.

- (b) Court and Judge:

United States District Court for the Northern District of California,  
the Honorable Fern M. Smith; the Honorable Wayne D. Brazil,  
U.S. Magistrate Judge

- (c) Co-Counsel:

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A related action for civil penalties for alleged violations of a 1976 Consent Decree concerning advertising for Dahlberg's hearing aids, **United States of America v. Dahlberg, Inc.**, Case No. 4-94-165, was pending and had been consolidated with Dahlberg's declaratory relief action challenging the FTC's jurisdiction to regulate the hearing aids at issue. Another law firm had filed and argued two potentially dispositive motions. We were asked to take over the lead in discovery matters in these actions in October 1994, and to take lead responsibility for all aspects of the case in mid-January 1995. Significant questions included the FTC's jurisdiction, the state of scientific and medical knowledge at the relevant times, whether the issues presented are ones of law or fact, the applicable burden of proof, scienter and the nature and appropriateness of the civil penalties sought under the Commission's unjust enrichment theories. This action was compromised. Our local counsel was Thomas Fraser of Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3397, (612) 347-7028; our principal opposing counsel was David A. Levitt, Office of Consumer Litigation, Civil Division, Department of Justice, Washington, D.C. 20530, (202) 307-6154.

**5. United Firefighters of Los Angeles City, Local 112 IAFF, AFL-CIO v. City of Los Angeles**, Case No. BC 088890, Superior Court of the State of California for the County of Los Angeles.

In December 1993, I was retained as lead litigation counsel by the City of Los Angeles in this action filed by the United Firefighters, three individual firemen and members of the Fire and Police pension system. Plaintiffs sought a peremptory writ of mandate and/or preliminary and permanent injunctive relief. We represented all defendants, which included the City, the City Council, the present and former mayors of Los Angeles, the present and former individual City Council members, the present and former individual members of the Board of Fire and Police Pension Commissioners and the Board itself, the City Controller and the General Manager of the Pension System. The suit arose from the alleged failure of the City to budget for and/or fund the fire and police pension system's investment-related expenses for the fiscal years 1992-93 and 1993-94, and sought an injunction preventing the City from failing to do so in fiscal year 1994-95. The

action presented significant issues as to whether the City's actions constituted an impairment of vested contractual rights under the state and federal constitutions and of interpretation of the City Charter provisions governing the Fire and Police Pension system. After months of discovery and internal investigation, legal and factual analysis, we reached a settlement of the action, which was approved by the Los Angeles City Council.

- (a) Date of Representation: December 1993-December 1995

Compromised before trial.

- (b) Court and Judge:

Superior Court of the State of California for the County of Los Angeles, the Honorable Diane L. Wayne

- (c) Co-counsel:

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6. **Richard P. Crane, Jr. and James D. Henderson vs. Arizona Republic, Jack Anderson, Jerry Vann aka Jerry Van Hoorelbeke, Jerry Seper, Darrow Tully, Alan Moyer, Phoenix Newspapers**, Superior Court Case No. C558953; Court of Appeal, Second Appellate District Case No. B032323; Supreme Court Case No. S004220; United States District Court Case No. CV 88-04762-ER; U.S. Court of Appeals, Ninth Circuit Case No. 90-55071.

This libel action was commenced on July 31, 1985 by Richard P. Crane, Jr. and James D. Henderson. It arose from an article published by our client, the Arizona Republic, a newspaper owned by Phoenix Newspapers. The article reported a United States Department of Justice investigation into allegations of official misconduct by Crane and Henderson, then the head and former head, respectively, of the Justice Department's Organized Crime Strike Force in Los Angeles. After litigating in the state courts for three years, we removed the case to federal court upon dismissal of the Doe defendants (this procedure was permitted for a short time). United States District Court Judge Edward Rafeedie of the Central District of California granted our motion for summary judgment, finding, inter alia, that the newspaper article was a "fair and true" report of a legislative or other public proceeding, and thus absolutely privileged under California Civil Code section 47(4). **Crane v. Arizona Republic**, 729 F.Supp. 698 (C.D. Cal. 1989). On August 21, 1992, the Ninth Circuit affirmed Judge Rafeedie's grant of summary judgment, except as to three paragraphs in the article that juxtaposed denials and related statements made to the Republic reporter, Jerry Seper. **Crane v. The Arizona Republic**, 972 F.2d 1511 (9th Cir. 1992).

The Ninth Circuit remanded for trial the question whether the juxtaposition of those denials was undertaken with actual malice. A three and one-half-day trial on the single issue of the juxtaposition of the paragraphs concluded on April 21, 1995, with an adverse determination. I did not act as trial counsel. I participated fully in the strategic decisions, wrote major portions of the state court papers, reviewed and edited all of the later papers, and reviewed all the trial preparation and post-trial filings.

(a) Date of Representation: November 1985-April 1995

Trial Dates: April 18-21, 1995

(b) Court(s) and Judge(s):

- (1) Superior Court of the State of California for the County of Los Angeles, the Honorable Paul Turner;
- (2) Court of Appeals, Second Appellate District, Division 2;
- (3) Supreme Court of the State of California, Honorable Malcolm M. Lucas;
- (4) United States District Court for the Central District of California, the Honorable Edward Rafeedie;
- (5) United States Court of Appeals for the Ninth Circuit, the Honorable Thomas Tang, the Honorable Stephen Reinhardt and the Honorable Charles E. Wiggins

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**7. In Re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding 1072, Superior Court of the State of California for the County of San Francisco.**

This consolidated proceeding consisted of five separate actions among five asbestos manufacturers and their multitude of insurers over coverage for the tens of thousands of underlying personal injury and property damage claims arising from asbestos injuries around the country. Plaintiffs sought a determination of the nature and extent of coverage available under comprehensive general liability policies issued collectively by the more than 100 insurance company defendants. The cases were ordered coordinated for discovery and trial, resulting in one of the most complex and protracted lawsuits of any kind in California judicial history. My primary responsibility was representing CIGNA in the Johns-Manville and Armstrong actions, which were compromised on behalf of our client before trial. From May 12, 1983, to April 19, 1985, I participated fully in the discovery phase, including attending hearings and arguing discovery related motions, and taking lead responsibility for several substantive areas. This phase involved almost a year and a half of eight tracks of simultaneous depositions, resulting in the taking of more than 1,000 volumes of transcripts, and in many hearings concerning discovery and other matters and in the drafting and arguing of the summary judgment motions. All motions for summary judgment were argued on November 29, 1984. I argued a significant motion on behalf of all of the insurance companies (five were chosen to represent the defendants' group; the other four were senior partners from their respective firms, as were each of the plaintiff's representatives). I also was responsible for identifying and preparing certain expert witnesses. Over 100,000 exhibits were designated during the pre-trial process. The trial that followed (in which I did not participate) lasted more than two years.

(a) Date of Representation: May 1983-April 1985

Trial Date: The cases over which I had principle responsibility were substantially compromised before trial.

(b) Court and Judge:

Superior Court of the State of California for the County of San Francisco, the Honorable Ira A. Brown

(c) Co-Counsel:

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8. **Academy of Motion Pictures Arts & Sciences vs. RKO General, Inc., and KHJ-TV**, Case No. 82-0433-LEW (Px), United States District Court for the Central District of California, Superior Court of the State of California for the County of Los Angeles.

This case involved the successful prosecution by our client, the Academy of Motion Pictures Arts and Sciences (the "Academy") of its copyright infringement claims against RKO General, Inc. Although I was the associate (working with one partner) assigned to the matter, I had substantial responsibility for it. I drafted the partial summary judgment papers which effectively concluded the actions (the remaining issues were compromised) and conducted discovery, including the defense of our expert industry witness, the producer, David L. Wolper. Judge Waters ruled in the Academy's favor "on the [summary judgment] papers" from the bench on November 15, 1982. The significant issue of law presented was whether the Academy's List of Nominees was copyrightable. By prevailing, the Academy established the protectibility as a compilation of its annual list of "Oscar" nominees. RKO was enjoined from using the Academy's List of Nominees in its program entitled "Your Choice for the Oscars." The Academy also obtained an injunction against the defendant's unauthorized use of the "Oscar" trademark in the program. The remainder of the action was settled.

- (a) Date of Representation: January 1982-August 1983

Trial Date: Compromised before trial on August 22, 1983.

- (b) Court and Judge:

United States District Court for the Central District of California,  
the Honorable Laughlin E. Waters

- (c) Co-Counsel:

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9. **Harry Lewis v. Richard S. Brill, Jack E. Dahl, William T. Gimbel, L.O. Grainger, Forrest M. Harold, Joe E. Roberson, Roland R. Sahar and Elixir Industries**, Case No. CA00718, Superior Court of the State of California for the County of Los Angeles.

This was a class action securities action originally filed in federal court in December 1981 to enjoin a "going private" merger. The District Court dismissed with prejudice plaintiff's federal securities claims and dismissed without prejudice for lack of federal jurisdiction plaintiff's claim for breach of fiduciary duty under state law, and the Ninth Circuit affirmed. Plaintiffs then filed this action in state court. The state claims involved allegations of material misstatements and omissions, as well as "control" issues and the exclusivity of appraisal remedies. I became involved in this litigation in October 1986, when the state claims appeared headed for trial. We represented defendants Elixir Industries, Morton Firestone, and Jack Dahl. After extensive litigation, including litigation concerning the adequacy of the purported class representatives, I first negotiated with the attorneys representing the directors and officers insurance coverage which then enabled us to negotiate a settlement of the state court action. This was approved on behalf of a settlement class by Judge Dowds.

- (a) Date of Representation: October 1986-August 1987

Trial Date: Compromised before trial.

(b) Court and Judge:

Superior Court of the State of California for the County of Los Angeles, the Honorable Norman R. Dowds

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**10. People of the State of California v. Edlyn Joy Hauser, Case No. A953670, Municipal Court of the County of Los Angeles.**

This action involved unpublished film taken by an NBC cameraman of a "pit bull" attack, which was allegedly encouraged by Ms. Hauser. It occurred at the height of public frenzy over pitbull attacks. I drafted a motion and argued on behalf of NBC Television to preclude the discovery of "outtakes," unpublished videotape footage in KNBC-TV's possession, on the grounds that

they were privileged from disclosure by the First Amendment, the California Constitution and California Evidence Code Section 1070, and argued the same at a hearing on August 3, 1987. NBC was not required to produce the "outtakes."

- (a) Date of Representation: July-August 1987

Trial Date: Not applicable.

- (b) Court and Judge:

Municipal Court of the County of Los Angeles, the Honorable Candace D. Cooper, now Judge, Superior Court of the County of Los Angeles

- (c) Opposing Counsel:

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19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I am currently active on several committees of my Court, including the Space Committee and the Ad Hoc Committee Regarding Attorney Disciplinary Procedures, and have served on the the Automation (1996-1997), Education (1996-1997), and Jury Committees (1996-1997). I am also currently a Trustee for the Attorney Admissions Fund Board.

Finally, I am serving on the U.S. Court of Appeals for the Ninth Circuit Library Committee (1997-present).

During my time in private practice I worked on several matters that did not involve litigation, but instead involved counseling and advice to clients. For example, in December 1990, Paramount Pictures Corporation retained my partner and I to undertake a confidential factual and legal analysis of certain worldwide production and distribution activities and their intellectual property implications over time in various media, including motion pictures, television, home video and books. The project spanned seven months and resulted in a 204 page opinion letter. Thereafter I consulted with Paramount concerning aspects of the work.

I also have represented clients in governmental investigations. In 1991, in **The People of the State of California vs. Montgomery Ward & Co., Inc.**, Case No. BC032336, Superior Court of California for the County of Los Angeles, for example, I represented Montgomery Ward in connection with misleading advertising claims concerning its "Scratch & Save" promotion asserted separately by the Los Angeles and Riverside County District Attorneys Offices. A Civil Consent decree was entered on July 11, 1991.

We were retained in September 1991 to defend one of the firm's clients in a Department of Labor investigation concerning alleged ERISA violations. The matter arose from the failure of the Executive Life Insurance Company following the conversion of a pension fund to an annuity contract purchased from First Executive. We responded to a subpoena with approximately 12,000 pages of documents and submitted to two rounds of interviews of key witnesses. After three years of investigatory proceedings, the Department of Labor decided against instituting suit.

In May 1993, I represented Bausch & Lomb Incorporated against allegations by the Ventura County District Attorney concerning allegedly misleading advertising about its contact lenses. The Ventura District Attorney took no action.

I have also been involved in significant matters which did not proceed to trial because we won dispositive motions. For example, I served as lead counsel in a federal securities class action arising from statements in a prospectus and registration statement for an initial public offering in which we won judgment for our client upon filing a Rule 12(b)(6) motion. **Heagy v. Buttrey Food & Drug Stores**, Case No. CV-93-00015 GF-PGH, in the United States District Court for the District of Montana, Great Falls Division. Memorandum and Order and Judgment, dated January 4, 1994; Motion to reconsider denied, Memorandum and Order dated August 29, 1994.

Similarly, I worked on **E. & J. Gallo Winery vs. Gallo Cattle Company, Michael D. Gallo and Joseph E. Gallo**, United States District Court For the Eastern District of California, Case No(s). CV-F-86-183 EDP; United States



Court of Appeals for the Ninth Circuit, Case No. 89-16271. This was a trademark action filed by E. & J. Gallo Winery against Joseph Gallo for the use of the mark GALLO on retail packages of cheese. Joseph Gallo counterclaimed, seeking a one third ownership interest in the Winery. After the discovery phase, the District Court granted the Winery's motion for summary judgment and also enjoined Joseph Gallo's use of his name in retail packages of cheese on the ground of infringement of trademarks and unfair competition under the Lanham Act, 15 U.S.C. §§114, 1125(a). My principal responsibility on this matter was to develop the likelihood of consumer confusion evidence underlying the trademark infringement claim and to engage in discovery on that and related issues. The decisions are reported as **E & J Gallo Winery v. Gallo Cattle Co.**, 967 F.2d 1280 (9th Cir. 1992); 12 U.S.P.Q. 2d 1657 (E.D. Cal. 1989).

I also have been involved in many cases which were fully litigated up to the time of trial, but which were compromised before trial. For example, in connection with our representation of INA (now CIGNA) in **MGM Grand Hotel - Las Vegas, Inc., a Nevada Corporation vs. Insurance Company of North America**, Case No.(s) CV-LV-82-26 HDM, CV-LV-82-96 HDM, we prepared the matter fully for trial during a substantial period while it was stayed. The case concerned MGM's claim for property insurance coverage and related counterclaims arising from the devastating fire at the MGM Grand in 1980. O'Melveny & Myers was retained as lead counsel in January 1985 when, on the eve of trial, Judge Harry Claiborne disqualified the law firm then representing INA for improper contacts with plaintiff's former employee. At the time we took over the representation, at least 192 depositions had been taken and more than one million documents had been produced. I coordinated the transfer of all discovery and trial materials, analyzed the jurisdictional issues raised by the disqualification appeal and related issues, drafted motions, worked with our construction experts to rebuild the MGM Grand Hotel from the ground up and to identify the reasonable costs associated therewith, worked with opposing counsel toward filing joint pre-trial papers, and attended hearings. Although the case was stayed pending the appeal of the disqualification order, we prepared the matter for trial, compromising MGM's claims on September 5, 1986 just before trial was again scheduled to commence.

In July 1991, I became involved in extensive discovery and trial preparation of the damages phase of patent litigation on behalf of Bausch & Lomb Incorporated. This case, **Hewlett-Packard Company vs. Bausch & Lomb Incorporated**, Case No. C 86-20406 JW, United States District Court for the Northern District of California, and a companion case, **Bausch & Lomb Incorporated vs. Ametek, Inc. and Summagraphics Corporation**, Case No. C-91-20796 JW (PVT), involved patents on devices for the movement of paper in scientific recording instruments. The Hewlett-Packard case was scheduled

for trial on March 16, 1992 in the federal district court for the Northern District of California before the Honorable James W. Ware. It was compromised on February 27, 1992, shortly before the trial, after extensive discovery on the question of intentional infringement (notice and willfulness) and damages issues, retention of expert witnesses and trial preparation. We also compromised the related litigation involving contractual indemnity and patent issues, pursued by the successor companies whose products were alleged also to have infringed the Hewlett-Packard patents, during a pre-trial settlement conference before Magistrate Judge Patricia V. Trumbull on November 4, 1992.

In one of my earliest representations, O'Melveny & Myers was designated Western Regional Coordinating Counsel for Procter & Gamble in the nationwide litigation involving allegations that the Company's Rely tampons caused toxic shock syndrome. I had frontline responsibility for managing thirty lawsuits in California, took numerous depositions, and worked with expert witnesses on numerous motions. On behalf of my firm, I monitored the jury trial in the United States District Court for the Northern District of Iowa, **Kehm v. Procter & Gamble**. I analyzed the testimony and witnesses and made recommendations to the O'Melveny team for the trials of the hundreds of toxic shock syndrome cases it was handling.

From time to time, on behalf of media defendants, I have made one-time court appearances to protect and advance their interests. For example, I filed an Emergency Petition to Clarify an April 13, 1988 court order on behalf of TIME Magazine, which had taken photographs of minors in the Los Padrinos Juvenile Hall in connection with a cover story investigation of the role of young children in the world of drug dealing. A hearing was held before the Honorable Katherine Doi Todd, Superior Court of the State of California for the County of Los Angeles, in which she determined that TIME's proposed cover and other photographs of Jimmy B. were proscribed by a prior court order precluding publication of any photograph in which a minor might be identified. A Petition for Review of Judge Todd's order on the ground that it constituted an unconstitutional prior restraint was summarily denied by the California Court of Appeal, Second Appellate District.

I also from time to time worked to avoid litigation for our clients, such as devising time, place and manner regulations for public access to a shopping mall and drafting a licensing arrangement to deal with the unauthorized distribution on T-shirts of the "VJ Day Kissing Sailor" photograph, in which TIME Magazine owns the rights.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I became a United States District Court Judge on January 3, 1996. I have abided and would continue to abide by the canons of judicial ethics which require "every judicial officer [to] satisfy himself that he is actually unbiased toward the parties in each case and that his impartiality is not reasonably subject to question." *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994). To avoid conflicts of interest and to ensure that any such areas would be identified and appropriate action taken I did the following. First, I made a commitment to recuse myself from all matters involving my former law firm for a three year period. Second, I immediately created a "Conflicts Checklist," which identifies all of the interests I have which could potentially create a conflict situation. Each new complaint is checked against this list by both my judicial secretary and my Courtroom Deputy. If a party is identified as on the list, I immediately recuse myself in accordance with 28 U.S.C. § 455(b)(4). I also divested numerous holdings upon taking the bench so as to minimize the number of potential conflicts. In addition, the Conflicts checklist is updated constantly in accordance with 28 U.S.C. § 455(c).

Beyond the initial readily identifiable conflicts, when I first see a complaint or indictment or information or other papers related to the case, I carefully examine the parties, issues and identity of counsel of record. In some instances I have thereupon recused myself under 28 U.S.C. § 455(b)(1)(2) or (3). In others, I have fully disclosed any relationship, knowledge, or prior activity which might be considered a potential conflict, permitting the parties to raise any issue which they might believe creates the appearance of a conflict of interest. In every instance I have consulted the applicable canons of ethics, the ABA

Code of Judicial Conduct, statutory or other rules governing judicial conflicts in making a determination whether recusal is appropriate under the circumstances. It has not yet become necessary to consult with the Judicial Conference of the United States Committee on Codes of Conduct, but I would not hesitate to do so in an appropriate case.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1979, may be substituted here.)

Please see the enclosed Financial Disclosure Report for Calendar Year 1997 with a report date of January 31, 1998.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see the attached financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

- a. Bill Clinton for President - California Campaign  
December 1991 - November 1992.  
I principally worked in the scheduling operation with primary responsibility for First Lady Hillary Clinton's California schedule. I also raised funds on behalf of the campaign.
- b. Riordan for Mayor (Los Angeles)  
January - June 1993  
I was a member of the Executive Committee and in charge of debate preparation.



- c. Kathleen Brown for Governor (California)  
March - November 1994  
Title: Chair of Debate Negotiation and Preparation Team for the  
Primary and General campaigns.

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While I was in private practice, I participated in pro bono litigation handled by my firm, supervising, for example, cases referred by Public Counsel, the public interest law office of the Los Angeles County and Beverly Hills Bar Association. For example, in **Interol Collectors & Investigators, Inc. v. Kurosaki**, we represented an indigent woman defending a claim for medical expenses incurred by her deceased husband which she had not agreed to pay. I also have provided free legal advice to the Women Lawyers Association of Los Angeles (WLALA) and the Women Lawyers Public Action Grant Foundation. In addition, as WLALA Amicus Brief Chairman, I participated in drafting several briefs on a pro bono basis, including a brief submitted on behalf of Amicus Curiae, the City of Los Angeles, the City of Wilmington and Women Lawyers Association of Los Angeles in **New York State Club Association, Inc. v. The City of New York, et al.** before the United States Supreme Court. This case presented the issue of the validity of a New York city ordinance that prohibited discrimination by organizations that were not distinctly private.

I also secured approval from our firm for and actively supervised a team of associates working in conjunction with the California Women's Law Center and the Committee for the California Coalition for Battered Women in Prison seeking clemency for women imprisoned after murdering their spouses who were deprived of the battered women's syndrome as a defense.

I served as local counsel pro bono on a Freedom of Information Act Case, **Gary Kern v. Federal Bureau of Investigation, et al.**, Case No. CV 94-0649-RT, U.S. District Court, Central District of California.

Many of my community service activities were through bar organizations, particularly WLALA. I was a founding member and one of the first officers of the Women Lawyers Public Action Grant Foundation ("PAGF"). I held every office of the PAGF, including serving as Advisory Council and Director through October of last year. We created the PAGF in 1985 to respond to the lack of state and federal funds for projects benefitting the disadvantaged. Since then, PAGF has funded over 20 law students who have undertaken summer law projects assisting the disadvantaged. As an officer, I

spent substantial time in outreach, fundraising, presenting programs, and evaluating and selecting applicants.

In my year as WLALA President, I devoted substantial time to two projects to assist the disadvantaged. The first was to adopt an inner city school in South Central Los Angeles. Second, working in conjunction with the Los Angeles County District Attorney's Office and the Los Angeles Police Department, we established the Domestic Violence Project to assist victims of spousal abuse in securing temporary restraining orders. Also, through WLALA, we twice a year assisted the Downtown Women's Shelter, organizing gift donations during the holiday season and hosting an Easter Brunch.

Through the years, I also volunteered on one-time projects such as the Los Angeles County Barristers' Christmas homeless project, which involves participation by the attorneys and staff in giving one homeless shelter the Christmas wish it wants. I organized the program at my firm for two years.

I also have participated on an informal basis in many women's organizations such as the Downtown Women Partners, the Leadership Council of Southern California and the Organization of Women Executives. These organizations are designed to network, mentor and support other women. I have participated in panel discussions sponsored by Women's Lawyers of Los Angeles Status of Women Lawyers Committee and the State Bar of California Committee on Women in the Law in which I gave advice to other women on how to make partner at their firms. I also participated in two segments of an eight-part national television series featuring judges, attorneys, clients and social scientists, discussing lawyering in the 90's called "Lawyers and The Law". These programs were designed to educate the general public about the legal system.

In 1991, as both a tribute to Judge Gray and to help disadvantaged students in Pasadena, I worked in conjunction with the Riordan Foundation, former law clerks of Judge Gray's and his colleagues to establish the Honorable William P. Gray Computer Learning Center at the John Muir Public High School in Pasadena.

In 1988, I established a scholarship in my husband's name at the University of Notre Dame. The funds are dedicated to awarding scholarships to disadvantaged youths from San Bernardino County (where my husband was raised) who desire, but do not have the means, to attend Notre Dame.

Since joining the bench, I have continued to participate in the professional advancement of bench and bar by joining certain judicial associations and by participating as a panel member in educational seminars, programs, and conferences. These organizations have included the

Association of Business Trial Lawyers, the Federal Bar Association, the Los Angeles County Bar and the Practicing Law Institute.

I also have maintained certain civic activities, such as participating as part of the Los Angeles Delegation to visit Israel with Mayor Richard J. Riordan, serving as an Honorary Co-Chair of the Steering Committee of the 1996 Olympic Torch Run in Los Angeles, and supporting various of our cultural institutions through the Blue Ribbon and other Los Angeles Music Center affiliate organizations. (I do not engage in any fundraising activities, however.)

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is not such a commission with respect to the Court of Appeals for the Ninth Circuit.

I was contacted by the Office of Counsel to the President in June 1997, with a request to complete certain forms. Thereafter, I was interviewed by members of the White House Counsel's Office and representatives of the United States Department of Justice. In December 1997 I was informed that the President had indicated his intention to nominate me to the Ninth Circuit Court of Appeals, subject to reviews by the Federal Bureau of Investigation and the American Bar Association. I was interviewed by a special agent of the FBI on December 23, 1997 and a representative of the ABA Standing Committee of the Federal Judiciary on January 19, 1998. The President sent my nomination to the United States Senate on January 27, 1998.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that



could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of the "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

My views regarding the proper role of the federal courts are similar to those set forth by Harvard Law Professor Mary Ann Glendon in her recent book A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society, 118 (1994). In describing the "classical virtues" of judicial self-restraint, Professor Glendon identifies "[t]hree distinct concepts of self-control . . . structural restraint (respecting the limits on judicial power imposed by federalism, the separation of powers, and the court's position in the judicial hierarchy; interpretive restraint (observing the bounds imposed on judicial discretion by precedent, statute, or constitutional text, design and tradition); and personal restraint (avoiding distortion of the decision-making process by one's own opinion of the parties or the issues)."

First and foremost, Article III of the United States Constitution defines the role of the federal judiciary. This provision limits the jurisdiction of the federal courts to cases or controversies. This limitation necessarily confines the courts to adjudicating disputes by applying the law to a concrete set of facts, not an abstract set of principles.

Out of the case or controversy requirement arise several principles that circumscribe the role of the federal judiciary. Among these are the concept of ripeness, which precludes the federal courts from reaching out to decide cases upon speculation or hypothetical threats. As the Supreme Court stated in United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947) "[s]hould the courts seek to expand their powers to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from the other branches."

The case or controversy requirement also supports the doctrines of mootness and standing which serve to limit the power of the federal courts. The federal courts must decide only "live" controversies in which the issues are presented by plaintiffs with a stake in the outcome. These requirements assure sufficiently concrete adverseness and sharpen the presentation of issues.

The principle of separation of powers existed from the outset of our government's formation. The Constitutional Convention rejected the notion that the federal courts should enjoy non-judicial powers. As early as 1793, the Supreme Court refused to issue an advisory opinion by answering questions that were within the province of the Executive Branch. This separation of powers, however, requires a scrupulously independent judiciary. The independence of the judiciary imposes a duty reflected in the oath of office to "administer justice without respect to persons" and to "impartially discharge and perform all duties...." Federal judges, therefore, must refrain from putting their own personal, political or ideological agendas ahead of the law. As the Supreme Court noted in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981), rejecting a court of appeals' decision that concepts of "simple justice" could override accepted precedent, "[s]imple justice' is achieved when a complex body of law developed over a period of years is even-handedly applied."

There are many reasons why it is wrong to substitute one's individual view of "justice" or the "correct result" for faithful interpretation and application of the law. It is important to have acceptability of decisions and stability, certainty and predictability in the law regardless of who serves as decision-maker.

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

RESPONSE: John David Kelly

2. Address: List current place of residence and office address(es).

RESPONSE:

Residence: Fargo, ND 58103

Office: Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd.  
502 First Avenue North  
P.O. Box 1399  
Fargo, ND 58107

3. Date and place of birth.

RESPONSE: October 9, 1934; Grand Forks, North Dakota.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

RESPONSE: Yes. Married to Patricia J. (Tish) Greeley. Tish is retired.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

RESPONSE: St. John's University, Collegeville, Minnesota, September 1952 to May 1956, A.B. 1956

University of Michigan Law School, Ann Arbor, Michigan, September 1956 to June 1959, J.D. Degree June 13, 1959

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1) Valley Motor Company, State Mill Road, Grand Forks, ND, employee, summers 1956-1958. Valley Motor Company was a family business primarily owned by my father. In addition to being employed during the summer, I was a director of the corporation from sometime in the 1950's until 1963, when the majority of stock was sold to key employees.

2) Office of General Counsel, 1740 Air Force, Pentagon, Washington, DC 20330, Secretary of Air Force, 1959-1962. Attorney.

- 3) Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd., 502 First Avenue North, P.O. Box 1389, Fargo, ND 58107; 1962 to present.
- 4) C. K. Garden City, Inc., Fargo, North Dakota, was organized as a North Dakota corporation. I was a director from April 8, 1974 until approximately 1980 when the restaurant was closed, the building and equipment were leased out and the corporation ceased doing business.
- 5) C.K. Billings, Inc., Fargo, North Dakota, was organized as a North Dakota corporation. I was a director from October 1, 1973 until October 2, 1980 when the restaurant was sold, the building and equipment were leased to the buyer and the corporation ceased doing business.
- 6) C.K. Yellowstone, Inc., Fargo, North Dakota, was organized as a North Dakota corporation. I was a director from February 1, 1974 until October 2, 1980 when the restaurant was sold, the building and equipment were leased to the buyer and the corporation ceased doing business.
- 7) C. K. Billings Heights, Inc., Fargo, North Dakota, was organized as a North Dakota corporation. I was a director from March 1, 1976 until October 2, 1980 when the restaurant was sold, the building and equipment were leased to the buyer and the corporation ceased doing business.
- 8) C.K. Mitchell, Inc., Fargo, North Dakota, was organized as a North Dakota corporation. I was a director from December 4, 1972 until August 3, 1978 when the restaurant was sold, the building and equipment were leased to the buyer and the corporation ceased doing business.
- 9) Lamb's Bank, Michigan, North Dakota, Director. Lamb's Bank was founded by my grandfather about 100 years ago. The bank is located in Michigan City, North Dakota, a small rural community located approximately 125 miles from Fargo. I was a director of Lamb's Bank from October 1, 1997 until September 12, 1994, when the bank was sold.
- 10) J. P. Lamb Land Co., Michigan, North Dakota, Director. This corporation was organized by my grandfather and several of his brothers in the early part of this century. I was a director of the Land Company from June 6, 1970 until July 1, 1988 after which date the assets were distributed to the stockholders.
- 11) Kelly Investment Company, Grand Forks, North Dakota. Director. This North Dakota corporation was established some time in the 1950's by my parents. It owned a building and land in downtown Grand Forks, North Dakota and mineral interests in real property located in western North Dakota and



eastern Montana (Williston Basin). After my father's death in 1964, the building and land were sold, the mineral interests were transferred into the David G. Kelly Residuary Trust, the corporation was liquidated and the remaining assets were distributed to the shareholders. The liquidation and distribution occurred in 1970.

- 12) Gullickson-Kelly Company, formerly known as Hustad-Kelly Company, 4th Street and Main Avenue, Fargo, North Dakota. This was a family automotive dealership, primarily owned by my father. I was a director of the corporation during the 1950's, until the business was liquidated and the assets were distributed to the stockholders in the late 1950's.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

**RESPONSE:** Yes. United States Air Force. I received a direct commission as a 2nd Lt. at the time I went on active duty on July 30, 1959. I was assigned to the office of the General Counsel, Secretary of the Air Force, for the entire period of my active duty service, which I completed on July 29, 1962. My serial no. in the Air Force was A0309188. During my term of duty, I was promoted to 1st Lieutenant. I returned to the Pentagon in the summer of 1963 and the summer of 1964 for two-week periods of active duty. Thereafter I was on inactive status, until I received an Honorable Discharge from the United States Air Force as a captain in 1974.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

**RESPONSE:** I graduated from the University of Michigan Law School with a JD Degree in 1959, which at the time was an honors degree only awarded to students maintaining at least a 3.0 overall grade average on a 4.0 system (roughly the top 10% of the class). While in law school, I was elected an Assistant Editor of The Michigan Law Review.

Fellow, American College of Trial Lawyers. I was elected as a Fellow in 1983. I currently serve as State Chairman for the College. I was also North Dakota State Chairman from 1985-1992.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

**RESPONSE:**

Member, North Dakota Bar Association  
 Member, Minnesota Bar Association  
 Member, Minnesota 7th District Bar Association  
 Member, American Bar Association  
 Former Member, North Dakota Attorney Standards Committee  
 Former Member, North Dakota Judicial Selection Committee  
 Member, North Dakota Bar Board, 1978-1991  
 President, North Dakota Bar Board, 1983-1991  
 Member of Temporary Bar Board that was  
     established by the North Dakota Supreme Court in 1997  
 Member, Association of Trial Lawyers of America  
 Member, American Judicature Society  
 Member, North Dakota Bar Foundation  
 Member, The Foundation of the American College of Trial  
     Lawyers, Inc.  
 Former Member, North Dakota Defense Lawyers Association  
 Former Member, North Dakota Trial Lawyers Association  
 Former Member, Local Rules Committee, United States District Court,  
     District of North Dakota

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

**RESPONSE:**

To the best of my recollection, I have never made a specific contribution to support particular lobbying activities by any organization of which I am a member. I belong to the following organizations that engage in lobbying before public bodies:

North Dakota Bar Association  
 Minnesota Bar Association  
 American Bar Association  
 Common Cause  
 American Association of Retired Persons  
 Association of Trial Lawyers of America  
 American College of Trial Lawyers  
 Cullen Lakes Property Owners Association

I am a member of Ducks Unlimited and Nature Conservancy, North Dakota chapter. I am not sure as to the extent that either of these organizations engage in lobbying before public bodies.

I am also a member of the following organizations:

Member, U.S. Supreme Court Historical Society  
 Member, Museum of New Mexico Foundation

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

RESPONSE: North Dakota Supreme Court - 1959; Minnesota Supreme Court - 1980; United States District Court, District of North Dakota - 1963; United States Court of Appeals, Eighth Circuit - 1968; United States Supreme Court - 1974; United States District Court, District of Minnesota - 1982; United States Court of Appeals for the Federal Circuit - 1988; Turtle Mountain Band of Chippewa Indians since 1995. I have been continuously licensed to practice law in North Dakota since 1963. I have been continuously licensed to practice law in Minnesota since 1980.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

RESPONSE: I did have the following case notes published in the Michigan Law Review, when I was a member of the staff while in law school:

John D. Kelly, Recent Decisions, 57 Mich. L. Rev. 300 (1958)  
 John D. Kelly, Recent Decisions, 57 Mich. L. Rev. 128 (1958)  
 John D. Kelly, Recent Decisions, 56 Mich. L. Rev. 1363 (1958)

Copies are attached as Tab 1. Since being in private practice, I have not authored any books, articles, reports, or other published materials. I have given no speeches on issues of constitutional law or legal policy. From September to November of 1997, I was an editor of the North Dakota Employment Law Letter, the law firm's monthly newsletter directed specifically to North Dakota employers. The newsletters for the relevant months are:

N.D. Employment L. Letter, (M. Lee Smith, Brentwood, Tenn.)  
 Vo. 2, No. 10 (Nov. 1997)  
 N.D. Employment L. Letter, (M. Lee Smith, Brentwood, Tenn.)  
 Vo. 2, No. 9 (Oct. 1997)  
 N.D. Employment L. Letter, (M. Lee Smith, Brentwood, Tenn.)  
 Vo. 2, No. 8 (Sept. 1997)

Copies are attached as Tab 2. I have not authored any of the articles appearing in the newsletter.

Legal Seminars and Meetings:

In January and February of 1976, I spoke to a lawyers' group at the National Rural Electric Association Annual Meeting in Anaheim, California. The subject of the talk was Square Butte Elec. Coop. v. Hilken, which was then on appeal to the North Dakota Supreme Court. (See page 15 for description of Square Butte). My speech was presented without an outline or notes. I did use a copy of the trial court's opinion during my talk.

Sometime in the 1980's, I spoke at a Federal Practice Seminar in Bismarck, North Dakota. The subject of my presentation related to the duties and responsibilities owed between an insured and the liability insurance carrier. I have no written materials relating to my talk.

On September 14, 1990, I spoke at a seminar in Fargo, North Dakota, sponsored by The Cambridge Institute. I spoke about employment at will and wrongful discharge liability. I have no written materials concerning my presentation.

On January 21, 1992, I spoke at a trial advocacy seminar in Fargo, North Dakota. The seminar was sponsored by the National Business Institute, Inc. I do not have any written speech or outline regarding this presentation.

On December 4, 1992, I spoke at a seminar on the subject of probate litigation in Bismarck, North Dakota. A copy of the materials I prepared for the seminar is attached as Tab 3.

On October 22, 1994, I spoke at a seminar in Fargo, North Dakota, on the subject of sexual exploitation of patients by physicians, which was sponsored by MeritCare Medical Group. A copy of the materials I used in this presentation is attached as Tab 4.

On October 11, 1997, I participated in a seminar in Bismarck, North Dakota, sponsored by the North Dakota Statewide Association of rural electric cooperatives. I discussed recent decisions relating to North Dakota's Territorial Integrity Act. I did not prepare any written materials for the presentation.

13. Health: What is the present state of your health? List the date of your last physical examination.

RESPONSE: I am in good health. I had a general physical examination in August of 1997 and I just completed my regularly scheduled six-month physical examination on January 21, 1998.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.



**RESPONSE:** I have never held judicial office.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

**RESPONSE:** I have never been a judge.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

**RESPONSE:** I have never sought or held public office.

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

**RESPONSE:** I have never served as clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

**RESPONSE:** I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

**RESPONSE:**

- 1) Office of General Counsel  
1740 Air Force, Pentagon Building  
Washington, DC 20330  
Period of Assignment: 7/59 to 7/62  
Position: Attorney

- 2) Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd.  
 502 First Avenue North  
 P.O. Box 1389  
 Fargo, ND 58107  
 Position: 1962 to 1965, Associate Attorney  
 1965 to 1978, Attorney Partner  
 1978 to Present, Attorney Stockholder

I have been in private practice since November of 1962, when I joined the firm of Wattam, Vogel, Vogel, Bright & Peterson in Fargo, North Dakota. There have been a number of changes in the formal name of the law firm. Currently the name of the law firm is Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd. The law firm is commonly referred to as the Vogel Law Firm. When I joined the firm it was a partnership. In 1978 the firm reorganized and became a professional corporation. I served as President of the firm from its incorporation in 1978 until October of 1997. I was elected to this position each year. As President, I was head of the Management Committee and generally was responsible for overseeing law firm operations.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

**RESPONSE:**

- b. 1. Office of General Counsel: During my practice with the General Counsel's Office, most of my work involved government contracting. I provided legal advice with regard to protests by unsuccessful bidders relating to awards of Air Force contracts. I was involved in responding to inquiries and investigations by the General Accounting Office and by both the Senate and House Armed Services Committees regarding awarding and performance of Air Force contracts. Legal questions relating to the suspension and debarment of Air Force contractors and bidders were assigned to me by the General Counsel. I worked with the Antitrust Division of the Department of Justice regarding damages to the Air Force attributable to price fixing on the part of manufacturers of heavy electric products. I also served as the Air Force attorney member of the editing committee of the Armed Services Procurement Regulation Committee. For a time, I was chairman of this committee.

Vogel Law Firm: Since entering private practice with the Vogel Law Firm in 1962, I have primarily been a trial lawyer, handling cases at both the trial and appellate levels. I have represented a wide variety of clients involved in many different types of civil

litigation. I have represented both plaintiffs and defendants, including individuals, partnerships and corporations. I have defended claims covered by liability insurance, and have also represented clients making claims that were so covered.

Since the early 1980's, I have represented MeritCare Medical Group, formerly known as Fargo Clinic, Ltd., a major regional medical clinic. My practice for MeritCare has involved extensive work in medical malpractice litigation, fraud and abuse questions, discrimination, sexual harassment, Americans With Disabilities Act, Family Leave Act, employment law matters, and investigations by the North Dakota and Minnesota State Medical Boards.

I have represented a number of cooperative corporations on legal matters, such as Cass County Electric Cooperative, Inc. of Kindred, North Dakota, and Minnkota Power Cooperative of Grand Forks, North Dakota. Since the 1960's, I have appeared regularly before the North Dakota Public Service Commission, primarily on behalf of Cass Electric, but also for Minnkota and other generation and transmission organizations. I have also represented and continue to represent business corporations. My practice includes cooperative and business corporation law, administrative law, federal antitrust law, labor and employment law, and environmental law. I also have experience in matters relating to the Health Quality Improvement Act of 1986. I have litigated cases relating to both federal and state RICO claims.

I was appointed Special Assistant North Dakota Attorney General for the purpose of representing North Dakota Secretary of State James Kusler in proceedings before the North Dakota Supreme Court. State, ex. rel., Kusler v. Sinner, 491 N.W.2d 382 (ND. 1992). While representing the Secretary of State in this matter, I continued to practice law with the Vogel Law Firm.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

**RESPONSE:**

The areas I have concentrated my practice in include the following:

- 1) Professional Liability - Medical. As a part of my legal work for clinics and physicians, I have tried more than 10 medical malpractice cases to completion. All

but one have been jury trials. I have never lost a medical malpractice case.

2) Professional Liability - Legal and Accounting. I also represent lawyers and accountants for alleged professional negligence.

3) Insurance - Coverage Disputes. I have represented a number of insureds that were denied coverage by their insurance companies.

4) Construction Claim Litigation. For a number of years, I have been attorney for Associated General Contractors of North Dakota. I have represented a number of construction contractors with regard to claims for additional compensation based upon a wide variety of circumstances such as defective material, changed conditions at the project site, and breach of contract by the owner.

5) Product Liability Claims. I have represented the Melroe Company with regard to several product liability cases involving the Bobcat skid steer loader. I have successfully defended Melroe against product liability claims based upon alleged Bobcat design defects in at least three separate cases.

6) Plaintiff cases. I have handled a number of plaintiff cases during my years of practice, including death cases and cases involving serious personal injuries. I continue to handle such cases.

7) Reapportionment. I have represented plaintiffs in several related lawsuits to obtain reapportionment of the North Dakota Legislative Assembly in compliance with the "one man one vote" federal constitutional standard. The litigation also sought to break up large multi-member legislative districts that had been fashioned by a federal district court in resolving an earlier reapportionment case.

8) Eminent Domain. I have tried a number of condemnation cases over the years. I have represented a number of landowners in proceedings involving Interstate 29 and in proceedings to acquire the land needed to complete the Pipe Stem dam. More recently, I have represented landowners whose lands were condemned for airport purposes. I have also represented Minnkota Power Cooperative, Inc., Grand Forks, North Dakota, United Power Association of Elk River, Minnesota, Central Cooperative Power Association of Minneapolis, Minnesota and Square Butte Electric Cooperative, Inc. of



Grand Forks, North Dakota, in obtaining right-of-way for high voltage transmission lines running from mine mouth electric generation plants in western North Dakota to various locations in the State of Minnesota.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

**RESPONSE:** I have appeared in court frequently since I entered private practice in 1962. The majority of my practice has always been devoted to litigation. While the number of cases I have tried to completion would vary from year to year, I have been in trial over the years on a regular basis.

2. What percentage of those appearances was in:  
 (a) federal courts;  
 (b) state courts of record;  
 (c) other courts.

**RESPONSE:**

- a) Approximately 25%  
 b) Approximately 75%  
 c) Less than 1% were appearances in tribal court before the Turtle Mountain Band of Chippewa.

3. What percentage of your litigation was:  
 (a) civil;  
 (b) criminal.

**RESPONSE:**

- a) Over 95%  
 b) Less than 5%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**RESPONSE:**

I have tried at least 150 civil cases to completion and at least five criminal cases. Of the 150 cases, at least 20 or more were tried in the United States District Court for the District of North Dakota. I was attorney in many more lawsuits in federal district court, primarily in the districts of North Dakota and Minnesota, where the cases were settled or dismissed prior to trial on the merits. The remainder of the 150 trials were in state district courts across North

Dakota and western Minnesota. During the first 10 years of private practice, I was associate counsel in approximately 50% of the cases tried to completion. In the rest of the cases, I was either sole counsel or chief counsel. From the early 1970's on, I was either sole or chief counsel in over 90% of the cases tried to completion. Regarding my appellate work, I have made approximately 50 appellate court arguments, including one in the United States Supreme Court, at least 12 before the United States Court of Appeals for the Eighth Circuit, and between 35 and 40 arguments before the North Dakota Supreme Court.

5. What percentage of these trials was:
  - (a) jury;
  - (b) non-jury.

**RESPONSE:**

- a) Approximately 75% were jury trials
- b) Approximately 25% were non-jury trials

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the names of the court and the name of the judge or judges before whom the case was litigated; and
- c. The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**RESPONSE:**

- 1) Chapman v. Meier, 420 U.S. 1 (1975). Argued November 13, 1974. Decided January 27, 1975. The case involved an appeal from a three-member federal district court decision reported at 372 F.Supp. 371 (D.N.D. 1974).

My clients, Daniel Chapman and Jacque Stockman, filed suit in United States District Court for the District of North Dakota to obtain reapportionment of the North Dakota Legislative Assembly which had failed to timely adopt such a plan. The three-member court that heard the case included Myron H. Bright of the 8th Circuit Court of Appeals, and Paul Benson and Bruce Van Sickle, Judges of the United States District Court for the District of North Dakota. The Court ordered an interim reapportionment plan that was to be in effect only for

the 1972 legislative elections, Judge Benson dissenting on the issue of whether the plan should be an interim one only. In 1973, the Legislative Assembly failed to adopt a reapportionment plan and the Court ruled that the interim plan that it had fashioned for the 1972 elections should be adopted as the permanent apportionment plan, Judge Bright dissenting. In his dissent, Judge Bright argued that the court should fashion an apportionment plan providing for single-member senate districts. He also challenged the population variances between districts allowed under the court-fashioned plan.

On appeal to the United States Supreme Court, I wrote the Jurisdictional Statement, which resulted in the Court noting probable jurisdiction. 416 U.S. 966 (1974). I was also the author of the appellants' brief submitted after the Supreme Court noted probable jurisdiction. I argued the case before the United States Supreme Court on November 13, 1974. The appeal challenged the district court's apportionment plan for the North Dakota Legislative Assembly, based upon the 1970 census, because the plan included large multimember districts and included substantial population disparities between districts. The Supreme Court accepted my argument that the court-fashioned plan included constitutionally impermissible population variances under the Fourteenth Amendment, and that the plan impermissibly failed to apply the equitable remedy of single-member districts. The Court unanimously reversed the district court's decision. The case is important because the Supreme Court set out rules to be followed by district courts in fashioning legislative apportionment plans. Specifically the Court restricted the use of multimember districts and population variances between districts for court-fashioned legislative reapportionment plans.

Appellee, Ben Meier, Secretary of State of North Dakota, was represented by Deputy Attorney General Paul Sand. Mr. Sand is deceased.

As an aftermath of this litigation, North Dakota has since adopted constitutional provisions providing for single-member senate districts.

- 2) O'Connell v. Rustan, et al., United States District Court, District of North Dakota, Southwestern Division, Civil No. A1-88-093 (1988). Maurice O'Connell, a prominent western North Dakota banker and rancher, and his wife, Kathleen, were shot dead by a disgruntled husband of a bank employee. The children of the O'Connells became dissatisfied with the way their parents' estates were being probated. Ultimately, they filed a lawsuit against the personal representative of their parents' estates, the attorney representing the personal representative, and the accountant who had also been employed by the personal representative. I represented defendants Ward

M. Kirby and Mackoff, Kellogg, Kirby & Kloster, P.C. Mr. Kirby had acted as the attorney for the personal representative.

This lawsuit included many theories of liability, including RICO claims, fraud, breach of trust, negligence and theft. Civil RICO claims were dismissed by Judge Patrick Conmy as against all defendants prior to trial. All remaining claims, except a claim of legal malpractice, were dismissed as to Kirby and his law firm by Judge Conmy at the conclusion of plaintiff's case. Trial began on April 20, 1992, and the jury returned its verdict on May 26 in favor of defendants Kirby and Mackoff, Kellogg, Kirby & Kloster regarding the legal malpractice claim. I acted as chief counsel on behalf of my clients and Harlan Fuglesten acted as associate counsel. At the time he was a member of the Vogel Law Firm. Mr. Fuglesten is currently employed by North Dakota Association of Rural Electric Cooperatives, 3206 Nygren Drive NW, P.O. Box 727, Mandan, ND 58554-0727, Office No. (701) 663-6501. For attorneys involved in probate practice in North Dakota, the case is important in defining responsibilities in representing personal representatives involved in probate litigation.

Co-defendant Rustan was represented by Jack G. Marcil, Serkland Law Firm, 10 Roberts Street, P.O. Box 6017, Fargo, ND 58108-6017; telephone number (701) 232-8957. Co-defendant Widmer was represented by Bernard E. Reynolds, 215 North 30th Street, P.O. Box 1077, Moorhead, MN 56561-1007; telephone number (218) 236-6462. The attorneys for the O'Connells were William F. Shore III and James Vieh, of Campana & Vieh, P.C., 4422 North Civic Center Plaza, Suite 101, Scottsdale, AZ 85251; telephone no. (602) 707-5000.

- 3) Cass County Elec. Co-op v. NSP, 419 N.W.2d 181 (N.D. 1988). This case had its origins in proceedings before the North Dakota Public Service Commission in which my client, Cass Electric, sought injunctive relief under the provisions of the Territorial Integrity Act, Chapter 49-03, N.D.C.C., against Northern States Power Company, a public utility. The Act is designed to provide territorial protection for electric cooperatives and public utilities to avoid duplication of investment in electric facilities. The Commission determined that it lacked jurisdiction to provide injunctive relief because the area in question had been annexed into the City of Fargo. Cass Electric appealed to the state district court and obtained a reversal and remand. Judge Benny A. Graff presided at the district court proceedings. NSP then appealed the matter to the North Dakota Supreme Court. The Supreme Court affirmed the district court's order and remanded the case for further proceedings. The North Dakota Supreme Court held that Cass Electric could obtain injunctive relief to protect the rural area that it was serving at the time of



annexation. The court ruled that the law covered both existing customers, as well as future customers, in the annexed area. The case is significant because it represents the first interpretation of the Territorial Integrity Act making it applicable to areas that were once rural, but are later annexed into a city.

I was lead counsel for Cass Electric throughout all of the proceedings before the Public Service Commission, the district court, and the North Dakota Supreme Court. Douglas R. Herman of our office appeared as my associate counsel. Mr. Herman recently left our office and can be contacted at Great Plains Software, 1701 38th Street SW, Fargo, ND 58103; telephone no. (701) 281-6900. NSP was represented by R. W. Wheeler, 42 Captain Marsh Drive, Mandan, ND 58554; telephone no. (701) 667-2888.

- 4) Van Ornum v. Otter Tail Power Company, 210 N.W.2d 188 (N.D. 1973). I represented the family of Claude Van Ornum who was asphyxiated at a construction site in Jamestown, North Dakota. The complaint alleged that Otter Tail Power Company negligently caused Mr. Van Ornum's death by allowing propane gas to leak from its gas mains into the construction site, causing Mr. Van Ornum's death while he attempted to rescue another worker who had been overcome by the gas. The District Court dismissed the claim against Otter Tail at the conclusion of plaintiffs' case. I prosecuted an appeal to the North Dakota Supreme Court, which reversed the dismissal ordered by the District Court, holding that the trial judge had improperly excluded expert testimony indicating that Otter Tail gas had caused the accident. In reinstating Otter Tail as a defendant, the North Dakota Supreme Court provided substantial guidance to judges and attorneys with respect to presentation of expert testimony. The case was retried in 1975 in the District Court for Stutsman County, North Dakota, and resulted in the highest wrongful death award in the county's history.

My associate counsel in the case was Duane Breitling, 15 Broadway, Suite 202, Fargo, ND 58102, telephone no. (701) 280-5801. Otter Tail was represented throughout the litigation by Norman Arveson of Fergus Falls, MN. Mr. Arveson is now deceased.

- 5) Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519 (N.D. 1976). My client, Square Butte, was in the process of constructing a direct current transmission line that was to run from Center, North Dakota, to the Duluth, Minnesota, area. In order to obtain right-of-way, it became necessary for Square Butte to invoke eminent domain. In this case, the District Court for Burleigh County, North Dakota, denied Square Butte the right to utilize eminent domain to obtain

right-of-way for the transmission line. Because the transmission line conducted direct current, it was not available to provide electricity for use in North Dakota. The district court held that as a result, there was no public use or benefit that would sanction utilization of the power of eminent domain under North Dakota law. On appeal, the Supreme Court overruled the district court determination, holding that there was a sufficient showing that the transmission line facilities were of public benefit to enable Square Butte to invoke eminent domain to obtain right-of-way for its proposed transmission line.

My partner, David Knutson, who is now deceased, represented Square Butte in the district court trial, and I handled the successful appeal to the North Dakota Supreme Court. The landowner was represented by Joseph A. Vogel, 402 First Street NW, P.O. Box 309, Mandan, ND 58554, telephone no. (701) 663-7577.

- 6) Falkenstein v. City of Bismarck, 268 N.W.2d 787 (N.D. 1978). I represented the parents of Kevin Falkenstein in a wrongful death claim brought against the City of Bismarck and a Bismarck police officer. The case involved the death of a young intoxicated man by suicide at the Bismarck City jail. He had been moved from a normal cell to a closet-type cell in the jail's basement commonly referred to by the police as "the hole". At the conclusion of the Falkenstein trial, the jury awarded compensatory damages to the plaintiff pursuant to North Dakota's Wrongful Death Act, and exemplary damages against the City of Bismarck. On appeal, the North Dakota Supreme Court affirmed, holding that the evidence sustained the jury verdict, including the award of punitive damages brought pursuant to federal statute establishing a civil claim for deprivation of rights. Because the death was by suicide, this was the most difficult plaintiff's case that I have ever tried from a factual standpoint.

Defendants were represented by Thomas A. Mayer. Mr. Mayer is now with the North Dakota Attorney General's office, 600 East Boulevard Avenue, Bismarck, ND 58505-0955; telephone no. (701) 328-2210.

- 7) Andrews v. O'Hearn, 387 N.W.2d 716 (N.D. 1986). I represented Fargo Clinic and two clinic physicians in a medical malpractice lawsuit brought by Mary Andrews and her husband, Mark, then a U.S. Senator, relating to medical care Mrs. Andrews had received by a number of Fargo-based physicians and Fargo-based health care facilities, following Mrs. Andrews' hospitalization for meningitis. Mrs. Andrews was disabled as a result of her illness. The claim was that her disabilities could have been avoided if she had received proper medical care.

During the course of discovery, my deposition was taken concerning medical records that had been copied and sent to the National Institutes of Health. The deposition was not read at trial. The case was tried in Cass County District Court, Fargo, North Dakota, beginning in early April of 1984 and concluding in mid-June, at which time the jury brought back a special verdict resulting in dismissal of all claims against all of the defendants. With respect to the unsuccessful appeal, citation above, the North Dakota Supreme Court sustained the rulings of the trial judge that were under review, as well as the findings of the jury. The court also rejected the appellants' efforts to impeach the jury verdict by unsworn statements allegedly given by one or more of the jurors.

Mr. and Mrs. Andrews were represented by David Harney, Suite 1300, Figueroa Plaza, 201 North Figueroa Street, Los Angeles, CA; telephone no. (213) 482-0881, and Robert Vogel, of the Robert Vogel Law Office, 106 North 3rd, Suite M-102, P.O. Box 5576, Grand Forks, ND 58206-5576, telephone no. (701) 775-3117. My colleague, Jane Voglewede, telephone no. (701) 237-6983, and I represented the defendants, O'Hearn, Thompson and Fargo Clinic. St. Luke's Hospitals was represented by Jack Marcil, P.O. Box 6017, Fargo, ND 58108-6017; telephone no. (701) 232-8957. Defendants, Neurologic Associates and Ryan Harrington, were represented by Patrick Maddock, 500 First Bank Building, P.O. Box 5849, Grand Forks, ND 58206-5849; telephone no. (701) 775-5595. Defendants, Roger Gilbertson and Dale Shook and their corporation, Radiologists, Ltd., were represented by Gunder Gunhus, of Moorhead, MN. Mr. Gunhus is now deceased.

- 8) Moorhead Construction Co., Inc. v. City of Grand Forks, 508 F.2d 1008 (8th Cir. 1975). My client, Moorhead Construction, built a pretreatment lagoon for the City of Grand Forks. Because of soil conditions at the project site, the cost of completing the project far exceeded the payment the contractor was to receive under the terms of the contract. After denial of its claim, Moorhead filed suit. This was a court-tried diversity case resulting in a judgment of damages for breach of contract. I represented Moorhead Construction, both at trial and in successfully defending the award on appeal to the 8th Circuit. The damage award by Chief Judge Paul Benson of the United States District Court for the District of North Dakota was based on the total cost of performing the construction contract under conditions that constituted a breach of contract.

The City of Grand Forks was represented by Gordon Caldis, 217 South 4th Street, P.O. Box 5267, Grand Forks, ND 58206-5267; telephone no. (701) 772-5511.

- 9) Clark Equipment Co. v. Keller, 570 F.2d 778 (8th Cir. 1978). Keller v. Clark Equipment Co., 715 F.2d 1280 (8th Cir. 1983). These two 8th Circuit decisions result from extensive patent litigation regarding validity of the patents covering the Bobcat skid steer loader produced by my client, the Melroe Company. Originally Clark Equipment sued the Kellers in federal court in Michigan and the Kellers countered with a separate suit against Clark Equipment venue in federal court in North Dakota. The Clark Equipment claims were that the patents were invalid because they did not describe patentable inventions or alternatively, that the subject of the inventions had been "on sale" or "in public use" more than a year before the patent applications, thus rendering the inventions unpatentable. Clark also sought to be relieved of royalty payments under a licensing agreement covering the Bobcat patents which Clark had negotiated with the Kellers. The Kellers claims were that the Bobcat patents were valid or alternatively, if the patents were determined to be invalid because of "on sale" activities, the Kellers sought damages on the theory that Clark's predecessor in interest had caused the invalidating activities. The Kellers sought payment under their license agreement with Clark Equipment. Ultimately, the case lodged in federal court in Michigan was transferred to federal court in North Dakota and the cases were consolidated. Originally I was acting as local counsel since the case was to be tried in North Dakota.

United States District Court Judge Paul Benson bifurcated the litigation with the first trial devoted to determining the validity of the patents. With regard to the Bobcat patents, at the first trial, the court determined that the mechanical patent for the Bobcat was invalid because the invention was "on sale" and "in public use" more than a year before the mechanical patent application had been filed. The design patent for the Bobcat was determined to be valid by the district court. In connection with the appeal reported at 570 F.2d 778, I was primarily responsible for drafting the portion of appellant's brief relating to the validity of the design patent. I made the oral argument on behalf of appellant on all issues when the case was argued before the 8th Circuit. The 8th Circuit affirmed that the mechanical patent was invalid. It did invalidate the design patent on the basis that it was not a patentable design.

The case was further litigated in the United States District Court, primarily with respect to who was responsible for the invalidating "on sale" activities that had defeated the mechanical patent for the Bobcat. The trial court determined that the invalidating activities were legally attributable to Clark Equipment Co. as the successor of Melroe Manufacturing. This ruling was also appealed to the 8th Circuit, and is the subject of the 8th Circuit opinion reported at 715 F.2d 1280.



During the second phase of the litigation, I assumed primary responsibility for handling the case and I presented Clark's oral argument to the 8th Circuit.

Malcolm Moore, a patent attorney, was the principal attorney for the Kellers in the lawsuit. His address is: Suite 3000, 90 South 7th Street, Minneapolis, MN 55402-3796, telephone no. (612) 332-8200. Associate counsel for Melroe were Fred E. Schulz, Wildman, Harrold, Allen & Dixon, 225 West Wacker Drive, Chicago, IL 60606-1229, telephone no. (312) 201-2000, and James Ryther, now of Rudnick & Wolffe, 203 North LaSalle Street, Chicago, IL 60601-1293, telephone no. (312) 368-4000.

- 10) Merchants National Bank and Trust Co. of Fargo v. United States, 272 F.Supp. 409 (D.N.D. 1967). This is the first major lawsuit in which I acted as lead counsel. I represented the plaintiff along with my then partner, Myron Bright, now a senior judge on the United States Court of Appeals for the 8th Circuit. The case was based upon a wrongful death claim involving Eloise A. Newgard who was shot and killed by her husband, William Bry Newgard, in Detroit Lakes, Minnesota, on July 31, 1965. Prior thereto, Mr. Newgard had been involuntarily committed as a mental patient and transferred to the Veterans Administration Hospital at Fort Meade, South Dakota. Eloise Newgard was appointed as her husband's legal guardian after he was committed. Mr. Newgard was able to return to the Fargo, North Dakota/Detroit Lakes, Minnesota area and kill his wife while he was on unsupervised leave from the Fort Meade hospital. The case was significant in at least two respects. First, District Court Judge Ronald Davies applied the significant contacts choice of law rule to assess damages under North Dakota's wrongful death law, rather than either Minnesota's or South Dakota's. This, in turn, allowed him to award \$200,000 in damages, which at the time was the largest award ever given for the death of a mother in the United States. The United States lodged an appeal with the 8th Circuit. Because of uncertainty concerning the applicability of the North Dakota Wrongful Death Act, I settled the case on behalf of the Newgard children for \$160,000.

The United States was represented by U.S. Attorney John O. Garass, who is now deceased, and Assistant U.S. Attorney Kermit Bye. Mr. Bye is now also a member of the Vogel Law Firm; telephone no. (701) 237-6983.

Members of the legal community with whom I have had recent contact include:

Peter Hsiao  
 McCutchen, Doyle, Brown & Enersen  
 355 South Grand Avenue, Suite 4400  
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 Pemberton, Sorlie, Sefkow, Rufer & Kershner  
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Rebecca Thiem  
 Attorney at Law  
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 North Dakota Association of Rural Electric  
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 3206 Nygren Drive NW  
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(Mr. Fuglesten was associated with me in  
 a number of lawsuits from the time he  
 joined the Vogel firm in the early 1980's  
 until he left in June of 1997.)

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19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

RESPONSE: In addition to the cases I have tried to completion, I have settled or obtained dismissal of many lawsuits prior to trial. I have also regularly attended meetings of board of directors of my business clients and have otherwise devoted significant time in advising clients regarding legal matters not involving litigation.

In 1978 I was appointed by the North Dakota Supreme Court as one of the three members of the North Dakota Bar Board. In 1983, I was elected president of the Board and thereafter I was reelected for consecutive two-year terms until 1991, when I requested the court to appoint a replacement for me.

The Board was charged with conducting bar examinations of applicants for admission to practice before the North Dakota Supreme Court. When I joined the Board in 1978, it was a practice for members to write the essay bar examination questions, administer the examinations, correct the bar exam answers, and to hear appeals by the very few applicants who failed the examination. Model answers to essay questions were nonexistent. While the multi-state bar examination was being used, the scores were converted in such a way that the essay scoring drove the determination as to who passed and who failed. Most everyone passed, no matter how dismally they did on the multi-state examination.

After I became a member, things began to change. The method of combining multi-state results with essay scores was significantly altered to provide appropriate weight to both parts of the examination. The minimum combined score to pass the examination was increased modestly to reflect more appropriate pass/fail standards. The Board hired lawyers and law professors to draft essay questions and to prepare model answers. We hired able lawyers in the state to correct and score the essay answers. This in turn permitted us to perform grading reviews on appeal objectively. We even changed the day for the essay examinations so that, as an example, an applicant could take the Minnesota bar examination, including the multi-state, and then come to North Dakota to complete the North Dakota essay exams.



These reforms did not doom large numbers of applicants to failure. To the contrary, as the word spread, applicants became more engaged in preparing for the North Dakota bar examination, and test results improved markedly.

The Bar Board was also charged with determining that each applicant was of good moral character and fit to practice law. At the time I joined the Board, character and fitness issues were handled in a quite informal manner, particularly for resident applicants. During my tenure, we substantially increased the scope of character and fitness examinations. We significantly increased utilization of character reports by the National Conference of Bar Examiners. We conducted the first formal hearing with respect to an applicant's character and fitness, and the North Dakota Supreme Court sustained our recommendation that the applicant be denied admission.

During my tenure, the Bar Board emphasized legal ethics as an essential element of the admission process by requiring all applicants to obtain a scaled score of at least 80 on the multi-state professional responsibility examination.

While acting as a member and president of the Bar Board, I also served for a time as a member of the Attorney Standards Committee. This Committee was responsible for recommending to the North Dakota Supreme Court changes in the admission to practice rules. Prior to the time the United States Supreme Court barred residency as a requirement for admission to practice, as a member of the Attorney Standards Committee and as President of the Bar Board, I was able to persuade the North Dakota Supreme Court to drop residency as a requirement to admission to practice in the state. Needless to say, there were many lawyers in North Dakota who were opposed to this change. However, I argued to the Court that it was unfair and indefensible to require a litigant who was being represented by a Minnesota-based attorney to bear the expense of employing an unneeded North Dakota lawyer in order to appear in a North Dakota court, whether as a plaintiff or a defendant.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

**RESPONSE:** Upon my resignation from the law firm, I would be entitled to be paid the sum of \$198,656 under the Deferred Compensation Agreement I have with the firm. The payments would be made in equal monthly installments over a period of six years. The deferred payments do not include interest.

I would also be required to sell my 1,000 shares of stock in the Vogel Law Firm for the sum of \$10,512.27, pursuant to a Buy-Sell Agreement with the law firm.

Under the terms of the current agreement, the Vogel Building Partnership would be required to buy, and I would be required to sell, my interest in the Partnership for the sum of \$20,942.14.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

**RESPONSE:** I would be careful to comply with the standards that have been established for the ethical conduct of judges. These are set out primarily in the Code of Judicial Conduct, but also may include relevant constitutional provisions, statutes, decisional law and court rules.

It is my understanding that the Eighth Circuit has in place a process for judges to recuse themselves where their impartiality might reasonably be questioned, including for potential conflicts of interest. I would intend to utilize that process appropriately when confronted with a conflict of interest whether actual or potential.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

**RESPONSE:** I have no such plans, commitments or agreements.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**RESPONSE:** See financial disclosure report attached as Tab 5.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

**RESPONSE:** See financial net worth statement attached as Tab 6.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

**RESPONSE:** Yes. I was campaign manager for George Sinner when he ran for U.S. Congress in 1964. He lost. As a volunteer, I was not paid for my services. My wife, Tish, served as a member of the North Dakota House from 1974 until 1990. She served as Speaker from 1983-1984. Tish also served in the North Dakota Senate from 1990 until 1994, when she decided not to seek reelection. The only role I have played in my wife's political campaigns was to give her unsolicited advice, which she routinely ignored.

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

RESPONSE: All of the legal work that I have done over the years in connection with reapportionment of the North Dakota Legislative Assembly has been done on a pro bono basis. Additionally, I participate in the North Dakota Volunteer Lawyers Program and do pro bono legal work as requested. The program is run through the State Bar Association of North Dakota. I have done pro bono work on a continuing basis over all the years I have been in private practice. I have represented indigent people facing criminal charges, tenants in disputes with landlords concerning rent and eviction, and persons facing collection actions for unpaid bills. Over the years I have prepared wills and other legal documents without charge for people who could not afford an attorney. I have always taken the time to listen to people's legal problems and to provide appropriate advice and assistance, regardless of whether those seeking my help had money to pay for my services. As president of the Vogel Law Firm for the past 20 years, I tried to make sure that the members of the firm were engaged in pro bono work on a regular basis. I have not kept track of the time I have spent on pro bono work, but I know that the time has been substantial.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership, what you have done to try to change these policies?

RESPONSE: In the mid-1960's I joined the Fargo Elks Lodge. I did so because it was a convenient place to eat lunch. At the time I was not aware that membership was restricted to Caucasians. I did understand that while there was some type of auxiliary group available, women were not eligible for full membership. I only attended one lodge meeting while I was a member of the Elks. I attended the meeting in order to support a resolution to do away with the racial clause that restricted membership. The resolution passed and ultimately the Elks Clubs of America did away with race as a bar to membership. I later let my membership in the Fargo



Elks lapse. My records indicate that I last paid annual dues in January of 1994.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

**RESPONSE:** North Dakota does not have a selection commission which recommends candidates for nomination to the federal courts.

I first learned in mid-December 1996 from former North Dakota Governor George Sinner that Judge Magill had decided to take senior status. Governor Sinner encouraged me to seek the appointment to succeed Judge Magill. With the encouragement of my wife and family, I sought the counsel of the state's congressional delegation. With these discussions in mind, I decided in late January 1997 to seek appointment to this high office.

At the suggestion of the congressional delegation, I contacted the White House to advise of my interest. In May 1997, I met with representatives of the White House Counsel's Office. This was followed by a formal interview at the Old Executive Office Building on July 23, 1997 with representatives of the Department of Justice and the White House Counsel's Office.

On October 15, Senator Conrad called to advise that President Clinton had provisionally selected me for appointment to the Eighth Circuit. On October 23, 1997, I completed and submitted a response to the FBI questionnaire, related waivers and releases. Additional forms were submitted on December 15 and 17, 1997. On January 8, 1998 I was interviewed by an agent of the FBI concerning my background. In addition, on November 11, 1997, I provided my responses to the ABA Personal Data Questionnaire to the Standing Committee on Federal Judiciary. On December 9, 1997, I was interviewed by H. William Allen, the circuit member of the ABA Standing Committee on Federal Judiciary concerning my professional qualifications.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such a case, issue or question? If so, please explain fully.

**RESPONSE:** No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include.

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**RESPONSE:**

My views about the proper role of the judiciary are largely shaped by my experiences representing clients in lawsuits in both federal and state courts for the past 35 years. I have always been mindful that the individual clients' interests are paramount. Attorneys and judges have an overriding responsibility to see that individual grievances are heard and resolved in a fair forum, where the facts are fully aired and the law is appropriately applied. The best contribution that the judicial system can make to society is to appropriately perform its functions in resolving disputes between litigants. Performing its assigned work in this day and age of complicated legislative enactments and regulatory implementations is itself a daunting task for the judiciary. The utilization of an individual dispute between the parties as a vehicle for imposing far reaching orders that extend to broad classes of individuals seems to me to be at odds with the fundamental concept of the rule of law.

To be sure, some cases are bound to have a broader impact upon society than others. Every judge is obliged to uphold legal rights and to enforce legal responsibilities. However, I believe that the people of this country are best served by a judiciary devoted to

fairly applying existing laws to real cases and grievances rather than engaging in social engineering to cure the perceived ills of modern society.

I believe that the history of this nation does not suggest that an expansive role for the judiciary advances the common good. Changes and reform are most appropriately accomplished by elected public officials involved in the legislative and executive branches of government.

AFFIDAVIT

I, John D. Kelly, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

1-30-98

(DATE)

John D. Kelly  
(NAME)

Kathryn Wenger  
(NOTARY)

KATHRYN WENGER  
Notary Public, State of North Dakota  
My Commission Expires Aug. 20, 1998  
STATE OF NORTH DAKOTA  
NOTARY PUBLIC



## QUESTIONNAIRE FOR JUDICIAL NOMINEES

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

**Ralph Eric Tyson, Sr.**

2. Address: List current place of residence and office address(es).

**Residence: Baton Rouge, Louisiana**

**Office: 222 St. Louis Street  
Baton Rouge, Louisiana 70802**

3. Date and place of birth.

**Born on August 13, 1948, in Baton Rouge, Louisiana.**

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

**Married to Patricia Jordan Tyson, nee Jordan. Spouse is employed as a teacher's aide for the East Baton Rouge Parish School Board, 1050 S. Foster Drive, Baton Rouge, Louisiana 70806.**

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

**College: I attended Louisiana State University from 1966-1970 and received a Bachelor of Arts degree in May, 1970.**

**Law School: I attended LSU Law School from 1970-1973 and received a Juris Doctor degree in May, 1973.**

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

**1973-1976 - Employed as Special Counsel and later promoted to Assistant Attorney General in the Criminal Division of the Louisiana Department of Justice.**

**1976-1979 - Employed as Assistant District Attorney for East Baton Rouge Parish, Louisiana.**

- 1979-1988 - Employed as Chief City Prosecutor for the City of Baton Rouge, Louisiana.
- 1973-1978 - Employed as a partner with the firm of Pitcher & Tyson, Attorneys at Law.
- 1978-1983 - Employed as a partner with the firm of Pitcher, Tyson, Avery & Cunningham, Attorneys at Law.
- 1983-1988 - Employed as a partner with the firm of Tyson, Avery & Cunningham, Attorneys at Law.
- 1989-1991 - Employed on a part-time basis as an Adjunct Professor at the LSU Law Center teaching Moot Court II.
- 1988-1993 - Employed as a City Judge in the Baton Rouge City Court.
- 1989-present - Employed on a part-time basis by the Southern University Department of Sociology/Law Enforcement as an instructor teaching Criminal Law and Administration of Criminal Justice.
- 1993-present - Employed as a District Judge on the 19th Judicial District Court for East Baton Rouge Parish, Louisiana.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I was a Distinguished Military Graduate and commissioned as a 2nd Lieutenant in the U.S. Army through the Reserve Officer Training Program at Louisiana State University upon my graduation in May, 1970. Thereafter, I was promoted to the rank of 1st Lieutenant and honorably discharged in 1978. My serial number was 433-82-2673.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

None.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Bar Associations:

Louisiana State Bar Association  
 Baton Rouge Bar Association  
 American Bar Association  
 National Bar Association  
 American Judges Association

Professional Associations/Societies:

Louisiana District Judges Association  
 Louisiana City Judges Association (I held the office of  
 Treasurer in 1992)  
 Louis A. Martinet Legal Society

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organizations which are active in lobbying before public bodies.

My other memberships include:

Bonanza Social Club, 1989 to present.

Baton Rouge Area Football Officials Association, 1990 to present.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Louisiana Supreme Court - (admitted to practice October 5, 1973).

United States District Court,  
 Middle District of Louisiana - (admitted to practice November, 1973).

United States District Court,  
 Eastern District of Louisiana - (admitted to practice May, 1974).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please

supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical examination was an insurance physical in November, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I am presently a Judge on the 19th Judicial District Court for East Baton Rouge Parish, Louisiana. In Louisiana, district courts have original jurisdiction in all civil and criminal matters. I was elected to this court and have served as a district judge since March, 1993.

Prior to my election to district court, I was a Judge on the City Court for the City of Baton Rouge, Louisiana. In Louisiana, city courts are courts of limited jurisdiction in civil matters involving an amount in controversy of up to \$15,000.00, and criminal matters relating to the violation of municipal ordinances. I was elected to the Baton Rouge City Court in October, 1988, and served there until my election to district court in 1993.

In addition to the service indicated above, I also received a special appointment from the Louisiana Supreme Court to serve as a Judge Pro Tempore on the Louisiana First Circuit Court of Appeal. In Louisiana, courts of appeal have appellate jurisdiction of all civil and criminal matters decided within its district except criminal cases in which the death penalty has been imposed. My appointment to the court of appeal ran from May, 1997 through October, 1997.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.



(1) The following opinions were written by me during my tenure on the Louisiana First Circuit Court of Appeal. Some of the citations given are court of appeal docket numbers as several opinions were not designated for publication. Copies of the unpublished opinions are attached.

- A. State of Louisiana v. James Ezell,  
(96 KA 2133, La. 1st Circuit Court of Appeal)
- B. Loretta Tubbs v. Philip Tubbs,  
700 So.2d 941 (La. App. 1 Cir., 1997)
- C. Donna Porter v. William Porter,  
(96 CA 2631, La. 1st Circuit Court of Appeal)
- D. Duronne Walker, et al v. Phi Beta Sigma Fraternity, et al,  
(96 CA 2345, La. 1st Circuit Court of Appeal)
- E. Joshua Gill v. Schindler Elevator Co.,  
697 So.2d 11 (La. App. 1 Cir., 1997)
- F. State of Louisiana v. Ketheric Young,  
(96 KA 1910, La. 1st Circuit Court of Appeal)
- G. Catherine Trahan, et al v. Rally's Hamburgers, et al  
696 So.2d 637 (La. App. 1 Cir., 1997)
- H. MRT Exploration Co. v. Shirley McNamara,  
(94 CA 0063R, La. 1st Circuit Court of Appeal)
- I. State of Louisiana v. Nathan Voclain,  
(96 KA 2458, La. 1st Circuit Court of Appeal)
- J. Louisiana DOTD v. Johnnie Rabb Keating,  
(96 CA 2187, 1st Circuit Court of Appeal)

(2) My decisions were reversed in the following cases:

- A. State of Louisiana v. Robert Lee Duke,  
(96 KA 2738, 1st Circuit Court of Appeal)

This case involved a conviction for manslaughter. The conviction was reversed and a new trial ordered because excerpts of defendant's confession, as opposed to the entire confession, was admitted into evidence. This issue is now pending before the Louisiana Supreme Court.

- B. State of Louisiana v. Michael Jarreau,  
692 So.2d 33 (La. App. 1 Cir., 1997)

This case involved a trial and conviction for 4th offense Driving While Intoxicated. The conviction was reversed because a defense expert was not allowed to give testimony consisting of general information as to the human body's absorption of alcohol.

- C. State of Louisiana v. Willie Johnese,  
674 So.2d 1175 (La. App. 1 Cir., 1996)

After the defendant was convicted of 2nd Degree Murder, I entered a modified judgment of conviction for manslaughter. This action was reversed by the appeals court. This issue is now pending before the Louisiana Supreme Court.

- (3) I have not had occasion to write any opinions on federal or state constitutional issues.

16. Public Office: state (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have held the following public, non-judicial, offices:

October, 1973 to March, 1976, I was an Assistant Attorney General in the Criminal Division of the Louisiana Department of Justice. This was an appointed position.

March, 1976 to October, 1979, I was an Assistant District Attorney in East Baton Rouge Parish, Louisiana. This was an appointed position.

October, 1979 to July, 1988, I was Chief City Prosecutor for the City of Baton Rouge. This was an appointed position.

I have never been an unsuccessful candidate for any elective public office.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and, if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Following graduation from law school, I was employed as Special Counsel and later Assistant Attorney General in the Louisiana Department of Justice. I was so employed from October, 1973, to March, 1976.

Louisiana Department of Justice  
P.O. Box 94005  
Baton Rouge, Louisiana 70804

In March, 1976, I began work as an Assistant District Attorney in the 19th Judicial District Court for East Baton Rouge Parish, Louisiana. I was employed as an Assistant District Attorney until October, 1979, when I resigned to accept an appointment as Chief City Prosecutor for the City of Baton Rouge, Louisiana.

District Attorney  
19th Judicial District Court  
222 St. Louis Street  
Baton Rouge, Louisiana 70802

I served as Chief City Prosecutor for the City of Baton Rouge from October, 1979 to July, 1988, when I resigned to campaign for election to the position of Baton Rouge City Court Judge.

Baton Rouge City Prosecutor  
233 St. Louis Street  
Baton Rouge, Louisiana 70802

From 1973 to 1988, I also maintained a private law practice in Baton Rouge, Louisiana. The firm name initially was Pitcher & Tyson and, at the time of my departure in 1988, the firm was Tyson, Avery & Cunningham. The firm was located at 2038 Plank Road, Baton Rouge, Louisiana 70802.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Prior to my election as City Judge, in my role as public prosecutor, I handled cases in state district court and in city court which involved violations of the criminal laws. In addition to my duties as public prosecutor, I also maintained a private general law practice in which I primarily handled personal injury cases, probate and other civil matters and family law cases.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a public prosecutor in state district court and in city court, I always maintained that my clients were the citizens of the State of Louisiana and the City of Baton Rouge respectively and, more particularly, those citizens who had been victims of a criminal offense. In my private practice, my typical former client was an ordinary citizen with a legal problem. I did not have any area of specialization in my private practice.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

As an Assistant Attorney General, I made occasional appearances in court. As an Assistant District Attorney and as Chief City Prosecutor, I was in court on a daily basis. Cases generated by my private practice required occasional court appearances.

2. What percentage of these appearances was in:  
 (a) federal courts;  
 (b) state courts of record;  
 (c) other courts.

Approximately 90% of my court appearances were in state court and city court. The remaining 10% of my appearances were in federal courts.

3. What percentage of your litigation was:  
 (a) civil;  
 (b) criminal.

Approximately 95% of my litigation experience involved criminal cases with the remaining 5% involving civil cases.



4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I can only approximate that in 15 years of practice (including my service as a prosecutor) I tried several hundred cases to verdict in courts of record. I was sole counsel in a majority of those cases.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

- 1) Jury - 40%
- 2) Non-jury - 60%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. USA V. Melvin Phillips, 569 F.Supp. 267 (M.D. La., 1983), was a federal criminal prosecution for firearms violations. I represented the defendant. The case is significant because I was able to win acquittal on one count of the indictment on the then-novel ground that the 1968 Gun Control Act required proof that shotgun was sawed-off in the United States.

The case was tried in May, 1983, before Judge Parker in the Middle District of Louisiana. The government was represented by Bradley C. Myers (presently practicing law at One American Place, 22nd Floor, Baton Rouge, Louisiana 70825, Phone (504) 382-3421).

2. USA V. Melvin Phillips, 727 F.2d 392 (C.A.5 (LA.)), was the 1984 appeal of the above-referenced trial. This appeal involved a less successful attack upon the search warrant which led to the evidence which was used against Phillips at trial. Opposing counsel again was Bradley C. Myers.
3. State of Louisiana v. Curtis Williams, 461 So.2d 1118, (La. App. 5 Cir. 1984). This was a criminal case charging two counts of First Degree Murder. This was the first time that I defended a person charged with First Degree Murder. The case is significant because I was able to win acquittal on one count and a life sentence rather than the death penalty. Opposing counsel was Gregory C. Champagne, 13601 River Road, Luling, La. 70070, Phone (504) 785-8481. The trial judge was the Honorable Mary Ann Vial Lemmon.
4. James Ellenburg v. Commercial Union Insurance Company, 434 So.2d 1216, (La. App. 1 Cir. 1983). This was a civil case in which I represented the intervenor who had been injured in an automobile accident but who had not timely filed his petition for intervention. The case is significant because I advanced what I still feel to be a strong argument in favor of allowing the intervention to proceed. Opposing counsel was: Walter C. Dumas, 1261 Government Street, Baton Rouge, La. 70821. Phone (504) 383-4701; William J. Cleveland, 341 St. Charles Street, Baton Rouge, La. 70802 Phone (504) 654-3641; and G. Thomas Arbour, 701 North Street, Baton Rouge, La. 70821. Phone (504) 387-5551. The trial judge was the Honorable Frank Foil.
5. State of Louisiana v. Margaret Page, et al, 431 So.2d 101, (La. App. 1 Cir. 1983). In this case I handled the appeal of a criminal case which had been tried by another lawyer. This was the first criminal case in which I represented the defendants, rather than the state, on appeal. Opposing counsel was Brett L. Grayson, 600 Jefferson Street, Lafayette, La. 70501. Phone (318) 262-6618.
6. City of Baton Rouge v. Carlton Cooley, 418 So.2d 1321, La. 1982). I represented the City of Baton Rouge in my capacity as City Prosecutor in this Louisiana Supreme Court case which reaffirmed the authority of ad hoc city judges. Opposing counsel was Dennis R. Whalen, 2320 Drusilla Lane, Baton Rouge, La. 70809. Phone (504) 923-1654.

7. State of Louisiana v. Stephen Elliot, 407 So.2d 659, (La. 1981). This was a drug case which I prosecuted as an Assistant District Attorney. In this Louisiana Supreme Court appeal, I successfully argued the validity of a warrantless stop and search of defendant. Opposing counsel was Michele Fournet, 715 St. Ferdinand Street, Baton Rouge, La. 70802. Phone (504) 383-5107.
8. State of Louisiana v. Ray Paul Landry, No. 8-78-177, 19th Judicial District Court (1978). This was a criminal case involving a charge of Aggravated Rape. I was the prosecutor in this matter, and the case is significant because the defendant's arrest and prosecution resolved a spree of similar offenses which had been occurring in Baton Rouge and the surrounding area at the time. I was able to win a conviction in this case. The defendant was represented by Allen Bergeron, 222 St. Louis Street, Baton Rouge, Louisiana 70802, (504) 389-4726. The trial judge was the Honorable Donovan W. Parker.
9. John McCormick v. Elayn Hunt, 328 So.2d 140 (La. 1976). In this habeas corpus action, I was able to win reversal of a trial court judgment granting "good time" for pre-trial detention. Opposing counsel was Roland Huson, now residing in West Virginia, Phone (304) 347-8613.
10. Richard J. Bertrand v. Elayn Hunt, 308 So.2d 760 (La. 1975). I represented the State of Louisiana in this case which was one of the first Louisiana cases to interpret and apply the holding in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Opposing counsel was Frank J. Uddo, 3850 N. Causeway Blvd., Metairie, La. 70002. Phone (504) 832-7204.
19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

In July, 1993, I was a member of a task force appointed by the Louisiana Supreme Court to study and make recommendations to the Court on the use of cameras in Louisiana trial courts.

Thereafter, in March, 1994, I was appointed to serve as a judicial delegate to the Louisiana Bar Foundation Conclave on Legal Education in Louisiana. The objective of the conclave was to study the state of legal education in Louisiana and to

make recommendations aimed at improving the professional development of lawyers, from law school forward, over the continuum of lifetime learning in the law.

In addition to the foregoing, I have also participated in panel discussions on various topics at several conferences conducted by the Louisiana Judicial College.

Further, as noted previously, I was appointed by the Louisiana Supreme Court to serve as Judge Pro Tempore on the Louisiana First Circuit Court of Appeal from May to October, 1997.



## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

**None other than funds on deposit in my Louisiana Judicial Retirement account.**

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

**Although I cannot now conceive of any category of litigation or financial arrangements that would present a conflict-of-interest for me as a United States District Judge, I would resolve any such situation by following the Code of Judicial Conduct and promptly recusing myself.**

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

**No. Although I am presently employed as a part-time instructor teaching Administration of Criminal Justice, I would not continue this employment as a federal judge.**

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**Please see attached copy of AO-10.**

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

**Please see attached net worth statement.**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have been a candidate for election to the Baton Rouge City Court in 1988 and the 19th Judicial District Court in 1993 and 1996. I have not held a position or played a role in any other political campaign.

AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial) Tyson, Ralph E.	<b>2. Court or Organization</b> U.S. District Ct.-Middle LA	<b>3. Date of Report</b> 04/06/1998
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge-Nominee	<b>5. Report Type (check type)</b> X Nomination, Date 04/02/1998 ____ Initial ____ Annual ____ Final	<b>6. Reporting Period</b> 01/01/1997 to 03/31/1998
<b>7. Chambers or Office Address</b> 222 St. Louis Street, Baton Rouge Louisiana 70802	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions)**POSITION****NAME OF ORGANIZATION / ENTITY**

<input checked="" type="checkbox"/> NONE (No reportable positions.)	
1 _____	_____
2 _____	_____
3 _____	_____

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions.)**DATE****PARTIES AND TERMS**

<input type="checkbox"/> NONE (No reportable agreements.)	
1 1998 _____	Louisiana Judicial Retirement (When eligible)
2 _____	_____
3 _____	_____

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions.)**DATE****PARTIES AND TERMS****GROSS INCOME**  
(yours, not spouse's)

<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1997	Salary-East Baton Rouge Parish School Board (S)	\$ 7,057.67
2 1997	Salary-Southern University	\$ 4,000.00
3 1997	Salary-Louisiana District Judge	\$ 92,520.00
4 1996	Salary-East Baton Rouge Parish School Board (s)	\$ 7,751.17
5 1996	Salary-Southern University "	\$ 4,000.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Tyson, Ralph E.	Date of Report 04/06/1998
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## SECTION HEADING. (Indicate part of report.)

## SECTION 3. NON-INVESTMENT INCOME (cont'd.)

Li. Date	Parties and Terms	Gross Income
6 1996	Salary-Louisiana District Judge	\$ 92,520.00



<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting	Date of Report
	Tyson, Ralph E.	04/06/1998

**IV. REIMBURSEMENTS and GIFTS** -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements or gifts)	
1	Exempt	
2		
3		
4		
5		
6		
7		

**V. OTHER GIFTS**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts)		
1	Exempt		
2			
3			
4			

**VI. LIABILITIES**

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities)		
1	LaCap Credit Union	Signature Loan	J
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

-- income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

[illegible]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Tyson, Ralph E.	04/06/1998

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☒ NONE (No additional information or explanations.)

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting	Date of Report
	Tyson, Ralph E.	04/06/1998

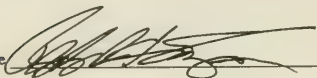
**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

4/6/98

**Note:** Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
 Administrative Office of the United States Courts  
 One Columbus Circle, N.E.  
 Suite 2-301  
 Washington, D.C. 20544



## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		500	00	Notes payable to banks—secured	/	/	/
U.S. Government securities—add schedule	/	/	/	Notes payable to banks—unsecured	/	/	/
Listed securities—add schedule	/	/	/	Notes payable to relatives	/	/	/
Unlisted securities—add schedule	/	/	/	Notes payable to others	/	/	/
Accounts and notes receivable	/	/	/	Accounts and bills due	3	222	00
Due from relatives and friends	/	/	/	Unpaid income tax	/	/	/
Due from others	/	/	/	Other unpaid tax and interest	/	/	/
Doubtful	/	/	/	Real estate mortgages payable—add schedule	146	072	00
Real estate owned—add schedule	200	000	00	Chattel mortgages and other liens payable	25	062	29
Real estate mortgages receivable	/	/	/	Other debts—itemize:			
Automobile and other personal property	50	000	00	La. Capitol Credit Union	14	331	00
Cash value—life insurance	14	238	75	B.R. Teacher Credit U.	7	585	00
Other assets—itemize:				Ready Financial	2	618	52
La. Judicial Retirement Account	73	701	00				
				Total liabilities	198	890	81
				Net Worth	139	548	94
Total Assets	338	439	75	Total liabilities and net worth	338	439	75
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor	/	/	/	Are any assets pledged? (Add schedule.)	/	/	/
On leases or contracts	/	/	/	Are you defendant in any suits or legal actions?	No		
Legal claims	/	/	/	Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	/	/	/				
Other special debt	/	/	/				

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar association's code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have not practiced law since 1988 and, as a judge, I have not been in a position to provide legal services. However I have always endeavored to insure that persons who appear in my court are treated courteously and equally without regard to their particular station in life.

Further, through my service on the Board of Directors of the Audubon Girl Scout Council (1990 - 1992); the Board of Directors of the Baton Rouge Food Bank (1990-1992); the Board of Directors of the Wesley Foundation at Southern University (1991-present); and motivational talks to school children, I have endeavored to fulfill this responsibility.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not now, nor have I ever, belonged to any organization that practices any form of discrimination.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No, there is no selection commission in this jurisdiction. My experience with the selection process began when I sent letters to both of my Senators indicating my desire to be considered for nomination to the judgeship in the Middle District of Louisiana.

Thereafter, I was interviewed by both Senator John Breaux and Senator Mary Landrieu who ultimately decided to recommend my nomination to the President. Following the recommendation of

the senators, I was interviewed by representatives of the United States Department of Justice, the Federal Bureau of Investigation and the American Bar Association. Finally, on April 2, 1998, I was advised that the President had decided to forward my nomination to the United States Senate.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A vital part of the job of the judiciary is to interpret the Constitution and laws of the United States. The constitutional concept of the separation of powers between the executive, legislative and judicial branches of government was intended, in part, to insure

judicial independence while, at the same time, giving proper deference to the prerogatives of the political branches of government.

The Constitutional and jurisprudential principles of standing and ripeness serve as a check on the exercise of judicial power by establishing conditions precedent to the exercise of judicial authority. When due regard is given to these principles, being mindful, of course, of the fact that federal district judges are also constrained by precedent in the exercise of their judicial authority, there should be little, if any, concern about judicial activism.



UNITED STATES SENATE COMMITTEE ON THE JUDICIARY  
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used).

Dan Aaron Polster

2. Address: List current place of residence and office address(es).

Shaker Hts., Ohio 44122

United States Attorney's Office  
1800 Bank One Building  
600 Superior Avenue, East  
Cleveland, Ohio 44114

3. Date and Place of Birth.

December 6, 1951  
Cleveland, Ohio

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I have been married to Deborah Ann Coleman since 1977. My wife is a partner at the law firm of Hahn Loeser & Parks, 3300 BP America Building, Cleveland, Ohio 44114.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Harvard College, 1969-1972 A.B. cum laude, 1972  
Harvard Law School, 1973-1976 J.D. cum laude, 1976

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Summers, 1969, 1970, 1971: Office of Congressman Louis Stokes; Cleveland, Ohio and Washington, D.C.

Summer, 1972: Intern, Offender Rehabilitation Program, Cleveland, Ohio

1972-73: New York City Urban Fellowship. I worked at the New York City Department of Consumer Affairs.

Summer, 1974: Atlanta Urban Fellowship. I worked for the Atlanta City Council.

Summer, 1975: Law Clerk, Jenner & Block, Chicago, Illinois.

1976-1982: Trial Attorney, U.S. Department of Justice, Antitrust Division, Cleveland, Ohio

1980, 1981: Adjunct Professor, Cleveland Marshall School of Law

Dan Aaron Polster

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1982-present: Assistant U.S. Attorney, Northern District of Ohio, Economic Crimes Unit

1983 (approx.)-1987: Board of Directors, Josam Manufacturing Co. My late father was President and majority shareholder of this plumbing specialties manufacturing firm in Michigan City, Indiana, and I served as an unpaid member of the Board for a few years. The corporation filed for Chapter 11 reorganization in 1985, and the assets were sold in early 1987.

Miscellaneous investment partnerships: Shaker Realty Associates [1965 (approx.)-1990]; 1500 Realty Associates [1965 (approx.)-1988]; Fairmount Leasing Associates [1965 (approx.)-1990]; JM Associates (1985-1988; Fashion Square Associates [1987-1995]

Educational and civic organizations: Cleveland College of Jewish Studies [Treasurer, 1981-1984, Chairman of Board of Governors, 1984-1988]; Agnon School [Vice President, 1990-1993, President, 1993-1996]; Jewish Community Federation of Cleveland [Trustee, 1988-1994; 1996-present]; Jewish Education Center of Cleveland [Trustee and Member of Executive Committee, 1993-present]; Park Synagogue [Trustee, 1989-1995]; Starting Point (child care resource and referral), [Trustee, 1991-present]

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have had no military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

U.S. Department of Justice Awards: Special Achievement Award, 1980 and 1984; Special Commendation, 1988

U.S. Department of Labor, Office of Inspector General: Special Commendation, 1991

Cleveland College of Jewish Studies: Honorary Doctorate Degree, 1988

Jewish Community Federation Kane Award for Young Leadership, 1990

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Cleveland Bar Association  
Member, Criminal Law Committee, 1994 - present

Federal Bar Association

I have lectured at Cleveland Bar Assn. and Federal Bar Assn. CLE courses on both legal ethics and the Federal Sentencing Guidelines. I was a panelist at the ABA's National Conference on Professional Responsibility in May, 1997.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The only organizations to which I belong that I am aware actively lobby public bodies are Common Cause, Sierra

Dan Aaron Polster

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Club, and American Civil Liberties Union. The Jewish Community Federation of Cleveland on occasion takes an advocacy position with respect to social service issues on the local and state level.

In addition to the foregoing, I am a member of the following organizations: Park Synagogue, Jewish Community Center, Food Communities Organization of People (food coop), and Friends of Shaker Square (neighborhood organization). I am also a member of Thirteenth Street Sports Club, a downtown Cleveland fitness center where I work out during the lunch hour.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Ohio (1976)

United States District Court for the Northern District of Ohio (1981)

United States Court of Appeals for the Sixth Circuit (1982)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance"; 28 Case Western Reserve Law Review No. 1 (Fall, 1977).

Essay in Alumni/e in Action Part II: Harvard Law School Graduates in Public Service Work, Office of Public Interest Advising, Harvard Law School (Fall, 1994)

Letter to the Editor, The Federal Lawyer, Vol. 43, No. 4 (May, 1996)

Letter to the Editor, Cleveland Jewish News, (March, 1997)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. My last complete physical was June 19, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or candidacies for elective public office.

I was elected a Democratic Party Precinct Committeeman in Shaker Heights in 1972. I resigned when I entered law school in 1973, since I knew I would be out of town for the next three years.

1976-1982: Trial Attorney, U.S. Dept. of Justice, Antitrust Division (appointed)

1982-present: Assistant U.S. Attorney, ND Ohio (appointed)

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- b.
  1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
  2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

- c.
  1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
  2. What percentage of these appearances was in:
    - (a) federal courts;
    - (b) state courts of record;
    - (c) other courts.
  3. What percentage of your litigation was:
    - (a) civil;
    - (b) criminal.
  4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
  5. What percentage of these trials was:
    - (a) jury;
    - (b) non-jury.



- a. I did not serve a judicial clerkship nor have I been a sole practitioner. Upon graduation from law school in 1976, I began my career with the Department of Justice, which I have continued for over 20 years. My appointed positions with the Department of Justice are as follows:

1976-1982: Trial attorney, U.S. Department of Justice, Antitrust Division, Cleveland, Ohio

1982-present: Assistant U.S. Attorney, Northern District of Ohio, Economic Crimes Unit  
I serve as the Professional Responsibility Officer for the Criminal Division, and the Ethics Officer for the entire office.

- b. 1976-1982: civil and criminal antitrust investigation and litigation

1982-present: investigation and prosecution of a wide range of economic crimes (fraud and corruption), including appellate litigation

For the past 15 years, I have served in the Economic Crimes Unit of the U.S. Attorney's Office, investigating and prosecuting fraud and corruption cases. For a street crime (drug trafficking, bank robbery, etc.), there is no question a crime has been committed, and the only issue is whether the defendant is the perpetrator. In a fraud case, there is usually no question that the defendant committed the acts, but the issue is whether the conduct was criminal, i.e. was it committed with criminal intent? The decision to put someone through the crucible of a federal prosecution essentially rests upon the judgment of the individual Assistant U.S. Attorney. I end up declining many more cases than I prosecute, because proof beyond a reasonable doubt in a fraud case is a very heavy burden. In addition to the quality of the evidence, I must weigh the expenditure of time and resources for the prosecution, the general deterrent effect of a prosecution, the likely sentence, the alternatives to prosecution, and any special mitigating factors. I have established a reputation as a vigorous and fair prosecutor, weighing carefully any arguments of defense counsel before I initiate prosecution.

Often the role of the an Assistant U.S. Attorney is to bring the tough cases against the prominent defendants that might not be brought by local prosecutors, and to withstand public criticism without backing down. I have brought a number of these cases during my career. In one situation, I pursued a four-year corruption investigation relating to a state agency, in the face of public criticism by high-level officials that the investigation was unwarranted and needlessly protracted. I ultimately secured the conviction of four individuals, including the second-ranking official of the agency. In another case, I prosecuted a prominent minority businessman, and I was accused of racial motivation in pursuing the matter. However, the individual ultimately pleaded guilty to fraud charges.

Perhaps the most important exercise of my professional judgment comes not in my own cases, but in my role as Ethics Officer for the entire office and Professional Responsibility Officer for the Criminal Division. I am the person to whom my colleagues turn for advice on both matters of general government ethics (acceptance of gifts, restrictions on outside employment, permissible political activities, etc.) and on matters of delicate professional ethics, such as contacts with represented persons during undercover investigations of new or continuing offenses. I believe that two successive U.S. Attorneys have selected me for these positions because I am respected in the office as both an aggressive prosecutor and a careful prosecutor. It is my responsibility to be available on a moment's notice to give the advice my colleagues need to investigate and prosecute some law breakers, while while at the same time not jeopardizing their license to practice law and maintaining the reputation for integrity the office enjoys with the defense bar and the federal judges of this district.

- c. I have appeared extensively in federal court since 1976, more frequently since 1982 when I became an Assistant U.S. Attorney. As I have been a full-time federal prosecutor for my entire legal career, I have not made any appearances in state courts. Since 1982, all my litigation has been criminal. From 1976-1982, while I worked at the Antitrust Division, I handled both civil and criminal matters. I estimate that about 70 percent of my litigation was criminal, and 30 percent was civil.

I have tried approximately 15 jury cases, three of which lasted more than 2 months, and I have tried two bench cases. I have generally been sole counsel. Of the three long trials, I was chief counsel in the last, second chair in the second, and third chair in the first.

In addition to the trials, the nature of my work involves the full range of federal courtroom activity involved in taking a criminal case from beginning to end. While more than 90 percent of my prosecutions resulted in guilty pleas, all required numerous courtroom appearances.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date of case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also, state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- a. U.S. v Howard and Ruffin 1:95CR359 (N.D. Ohio)--guilty pleas during jury selection 1996 (Judge Solomon Oliver)

I supervised an FBI and IRS investigation into the activities of two sisters who defrauded an American doing business in Russia of more than \$600,000. The defendants, doing business in Cleveland, received the money via wire transfer from Russia as a deposit for a large quantity of chicken, and used most of the money for other purposes. During jury selection, the defendants agreed to plead guilty to fraud charges. In addition, the defendants agreed to plead guilty to committing perjury in the federal civil case brought by the victim. It is unusual to bring a perjury prosecution for false statements made during a federal civil case. These defendants created, and then authenticated during their depositions, fraudulent documents which purported to show the disposition of \$200,000 of the victim's money. Both defendants were sentenced to prison terms.

Sonja Rowan, Skylight Office Tower, 1660 West Second Street, Suite 750, Cleveland, Ohio 44113, 522-4856, represented Howard; Janet Burney, 815 Superior Ave., Cleveland, Ohio 44114, 696-3833, represented Ruffian.

- b. U.S. v McConnell 1:90CRO310 (N.D. Ohio)--trial 1991 (Judge John Manos)  
U.S. v McEaney 1:90CRO159 (N.D. Ohio)--guilty plea 1990 (Judge Frank Battisti)  
U.S. v Brown 1:90CRO172 (N.D. Ohio)--guilty plea 1990 (Judge Frank Battisti)  
U.S. v Binder 1:90CRO160 (N.D. Ohio)--guilty plea 1990 (Judge Frank Battisti)

I supervised an intensive four-year investigation by the FBI and the Department of Labor into allegations of fraud and corruption at the Ohio Bureau of Employment Services (OBES) involving millions of dollars of federally-funded telephone leases. Columbus, Ohio lobbyist Robert McEaney,

Ohio Department of Administrative Services employee Scott Binder, and OBES employee Larry Brown all entered guilty pleas. OBES Deputy Administrator Donald McConnell, the #2 person at the agency, was convicted by a jury of mail fraud, bribery, and conspiracy and was sentenced to prison. I received commendations from the Director of the FBI and the Office of Inspector General, Department of Labor.

My assistant counsel in the McConnell trial was Assistant U.S. Attorney John D. Sammon, 1800 Bank One Center, Cleveland, Ohio 44114, (216) 622-3829. Elmer A. Juliani, Leader Building, Cleveland, Ohio 44114, (216) 241-0520, represented McConnell. Carmen Policy, 3 Com Park, San Francisco, California, (415) 656-4949, represented McEaney. Terry K. Sherman, 52 W. Whitter, Columbus, Ohio 43206; (614) 444-8800, represented Binder. Robert E. Wilson, 132 S. Main, Marion, Ohio 44302, (614) 387-0970, represented Brown.

- c. U.S. v Yakubik 5:94CRO0419 (N.D. Ohio)--guilty plea 1994, sentencing 1995 (Judge Sam Bell)

I supervised an FBI investigation into an Akron, Ohio telemarketing operation that targeted elderly victims across the country. Following the execution of search and arrest warrants, John Yakubik, the ringleader, entered a guilty plea to wire fraud and was sentenced to more than three years in prison. He acknowledged that his operation generated more than \$600,000 in one year of operation. The case generated a significant amount of attention, since Yakubik preyed upon elderly victims. I was sole counsel on the case; Yakubik entered a plea of guilty in 1994 rather than going to trial.

Frank Pignatelli, 437 Quaker Square, Akron, Ohio 44308, (330) 376-5756, represented Yakubik.

- d. U.S. v. Pavlish 5:92CRO234 (N.D. Ohio)--guilty plea 1992 (Judge Ann Aldrich)

I supervised an investigation by the Postal Inspectors which culminated with a search warrant, civil injunctive action, and criminal prosecution of telemarketer James Pavlish, who defrauded 100,000 individuals across the country of more than \$4,000,000. Pavlish received a substantial prison sentence, and forfeited more than \$1,000,000. The case was significant both in the magnitude of the fraud and in the amount of assets recovered. Ordinarily, we apply any assets to restitution. In this case, since no individual lost more than \$50 and the administrative costs to track down 100,000 people would have used up a substantial portion of the \$1,000,000, it seemed best to apply the \$1,000,000 to help fund future law enforcement efforts. I drafted the indictment and conducted the lengthy plea negotiations that culminated in Pavlish's guilty plea in 1992.

Michael Hennenberg, 30100 Chagrin Blvd., Pepper Pike, Ohio 44124, (216) 765-9600, represented Pavlish.

- e. U.S. v Supina 5:92CRO325 (N.D. Ohio)--guilty plea 1992 (Judge David Dowd)

I supervised a short but intense investigation of Akron insurance agent Dennis Supina, who was involved in an ongoing scheme to defraud Nationwide Insurance Company and Supina's clients. Supina would receive insurance premiums from his clients and fail to remit the premiums to Nationwide. In most cases Nationwide was unaware that the policies were even being issued. The investigation required coordination among Nationwide, the Ohio Department of Insurance, and the FBI. When Supina was confronted by law enforcement agents, he admitted his wrongdoing, and acknowledged additional premium embezzlements of which Nationwide had not been aware, totaling approximately \$250,000. I coordinated the activities of Nationwide, the FBI, and the Ohio Department of Insurance. Supina was sentenced to a prison term.

Edward Pulekins, 800 Society Bldg., 159 South Main St., Akron, Ohio 44308, (216) 762-6431), represented Supina.

- f. U.S. v Bustamante 1:90CRO240 (N.D. Ohio)--1991 trial, 1992 appeal, 1993 guilty plea (Judge John M. Manos)

Following a lengthy and complex investigation, I prosecuted Cleveland attorney, newspaper publisher, and former bank president John Bustamante on charges that he defrauded a Washington, D.C. insurance company. The case was particularly difficult because the president of the insurance company was a close friend of Bustamante's, who testified that he did not believe Bustamante had done anything wrong. At the time of the trial, the full impact of the damage to the company inflicted by Bustamante's conduct had not been felt; the insurance company subsequently went into receivership.

Bustamante was convicted by a jury in February, 1991 of 5 counts of fraud. In May, 1991, the trial judge ordered a new trial, holding that his instructions may have confused the jury as to which evidence corresponded to each count of the indictment. I obtained Department of Justice approval to appeal the new trial ruling. While the appeal was successful, the trial judge amended his order to correct the error. Prior to the retrial, I uncovered evidence of additional fraudulent conduct by Bustamante, and in 1993, Bustamante pleaded guilty to defrauding the insurance company. The insurance company went into receivership in 1994.

Charles Clarke, Squire Sanders & Dempsey, Society Center, Cleveland, Ohio 44114, (216 479-8551), represented Bustamante.

- g. U.S. v Carsley 1:91CRO0248 (N.D. Ohio)--guilty plea 1992 (Judge Alvin Krenzler)  
U.S. v Dierker 1:91CRO0237 (N.D. Ohio)--guilty plea 1992 (Judge Alvin Krenzler)  
U.S. v Wall 1:91CRO0238 (N.D. Ohio)--guilty plea 1992 (Judge Alvin Krenzler)

Following a lengthy investigation by the FBI and the Department of Defense, Office of Inspector General, which I supervised as sole counsel, I prosecuted Joseph Carsley, Edward Dierker, and David Wall for participating in a scheme to defraud NASA's Lewis Research Center. Carsley, Dierker, and Wall were senior officers of Analox Corporation, which provided engineering support services to NASA. The three men carried out a scheme to conceal in the costs under the NASA contracts more than \$1,000,000 in charges for an Atlanta restaurant run by Carsley, a junket to Europe, and payments to Carsley's wife and mistress. All three men elected to plead guilty in 1992 rather than going to trial. Carsley was sentenced to a substantial prison sentence; the other two defendants received probationary sentences.

Gail Rose Kane, Cuyahoga County Board of Mental Retardation, 1050 Terminal Tower, 50 Public Square, Cleveland, Ohio 44113, (216) 736-2653, represented Carsley; Harry Hanna, Cuyahoga County Court of Common Pleas, 1 Lakeside Ave., Cleveland, Ohio, (216) 443-8739, represented Dierker; and Stephen Parisi, 600 Superior Ave., East, Cleveland, Ohio 44114, (216) 348-5400, represented Wall.

- h. U. S. v Affiliated Foot Care dba Family Foot Care Center, et al. CR85-180 (N.D. Ohio)--1986 guilty pleas and trial (Judge George White)

I supervised a lengthy undercover investigation of a group of local podiatrists who were billing insurers for millions of dollars of unnecessary, and in some cases fake surgery. In addition to the massive monetary fraud on the insurers, patients were suffering serious complications from the unnecessary soft tissue surgery. The guilty pleas of three podiatrists and the publicity surrounding the two search



warrants led to the demise of the business, saving the insurers millions of dollars and sparing patients needless suffering. The prosecution throughout the two month trial was hindered by the lack of firm surgical standards within the podiatric community. While the corporation was convicted of fraud, several of the other podiatrists, including the president of the corporation, were acquitted.

Kevin Connelly, currently at the Department of Justice, Criminal Division, Bond Building, 1400 New York Ave., N.W., Washington, D.C. 20530, (202) 514-1244, was my co-counsel. Robert Rotatori, 1500 Leader Bldg., Cleveland, Ohio 44114, (696-6122) represented Rustom Khouri, the president and owner of the corporation; George Emershaw, 437 Quaker Square, 120 E. Mill Street, Akron, Ohio 44308, (330) 376-5756, represented Affiliated Foot Care; Paul J. Cambria, 42 Delaware Ave., Suite 300, Buffalo, NY 44202, (716) 849-1333; Gary Garson, 1200 Illuminating Bldg., Cleveland, Ohio 44113, (216) 687-0555; John Gibbon, 1300 Terminal Tower, Cleveland, Ohio 44113, (216) 781-1212; and Stewart I. Mandel, 75 Public Square Bldg., Cleveland, Ohio 44113, (216) 241-5115, represented the other defendants.

- i. U.S. v. Stull CR82-70 (N.D. Ohio)--1982 trial, (Judge George White), 743 F.2d 439 (6th Cir. 1984), cert. denied, 470 U.S. 1062 (1985)

I was co-counsel on a two-month trial that resulted in the conviction of three defendants on 20 counts of mail fraud in a scheme that defrauded individuals and businesses across the country. I drafted the indictment, and examined one-half of the numerous witnesses. Due to the victimization of individuals and small business across the country, and the fact that the two principal defendants had been prosecuted previously by our office, the trial judge imposed prison sentences of 100 years, which he subsequently reduced to 50 years. As a postscript, I am currently prosecuting one of these defendants for an alleged fraud he committed since he has been on parole.

Kenneth McHargh, now Deputy Chief of the Criminal Division, Drug Task Force Unit, 1800 Bank One Center, Cleveland, Ohio 44114, (216) 622-3936, was lead counsel. Donald Krosin (retired), Federal Public Defender's office, 1660 W. 2d Street, Cleveland, Ohio 44113, (216) 522-4856; Jay B. White (deceased), Standard Bldg., Cleveland, Ohio 44114, (216) 696-6996; and Terry Gilbert, Standard Bldg., Cleveland, Ohio 44114, (216) 241-1430, represented the defendants. Msrs. Krosin and White were appointed advisors to their clients, who were representing themselves.

- j. U. S. v. Taish Tribhawan, et al. CR84-6 (N.D. Ohio)--1984 guilty pleas (Judge Sam Bell)

Following an undercover investigation by the U.S. Customs Service, I prosecuted several Canadians for plotting to purchase machine guns, silencers, and grenades in the United States and to transport them to Guyana to be used in an effort to overthrow the government. All of the defendants were held in jail until they pleaded and were returned to Canada, where some of them faced additional charges.

J. Ross Haffey, 5001 Mayfield Rd., #301, Lyndhurst, Ohio 44124, (216) 291-3600, represented the principal defendant, and Paul Scott, 536 S. High St., Columbus, Ohio 43216, (614) 221-1578; John S. Pyle, 1500 Leader Bldg., Cleveland, Ohio 44114, (216) 696-6122; Edward Reigler, 1030 Key Bldg., 159 S. Main Street, Akron, Ohio 44308 (330) 535-8171; and Gary Procaro, 4450 Belden Village Street, NW, Suite 800, Canton, Ohio 44718, (330) 492-5151 represented the other defendants.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)
- a. During the period 1978-1980, I led a team of 5 lawyers at the Cleveland Antitrust Division office in an intensive civil shared monopoly investigation of the Cleveland-based iron ore industry. The case attracted national attention. We recommended the filing of a civil complaint. After extensive review and debate, the Assistant Attorney General decided not to proceed.
  - b. I am currently Chairman of the Ohio Insurance Fraud Task Force. The Task Force is comprised of representatives from the U.S. Attorney's offices for the Northern and Southern Districts of Ohio, federal investigative agencies, state and local law enforcement agencies, the Ohio Department of Insurance, and numerous private insurance companies. The Task Force meets semi-annually to coordinate the investigation and prosecution of insurance fraud throughout Ohio. We have created a legislative liaison committee to work with the Ohio Legislature to toughen legislation against insurance fraud. In March, 1993, the task force sponsored a seminar for county prosecutors and investigative agents around the state to encourage them to take a more aggressive role in prosecuting insurance fraud cases.
  - c. During the period 1991-1992, I participated in a Department of Justice task force to draft a federal regulation covering contacts by prosecutors and agents with represented persons. This regulation is of critical importance to U.S. Attorney's Offices, since several prosecutors have been faced with state disciplinary proceedings for their conduct in supervising undercover investigations and in dealing with defendants who wanted to approach the government directly. I was mentioned for my efforts, along with a handful of other attorneys, in the Department press release announcing the proposed regulation. Attorney General Reno directed a new study of the issue, and the final regulation was promulgated in 1994. It safeguards the attorney-client privilege and the Sixth Amendment right to counsel, while allowing undercover investigation of new and ongoing criminal conduct.
  - d. In 1995, I was asked by the Department of Justice to chair a subcommittee of the Insurance Fraud Working Group, a multi-agency national level group which consists of representatives from the Department of Justice's Criminal Division, U.S. Attorney's Offices, investigative agencies, and other federal law enforcement agencies with responsibilities in the insurance area. The insurance industry is primarily regulated by the states, and my subcommittee includes members of the National Association of Insurance Commissioners. We recommended a change in the annual financial interrogatories submitted by insurance companies to state departments of insurance to deal with the problem of "rented assets" which are used by deceptive officers to inflate their company's balance sheet. This change has been implemented.
  - e. For the past two years, I have served on the panel of neutrals for the Northern District of Ohio. I did not receive any assignments until this past fall, when I was asked to mediate two matters in November, 1996. I was able to settle both cases in a single session. The strategy I used was to come up with a dollar figure, and supporting rationale, that I felt was fair and then attempt to get each side to accept it. This way, neither party felt it was accepting the other side's offer. I found the process intellectually stimulating, and I felt a sense of accomplishment at saving both sides the expense and anguish of litigation. I spent a good deal of time explaining to each client the personal costs of prolonged litigation, and I think this helped facilitate a settlement. I also tried to address in my private discussions with the parties both the financial and the emotional components to the dispute, since a successful resolution must take both facets into account.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None, other than the pension benefits from my 21 years of federal government employment and the funds I have in the federal Thrift Savings Plan.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

If I determine that my prior association with a party or matter creates a conflict, or suggests the appearance of impropriety, I will recuse myself. If I see something that raises any concern, I will immediately disclose it to the parties to determine if any of them have an objection to my handling the case.

I would adhere strictly to the Judicial Code with respect to any matter in which my wife's firm (Hahn Loeser & Parks) is involved, either through recusal or an agreement that my wife would not receive any compensation from the matter. I would also not handle any matter with which I had any involvement while at the U.S. Attorney's Office. This would include, of course, my own investigations and cases, as well as those few cases where I have been asked to serve as a consultant.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no plans to pursue outside employment while on the court. The only possibility might be occasional teaching or lecturing at a law school sometime in the future, or participating in CLE programs as a speaker or panelist.

4. List sources and amounts of all income received during the calendar preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more.

See attached financial disclosure statements.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

I have attached the completed financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I worked on several political campaigns during my college years, in a low-level volunteer capacity. I assisted in the campaign office during the campaign of Arnold Pinkney for Mayor of Cleveland in 1971. I did low-level volunteer work for the presidential campaign of George McGovern in Ohio and New York in 1972. When I began employment with the Department of Justice in 1976, I was prohibited from participating in partisan political campaigns.



## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I serve on the legal committee and the Board of Trustees of Starting Point, a child care resource and referral agency. Many of those served are low and modest income parents trying to find affordable and suitable child care so they may work. My service on the legal committee is on as-needed basis. I have served on the Strategic Planning Committee for the past year, helping the agency develop a plan to deal with the rapidly-changing environment.

I take an active role each year in the Jewish Welfare Fund Campaign, which raises approximately \$25 million annually for Jewish agencies in Cleveland and overseas. Local Jewish agencies serve clients of all races and religions, and much of the money raised goes toward providing social services for those Clevelanders who cannot afford the normal fees. I served as co-chair of the Attorney's Division for two years.

I have chaired the Combined Federal Campaign drive in the U.S. Attorney's office. This is the national campaign among federal employees to raise money for local, national, and international charitable organizations.

Along with my wife, I served as a legal advisor for many years for Food Communities Organization of People, a Cleveland food coop. We were heavily involved in the complicated process of helping the organization grow and move into a new building. Due to its location and reasonable prices, the food coop is the main grocery store for many Cleveland residents of low and moderate income in the University Circle area.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list with dates of membership. What have you done to try to change these policies?

I am not a member of any organization which discriminates on the basis of race, sex, or religion. As a practical matter, many of the Jewish community organizations to which I belong are composed voluntarily of Jewish members.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senator Glenn appointed a 5-member, bipartisan commission in January, 1997 to evaluate and recommend candidates to fill the two vacancies on the federal district court for the Northern District of Ohio. The committee ultimately ranked four candidates in order of preference; I was ranked second. Senator Glenn followed the committee's recommendation, and in early May, he announced that he was recommending Stark County, Ohio Common Pleas Judge James Gwin and me for the two positions.

All candidates were required to complete a detailed written questionnaire patterned upon the Senate Judiciary Committee Questionnaire. In addition, the committee encouraged candidates to obtain letters of reference. I contacted numerous members of the legal and general community with whom I have worked and been associated, and encouraged them to write and call the committee members. The committee spent approximately five weeks reviewing all the written submissions, and then interviewed 15 of the 28 applicants on April 30 and May 1, 1997. My interview was April 30, and I was impressed with how much the committee members knew about my background and the probing nature of their questions.

Following Senator Glenn's announcement, I received a large packet of forms from the White House, and a telephone call from a representative of the Department of Justice. I went to Washington, D.C. on May 21, where I was interviewed by Department of Justice officials. The officials also conducted a background investigation in late May and early June, contacting judges and lawyers with whom I have had contact.

The first week of June, 1997, my completed forms were submitted to the FBI and the American Bar Association. I was interviewed by a retired FBI Special Agent on June 6, 1997 as part of my FBI background evaluation. On June 18, 1997, the ABA representative who conducted my ABA background evaluation came to Cleveland to interview me.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonable be interpreted as asking how you would rule on such case, issue, or question?

I have had no conversations with anyone in the screening process concerning how I might rule on a specific case, legal issue, or question..

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The federal judiciary is a coequal branch of government. While judges should not usurp the role of Congress or state legislatures to make the laws, or the role of the President or the Governors to carry out the laws, federal judges must interpret the laws and measure them against the yardstick of the Constitution. It is not by accident that we live under the oldest constitutional government on earth. The genius of the Founding Fathers was their ability to design a system that was both firm and flexible enough to stand the test of time.

Having worked as a significant participant in the federal process for twenty years, I have an excellent understanding of the delicate balance among the three branches of government, particularly in criminal cases. It is the absolute prerogative of Congress to pass the laws, and the absolute prerogative of the Executive Branch to enforce the laws. It is not appropriate for a judge to inject his/her personal belief as to the merits of a particular statute, or the wisdom of a particular prosecution, into the decision-making process directly or indirectly, as by giving signals to the jury.

Federal judges are obligated to give substantial deference to the decisions of Congress and to search for an interpretation of a challenged statute that is consistent with the Constitution. Because of the constitutional checks and balances, which subject legislative action to judicial review, change in our society generally is made in increments. Our country has generally not experienced the radical, overnight shifts that are the hallmark of many other democracies.

On the other hand, one of the distinctive features of our system is its self-corrective nature. If the Supreme Court interprets a statute in a manner with which Congress disagrees, Congress is free to amend the statute or otherwise clarify the ambiguity. A case in point is the federal mail fraud statute, 18 U.S.C. Section 1341. For years, virtually every federal court that had faced the issue held that the crime of mail fraud encompassed a scheme to defraud the public of the honest services of its employees. This "intangible rights" theory was one of the primary vehicles used by federal prosecutors against corrupt state and local officials. In 1987, the Supreme Court, in McNally v. United States, 483 U.S. 350, held that the mail fraud statute covered only schemes the object of which were to deprive the victim of some tangible economic interest. Congress decided that the Supreme Court was wrong, and promptly passed 18 U.S.C. Section 1346, which specifically provides that the mail fraud statute covers schemes to deprive victims of the intangible right of honest services.

Those who designed our system of government deliberately created one branch whose members would not be elected and would have life-time tenure, and charged it with the responsibility of safeguarding the Constitution. This unique feature of the federal judiciary is the source of its critical independence. I spent one week in the former Soviet Union in 1988 visiting Jewish families. Having glimpsed first-hand what life in a country can be when the constitution was nothing more than empty words, I came home far more appreciative of the wisdom and understanding that has gone into the creation and preservation of our system of government. It certainly is imperfect, but it is just as certainly the best system ever devised.

AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Polster, Dan A.		2. Court or Organization U.S. Dist. Ct., ND Ohio	3. Date of Report 07/31/1997
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge--Nominee		5. Report Type (check type) X Nomination, Date 07/31/97 ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1996 to 06/30/1997
7. Chambers or Office Address U.S. Attorney's Office 600 Superior Ave. E., Ste.1800 Cleveland, Ohio 44114		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Lifetime Trustee	Cleveland College of Jewish Studies
2 Lifetime Trustee	Agnon School
3 Trustee	Jewish Community Federation of Cleveland

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1996-97	U.S. Civil Service Retirement System (CSRS) benefits
2	
3	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1996-97	Hahn, Loeser & Parks (law firm) (S)	
2		
3		
4		
5		



FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Polster, Dan A.	07/31, 1997

**IV. REIMBURSEMENTS and GIFTS** — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	Exempt	
2		
3		
4		
5		
6		
7		

**V. OTHER GIFTS**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts)		
1	Exempt		
2			
3			
4			

**VI. LIABILITIES**

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	American Express Co.	Travel and Entertainment Card	J
2	VISA (J)	credit card	J
3	Discover Card (J)	credit card	J
4	Connecticut General Ins. Co.	borrowing cash value of univ. life	K
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 0=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Polster, Dan A.	Date of Report 07/31/1997
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**VII. Page 1 INVESTMENTS and TRUSTS**

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period							
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	Exempt						
	If not exempt from disclosure				Exempt							
	(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)								
NONE (no reportable income, assets, or transactions)												
1 Money Market Funds	A	Interest	J	T								
2 Cuy. Cty Ohio Hosp. Bond	A	Interest	J	T								
3 Little Blue Valley, Mo. Sewer Dist. Bond	C	Interest	K	T								
4 Mont. Cty Maryland Hosp. Bond	A	Interest	J	T								
5 GTE common	A	Dividend	J	T								
6 Sprint common	A	Dividend	J	T								
7 360 Communications common	A	Dividend	J	T								
8 Transonic common	A	Dividend	J	T								
9 Servicemaster Ltd. common	A	Distribution	K	T								
10 Merrill Lynch Dev. Cap. Market Fund	A	Dividend	K	T								
11 Merrill Lynch Global Alloc. Fund	C	Dividend	K	T								
12 Merrill Lynch Latin Amer. Fund	A	Dividend	J	T								
13 Merrill Lynch Pac. Fund	A	Dividend	K	T								
14 Small cap World Fund	A	Dividend	K	T								
15 Rockwell common	A	Dividend	K	T								
16 Steels common	A	Dividend	J	T								
17 Asm Fund	C	Dividend	K	T								
1 Inc/Gain Codes: A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 I=\$15,001-\$50,000 or more		E=\$15,001-\$50,000					
2 Val Codes: J=\$15,000 or less (Col C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more					
3 Val/Mth Codes: Q=Appraisal (Col C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market							

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Polster, Dan A.Date of Report  
07/31/1997

## VII. Page 2 INVESTMENTS and TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	Exempt				
					(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)									
18 Dreyfuss Prem. Mun. Bd Fund	C	Dividend	L	T					
19 Funded Adv. Target Fund	C	Dividend	K	T					
20 Kemper High Inc. Trust	A	Dividend	J	T					
21 Tenneco common	A	Dividend	J	T					
22 United Telephone common	A	Dividend	J	T					
23 Access common	A	Dividend	J	T					
24 Transistor Devices common	A	Dividend	J	W					
25 Transistor Dev. common (S)	A	Dividend	K	W					
26 Japan Fund (S)	A	Dividend	J	T					
27 Vanguard Fund (S)	A	Dividend	J	T					
28 Comm. Ed. preferred	A	Dividend	J	T					
29 National City Bank-check.	A	Interest	J	T					
30 National City Bank-check (S)	A	Interest	J	T					
31 National City Bank--CD	A	Interest	J	T					
32 National City Bank--CD (S)	A	Interest	J	T					
33 Ohio Savings--savings	A	Interest	J	T					
34 IRA-Ohio Savings Bank	B	Interest	J	T					
1 Inc Gain Codes: A=\$1,000 or less (Col B1, D4)	F=\$50,001-\$100,000	B=\$1,001-\$2,500	G=\$100,001-\$1,000,000	C=\$2,501-\$5,000	H1=\$1,000,001-\$5,000,000	H2=\$5,000,001 or more	D=\$5,001-\$15,000	E=\$15,001-\$50,000	
2 Val Codes: J=\$15,000 or less (Col C1, D3)	O=\$500,001-\$1,000,000	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000				
3 Val Mth Codes: Q=Appraisal (Col C2)	U=Book Value	R=Cost (real estate only)	V=Other	S=Assessment	W=Estimated	T=Cash/Market			

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Polster, Dan A.Date of Report  
07/31/1997

## VII. Page 3 INVESTMENTS and TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period		D. Transactions during reporting period						
		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Code (Q-W)	Exempt				
						(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure	Exempt		
							(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)										
35 IRA-Ohio Savings Bank (S)	B	Interest	J	T						
36 IRA-Prudential Equity Fund	A	Dividend	K	T						
37 IRA-Prud. Equity Fund (S)	A	Dividend	K	T						
38 U.S. Thrift Savings Plan	E	Dividend	L	T						
39 401(K) (S)										
40 Pimco Total Ret. Fund	A	Dividend	K	T						
41 Mut. Series Qual Fund	B	Dividend	K	T						
42 Fidelity Adv. Growth Fund	E	Dividend	K	T						
43 Brandywine Fund	A	Dividend	K	T						
44 Pioneer Cap. Gr. Fund	B	Dividend	J	T						
45 HR-10: Prof. Managed (S)	E	Distribution	M	T						
46 Joshua Polster (DC)										
47 Money Market Fund	A	Interest	J	T						
48 Hanna Mining common	A	Dividend	J	T						
49 FLY Royal Duto common	A	Dividend	J	T						
50 McDonald's common	A	Dividend	J	T						
51 Merrill Lynch Drag. Fund	A	Dividend	J	T						
1 Inc Gain Codes A=\$1,000 or less (Col B1, D4)	F=\$50,001-\$100,000	B=\$1,001-\$2,500	G=\$100,001-\$1,000,000	C=\$2,501-\$5,000	H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000	I=\$15,001-\$50,000	E=\$50,001-\$100,000	F=\$100,001-\$1,000,000	G=\$1,000,001-\$5,000,000
2 Val Codes J=\$15,000 or less (Col C1, D3)	O=\$500,001-\$1,000,000	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000	P=\$500,001-\$1,000,000	Q=\$1,000,001-\$5,000,000	R=\$5,000,001-\$25,000,000	S=\$25,000,001-\$50,000,000	T=\$50,000,001 or more
3 Val Mth Codes Q=Appraisal (Col C2)	U=Book Value	R=Cost (real estate only)	V=Other	S=Assessment	T=Cash/Market	W=Estimated				



<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Polster, Dan A.	Date of Report 07/31/1997
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— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

# **VII. Page 4 INVESTMENTS and TRUSTS**

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(G)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period  Exempt
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W) (3) Type (e.g., buy, sell, merger, redemption) (4) Date: Month-Day (5) Value Code (J-P) (6) Gain Code (A-H) (7) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			
52 M. Lynch Glob. All. Fund	A	Dividend	J T
53 M. Lynch Bond H. Inc. Fund	A	Dividend	J T
54 Smallcap World Fund	A	Dividend	K T
55 Transistor Devices common	A	Dividend	K W
56 U.S. Treas. Zeros	A	Interest	J T
57 Wendy's common	A	Dividend	J T
58 Disney common	A	Dividend	J T
59 State of Israel Bond	A	Interest	J T
60 Ford common	A	Dividend	J T
61 Gen. Edison pref.	A	Dividend	J T
62 Unicom common	A	Dividend	J T
63 Warburg Pincus Growth	A	Dividend	J T
64 Shira Polster (DC)			
65 Money Market Fund	A	Interest	J T
66 China Power and Light common	A	Dividend	J T
67 Transistor Devices common	A	Dividend	K W
68 Merrill Lynch Drag. Fund	A	Dividend	J T
1 Inc./Gain Codes A=\$1,000 or less (Col B1, D4)	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more E=\$15,001-\$50,000
2 Val Codes J=\$15,000 or less (Col C1, D3)	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000 N=\$250,001-\$500,000 P4=\$50,000,001 or more
3 Val Mth Codes Q=Appraisal (Col C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Polster, Dan A.	Date of Report 07/31/1997
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**VII. Page 5 INVESTMENTS and TRUSTS**

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(U)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period  Exempt
(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)
(3) Date: Month-Day	(4) Value Code (J-P)	(5) Gain Code (A-H)	(6) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			
69 Merrill, Lynch Glob. All. Fund	H Dividend	K	T
70 Merrill, Lynch Pac. Fund	A Dividend	J	T
71 M. Lynch H. Inc. Bn. Fund	A Dividend	J	T
72 Smallcap World Fund	A Dividend	J	T
73 State of Israel Bond	A Interest	J	T
74 Ford common	A Dividend	J	T
75 Comm. Edison pref.	A Dividend	J	T
76 Unicom common	A Dividend	J	T
77 Warburg Pincus Growth	A Dividend	J	T
78 Ilana Polster (DC)			
79 Money Market	A Interest	J	T
80 Transistor Devices common	A Dividend	K	W
81 Merrill, Lynch Drag. Fund	A Dividend	J	T
82 M. Lynch Glob. All. Fund	A Dividend	J	T
83 State Street Research	A Dividend	J	T
84 State of Israel Bond	A Interest	J	T
85 Ford common	A Dividend	J	T
1 Inc./Gain Codes: A=\$1,000 or less (Col. B), D4	B=\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000
2 Val Codes: J=\$15,000 or less (Col. C), D3	G=\$100,001-\$1,000,000	H1=\$1,000,001-\$5,000,000	H2=\$5,000,001 or more
3 Val Mth Codes: Q=Appraisal (Col. C2)	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000
	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000
	R=Cost (real estate only)	S=Assessment	T=Cash/Market
	U=Book Value	V=Other	W=Estimated

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting <b>Polster, Dan A.</b>	Date of Report <b>07/31/1997</b>
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**VII. Page 6 INVESTMENTS and TRUSTS**

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "X" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
					Exempt				
	(2)	(3)	(4)	(5)	(2)	(3)	(4)	(5)	Exempt
	Date: Month-Day	Value Code (J-P)	Gain Code (A-H)	Identity of buyer/seller (if private transaction)					
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)									
86 Comm. Edison pref.	A	Dividend	J	T					
87 Unicom common	A	Dividend	J	T					
88 Watburg Pauds Growth	A	Dividend	J	T					
89 Lewis Polster Fam. Trust **									
90 State of Israel Bond	B	Interest	K	T					
91 Dornier common	A	Dividend	J	T					
92 M. Lyon Money Market	B	Interest	K	T					
93 U.S. Gov bonds	A	Interest	J	T					
94 Cleve. Ohio Waterworks Bonds	D	Interest	L	T					
95 Ohio State GO Bonds	C	Interest	L	T					
96 Alltel common	A	Dividend	J	T					
97 Ampal Israel Preferred	A	Dividend	J	T					
98 Ind. Dev. Bank of Israel Pref.	A	Dividend	J	T					
99 Johnson & Johnson comm.	A	Dividend	K	T					
00 National City Bank comm.	A	Dividend	K	T					
01 Keycorp common	A	Dividend	K	T					
02 Oracle common	A	Dividend	K	T					
1 Inc Gain Codes: A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000					
2 Val Codes: J=\$15,000 or less (Col C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more					
3 Val Mth Codes: Q=Appraisal (Col C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market						

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Polster, Dan A.	Date of Report 07/31/1997
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**VII. Page 7 INVESTMENTS and TRUSTS**

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period  Exempt
	(1) Amt. Code (A-H) (2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)  If not exempt from disclosure Exempt (2) Date: Month-Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			
03 M. Lynch Global Alloc. Fund	A	Dividend K T	
04 Smallcap World Fund	A	Dividend L T	
05 Blackrock Target Fund	B	Dividend K T	
06 Convertible Holdings Fund	C	Dividend K T	
07 Worldwide Dollar Vest F.	B	Dividend K T	
08 Cowen Money Fund	A	Interest J T	
09 Apollo Thermal common	A	Dividend K T	
10 East Dist. Sys. common	A	Dividend J T	
11 Inco Homes common	A	Dividend J T	
12 Interlake common	A	Dividend K T	
13 Steel of W.Va. common	A	Dividend K T	
14 Everen Money Market	B	Interest K T	
15 AT&T common	A	Interest K T	
16 Aultman common	A	Dividend K T	
17 Computer Assoc. Intl comm.	A	Dividend K T	
18 Covance common	A	Dividend K T	
19 Eaton common	A	Dividend K T	
1 Inv. Gain Codes A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more E=\$15,001-\$50,000
2 Val Codes J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000 N=\$250,001-\$500,000 P4=\$50,000,001 or more
3 Val Mth Codes Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market



Date of Report  
07/31/1997

**VII. Page 8 INVESTMENTS and TRUSTS**

- income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

53 708 00 15

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Polster, Dan A.	07/31 /1997

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. (Indicate part of report.)

☐ NONE (No additional information or explanations.)

\*\* Section VII: I have detailed all the holdings of the Lewis H. Polster Family Trust, of which I am an unpaid trustee. I receive none of the income detailed in Column B; it all goes to my mother.

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Polster, Dan A.

Date of Report

07/31/1997

## SECTION HEADING. (Indicate part of report.)

## SECTION 1. POSITIONS (cont'd.)

Li. Position

Name of Organization/Entity

4 Trustee

Jewish Education Center of Cleveland

5 Trustee

Starting Point for Child Care and Early Educ.

6 Trustee

Lewis H. Polster Family Trust

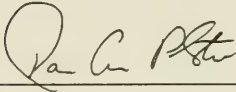
**FINANCIAL DISCLOSURE REPORT**Name of Person Reporting  
Polster, Dan A.Date of Report  
07/31/1997**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature


Date July 31, 1997

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544



## FINANCIAL STATEMENT

NET WORTH DAN POLSTER AND DEBORAH COLEMA  
JUNE, 1997

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	\$ 20	000	Notes payable to banks—secured		
U.S. Government securities—add schedule			Notes payable to banks—unsecured		
Listed securities—add schedule	385	000	Notes payable to relatives		
Unlisted securities—add schedule Transistor Devices	27	000	Notes payable to others		
Accounts and notes receivable:			Accounts and bills due	\$ 8	00
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—add schedule 3157 Belvoir Blvd	171	00
Real estate owned—add schedule 3157 Belvoir Blvd	310	000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property			Credit line, Huntington Bank	15	000
Cash value—life insurance			Checking account reserve	1	000
Other assets—itemize:			Balance of 36 month van lease (Star Bank)	6	000
401K, IRA's, HR-10, Thrift Sav.	400	000			
Hahn, Loeser partnership interest					
			Total Liabilities	201	00
			Net Worth	941	00
Total Assets	1,142	000	Total liabilities and net worth	1,142	00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add schedule.)	NO	
On leases or contracts	None		Are you defendant in any suits or legal actions?	NO	
Legal Claims	None		Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax	None				
Other special debt	None				

## Schedule 1: Assets held by Dan Polster and Deborah Coleman

Cash/Money Market/CD's	\$	20,000
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## Municipal Bonds

Cuy Cty Ohio Hosp.	10,400
Little Blue Valley Sewer Dt.	20,100
Montgomery Cty Ohio Hosp.	5,300

## Stocks

Rockwell	35,800
Servicemaster	16,500
Steris	13,100
Transistor Devices est.	27,000
Tranzonic	1,000
GTE Corp.	4,000
360 Comm. Co.	200
Sprint	4,000
Tenneco	5,600
United Telephone	900
Commonwealth Edison	150
KeyCorps	1,000
Access	300

## Mutual Funds

ML Developing Markets	15,800
ML Global Allocation	44,000
ML Latin America	13,800
ML Pacific	18,100
Small Cap World	23,700
Aim	36,000
Dreyfuss Premier Mun. Bond	82,800
Pimco Advisors	45,100
Japan Fund	1,600
Kemper High Inc. Trust	6,800
Vanguard	1,000

**Schedule 2: Assets held in custodial accounts for Joshua Polster  
(not counted in D.Polster/D.Coleman Net Worth)**

Cash/Money Market	\$	3,400
Government Securities		
U.S. Treasury Zero's		8,000
Israel Bond	est.	3,000
Stocks		
Hanna Mining		8,700
KLM Royal Dutch		5,100
Transistor Devices	est.	18,000
McDonald's		6,300
Wendy's		25
Disney		80
Ford		1,500
Unicom		700
Comm. Edison		150
Mutual Funds		
ML Dragon		6,200
ML Global Allocation		9,900
ML Corp. Bond High Inc.		3,600
Small Cap World		23,800
Warburg Pincus Growth		2,100

**Schedule 3: Assets held in custodial account for Shira Polster  
(not counted in D.Polster/D.Coleman New Worth)**

Cash/Money Market	\$	3,300
Government Securities		
Israel Bond	est.	3,000
Stocks		
China Light and Power		1,500
Transistor Devices	est.	18,000
Ford		1,500
Unicom		700
Comm. Edison		150
Mutual Funds		
ML Dragon		1,700
ML Global Allocation		25,300
ML Corp. Bond High Inc.		6,800
ML Pacific		5,900
Small Cap World		26,200
Warburg Pincus Growth		1,700

Schedule 4: Assets held in custodial account for Ilana Polster  
(not counted in D.Polster/D.Coleman Net Worth)

Cash/Money Market	\$	700
Government Securities		
Israel Bond	est.	3,000
Stocks		
Transistor Devices	est.	18,000
Ford		1,500
Unicom		700
Comm. Edison		150
Mutual Funds		
ML Dragon		1,700
ML Global Allocation		1,900
State Street Research		8,500
Warburg Pincus Growth		2,800



## QUESTIONNAIRE FOR JUDICIAL NOMINEES

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Robert Gillespie James

2. Address: List current place of residence and office address(es).

Residence:  
Ruston, LA 71270

Office:  
401 N. Trenton St., Room 247  
Ruston, LA 71270

3. Date and place of birth.

June 19, 1946; Ruston, LA

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I am not presently married, having obtained a divorce decree on March 19, 1992.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

- a. Louisiana Tech University, 1964-1968; Bachelor of Arts-Political Science, May, 1968.
- b. Louisiana State University Law School, 1968-1971; Juris Doctor, May, 1971.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

a. Paid Employment

1. From 1970 until 1971, I was a research assistant for Professor William Crawford at the Louisiana State University Law Center, 210 Law Center, Baton Rouge, LA 70803.
2. In 1971 I was hired as an associate by the law firm of Barham, Wright, Barham, and Dawkins. From 1972 until 1985, I was a partner with the law firm of Barham, Wright, Barham, and Dawkins, and its successor firms, located at 207 West Alabama, Ruston, LA 71270, where I served in the capacity of an attorney at law.
3. From 1992 until the present, I have been employed by Louisiana Tech University, P. O. Box 10318 (Box 18), Ruston, LA 71272, as a Business Law instructor.

4. From 1985 until the present, I have been employed by the City of Ruston, 401 N. Trenton, Ruston, LA 71270, as the judge for the Ruston City Court..
  5. James Management Company, Inc., 401 Pinewood Lane, Ruston, LA 71270, is a property management and legal services corporation. To the extent that I am still practicing law, I report any income received through this corporation. I have been the president and secretary/treasurer since its incorporation October 2, 1980.
  6. James Real Estate, 401 Pinewood Lane, Ruston, LA 71270, is a property management company. I have been a general partner since the partnership was established in 1992, primarily to manage former community real estate assets following my divorce.
  7. Judd & Company, 401 Pinewood Lane, Ruston, LA 71270, is a property management company. I am one of two general partners, having formed this partnership effective January 1, 1978. My duty entails performance of the management functions.
- b. Voluntary/Unpaid Service
1. Since 1980, I have served on the Board of Directors for the Ouachita Valley Council, Boy Scouts of America, 2405 Oliver Road, Monroe, LA 71207.
  2. Since 1976, I have been a member of the Louisiana Tech University Foundation, P. O. Box 3183, Ruston, LA 71272.
7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
- No.
8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
- a. Awarded T. H. Harris and Masonic Home Education Scholarships at Louisiana Tech University.
  - b. National Rhodes Scholarship finalist at Louisiana State University.
  - c. Awarded Entering Freshman Scholarship at Louisiana State University Law School.
  - d. Fellow of Louisiana Bar Foundation.
  - e. Member of Omicron Delta Kappa National Honor Society
  - f. Eagle Scout, Boy Scouts of America

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
- a. Lincoln Parish Bar Association 1971-present  
President 1984
  - b. Louisiana Bar Association 1971-present
  - c. American Bar Association 1971-present
  - d. Louisiana City Judge's Association 1985-present  
President 1993-94
  - e. Louisiana Bar Foundation 1995-present  
Fellow  
Member IOLTA Committee 1997
  - f. American Judge's Association 1985-present  
Director 1995-96
  - g. Supreme Court Committee on Ethics 1993-94  
Member
  - h. Louisiana Judicial College Board 1993-94
10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
- a. None of the organizations to which I belong are active in lobbying before public bodies.
  - b. Organizations
    - 1. Boy Scouts of America 1980-present  
Board of Directors, Ouachita Valley
    - 2. Nature Conservancy 1987-present  
Member
    - 3. Louisiana Tech University Foundation 1976-present  
Member
11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
- a. United States Supreme Court  
12/5/83 to present
  - b. United States District Court, Western District of Louisiana  
1/17/77 to present

- c. United States Bankruptcy Court, Western District of Louisiana  
1/17/77 to present
- d. Each district court in the State of Louisiana, principally the Third Judicial District Court located in Ruston and Farmerville, LA  
9/9/71 to present
- e. All city courts in the State of Louisiana, principally Ruston City Court.  
9/9/71 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have not been published nor made speeches involving constitutional law or legal policy.

13. Health: What is the present state of your health? List the date of your last physical examination.

I am presently, to the best of my knowledge, a healthy individual. My last physical examination was completed September 22, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I currently hold the judgeship for the Ruston City Court, to which I was originally elected in 1985 and have been reelected to without opposition since that time.

The Ruston City Court has territorial jurisdiction throughout Lincoln Parish. Its subject matter jurisdiction includes all juvenile cases, criminal cases, involving misdemeanors, and civil cases in which the amount in dispute does not exceed fifteen thousand dollars.

In addition to my city court judgeship, since 1993 I have voluntarily served as a judge of the Third Judicial District for Lincoln and Union Parishes as a pro tempore appointee of the Supreme Court of Louisiana. In that capacity I have heard all juvenile cases, some civil cases, and, in the fall of 1997, assumed responsibility for two criminal jury terms which are still ongoing.

Moreover, for the past five years I have voluntarily served as Juvenile Judge for Union Parish with Supreme Court of Louisiana.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues,



together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

1. Citations

- a. Kedia vs. Oeswein, No. 23,976, Ruston City Court.
- b. State of Louisiana vs. Green, Criminal Docket No. 69,431, Ruston City Court.
- c. In the Interest of Sibyl Windham et al , Juvenile Docket No. 1,672, Ruston City Court.  
Appealed to Second Circuit and reported as State ex rel. Four Minor Children v. DW, 585 So.2d 1222 (La. App. 2d Cir. 1991), affirming.
- d. Ruston Housing Authority vs. Givens, No. 20,747, Ruston City Court.  
Appealed to Second Circuit, affirming, but not published.
- e. State of Louisiana vs. Steve Allen, No. 29,612, Third Judicial District Court, Union Parish, State of Louisiana.
- f. State of Louisiana in the Interest of: Frederick Delacy Jackson, et al, Juvenile Docket No. 2009, Ruston City Court, State of Louisiana.
- g. Henry H. Roy, Jr. vs. M. P. Rasbury, Sr. , Civil Docket No. 28,108, Third Judicial District Court, Lincoln Parish, State of Louisiana.  
Appealed to Second Circuit and reported as Roy v. Rasbury, 425 So.2d 1284 (La. App. 2d Cir. 1983), affirming.
- h. State of Louisiana vs. Donald Russell Wilson, Criminal Docket No. 55,377, Ruston City Court, State of Louisiana.
- i. Bruce Odell vs. James Aycock Appraisals, Inc., No. 26,053, Ruston City Court, State of Louisiana.
- j. State Farm Mutual Automobile Insurance Company and Vincent Lance vs. Leonard P Hollingsworth and Enterprise Leasing Company--Southwest, No. 25,849, Ruston City Court, State of Louisiana.

Copies are attached.

2. None of my decisions have been reversed, and all affirmations have been without significant criticism.
3. None.
16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were

elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have not held any public office other than a judicial office. I have never been an unsuccessful candidate for elective public office. I have been elected and reelected without opposition to serve as Ruston City Court Judge since January, 1985.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and the dates;

Prior to my election as judge for the City of Ruston, I did not maintain a solo practice; however, as a part-time judge, I am allowed to maintain a private law practice as long as it does not interfere with the performance of my duties or present a conflict of interest or the appearance of a conflict of interest. Therefore, I have maintained a very limited practice dealing primarily with estates since my election in 1985 and continuing to the present. I do not have a formal office but do some work from home and some from my paralegal's office which is located at 207 West Alabama, Ruston, LA 71270.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- a. In 1971, I was hired as an associate by the law firm of Barham, Wright, Barham, and Dawkins. From 1972 until 1985, I was a partner with the law firm of Barham, Wright, Barham, and Dawkins, and its successor firms, located at 207 West Alabama, Ruston, LA 71270, where I served in the capacity of an attorney at law.
- b. From 1992 until the present, I have been employed by Louisiana Tech University, P. O. Box 10318 (Box 18), Ruston, LA 71272, as a Business Law instructor.
- c. From 1985 until the present, I have been employed by the City of Ruston, 401 N. Trenton, Ruston, LA 71270, as the judge for the Ruston City Court.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Prior to becoming a judge, I maintained a general rural law practice, concentrating primarily in the area of business law. The majority of my clients were local businesses, primarily oil and gas, banking, timber, and transportation industries, for whom I provided a wide

range of legal services, including title examinations, litigation and contract negotiation.

In addition to my business law practice, I represented many individuals on a wide variety of personal matters, including estate planning, real estate transactions, domestic and criminal cases.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical former clients were local businesses in the banking, oil and gas, timber, and transportation industries. The majority of my work was concentrated in business law. In addition, I represented a cross-section of individuals in a wide range of personal matters.

- c. 1. Did you appear in court frequently, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

In my practice, I appeared on an occasional basis in court.

2. What percentage of these appearances was in:

- (a) federal courts;  
5%
- (b) state courts of record;  
75%
- (c) other courts.  
20% (city courts)

3. What percentage of your litigation was:

- (a) civil;  
90%
- (b) criminal.  
10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I would estimate the number of cases I tried to verdict or judgment to be approximately 60, of which approximately 60 % were as sole counsel and approximately 40% were as associate counsel.

5. What percentage of these trials was:

- (a) jury;  
5%
- (b) non-jury.

95%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. David Owen v. Kerr-McGee Corp., 3: CV 79-287.

I served as co-counsel for Jim Frasier in litigation before a jury in federal district court in Monroe, LA. My client owned property where a pipeline explosion occurred that severely injured David Owen. The defendant pipeline company filed a third party claim against my client which was dismissed immediately prior to submission of the case to the jury. The pipeline company contended that my client was liable for the plaintiff's injuries since he had hired the plaintiff to do excavation work on his property and had failed to warn the plaintiff of the existence and location of the pipeline which the plaintiff struck and ruptured during the course of his excavation. Kerr-McGee was held liable for damages to plaintiff in the amount of \$150,000.00.

- a. I do not recall the exact dates, but I believe the trial took place during March, 1979.
- b. Court: United States District Court, Western District of LA,  
sitting in Monroe, LA  
Judge Edwin F. Hunter
- c. Counsel for Plaintiff: Ray Madden  
207 W. Carolina Ave.  
Ruston, LA 71270  
(318)-255-2631  
  
Counsel for Defendant Insurance Company: Judge Robert W. Kostelka  
300 St. John St.  
Monroe, LA 71201  
(318)-361-2250  
  
Counsel for Defendant Pipeline: Charles S. "Chuck" Smith  
2811 Kilpatrick Blvd.  
Monroe, LA 71201  
(318)-387-2422



2. State v. Davis, 300 So.2d 496 (La. 1974); 311 So.2d 860 (La. 1975)

I served as co-counsel for the defendant who was charged with armed robbery. This case was legally significant in that the Supreme Court granted our writ request and required that the state give notice of its intent to introduce an oral confession into evidence. Prior to this ruling, the law required notice of only written confessions. Louisiana statutory law was subsequently amended to comply with the Supreme Court's ruling. Although most of the oral arguments were handled by co-counsel, I played a significant role in framing and presenting the issue raised in our writ application. The defendant was ultimately convicted of armed robbery following a jury trial. The verdict was 10-2.

- a. I do not recall the exact dates but it began in mid to late 1974, and the writ application was granted September 25, 1974.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge Fred W. Jones, Jr.
- c. Counsel for the State: Ragan D. Madden  
District Attorney  
(Deceased)
- Co-Counsel: Joe Bleich  
114 S. Trenton St.  
Ruston, LA 71270  
(318)-255-1234

3. Succession of Arthur "Pune" Washington et al, 308 So.2d 892 (La. App. 2d Cir. 1974)

I served as counsel for the plaintiff who desired to be recognized as a legitimated child entitled to share in her parent's estate. Her siblings were contending that she was born out of wedlock and therefore was not entitled to inherit her parents' estates. This case addressed significant legal and factual issues involving legitimation both at trial and on appeal. I handled the judge trial and appeal of this case as sole counsel. My client prevailed at trial and on appeal.

- a. I do not recall the exact dates, but the district court rendered the judgment of possession on April 20, 1973.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge Fred W. Jones, Jr.
- c. Counsel for Defendant: Truett West  
111 Washington St.  
Farmerville, LA 71241  
(318)-368-2201

4. Agnes Thomas Wilson, et al v. State Farm Mutual Automobile Insurance Company, et al, Civil Docket No. 22,086, Third Judicial District, Union Parish, State of Louisiana.

I served as lead counsel for a widow and her minor child with reference to an automobile accident in which their husband and father was killed. This wrongful death and survival action involved disputed factual issues and significant legal issues relating to uninsured motorist coverage. Following extensive discovery and pretrial motions, this case was settled for approximately 75% of the disputed amount.

- a. This case was filed in late 1976 and settled on July 26, 1977.
- b. Court: Third Judicial District Court for Union Parish, LA  
Judge Fred W. Jones, Jr.
- c. Counsel for Defendant: J. Bachman Lee  
P. O. Box 4846  
Monroe, LA 71211-4846  
(318)-322-6949  
  
William J. Knight  
Hudson, Potts, and Bernstein  
P. O. Box 3008  
Monroe, LA 71201-3008  
(318)-388-4400  
  
A. K. Goff, Jr. (deceased)  
Goff and Goff  
P. O. Box 2050  
(318)-255-1760

5. State of Louisiana v. Shirley Mae Rogers, Criminal Docket No. 25,428, Third Judicial District, Lincoln Parish, State of Louisiana.

I served as sole counsel for the defendant who was originally charged with attempted 1st Degree Murder after she shot her husband in a domestic dispute. The defendant was arraigned on September 14, 1979. I subsequently filed a motion for a preliminary examination, a motion for discovery and a bill of particulars. On the hearing date, I was able to establish a history of domestic abuse by the defendant's husband. The State thereafter negotiated a plea bargain wherein the charges were reduced to aggravated battery and the defendant was given a suspended sentence.

- a. The defendant was arraigned on September 14, 1979.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge Fred W. Jones, Jr.
- c. Counsel for State: Dan Grady, Asst. District Atty.  
Lincoln Parish District Atty.

P. O. Box 777  
Ruston, LA 71273-0777  
(318)-251-5100

6. In 1975, I represented the Succession of Ollie and L. White, Probate Docket No. 5231. This included litigation over the validity of a testament, liquidating assets, payment of taxes, and settlement with heirs. The value of the estate was in excess of one million dollars.

A petition to annul will, traverse descriptive list and assert claim to separate estate was filed by an heir who was not named as a legatee in the testament. Following discovery and hearings, the claims were settled for \$50,000.

- a. The initial filing was October 14, 1975.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge Fred W. Jones, Jr.
- c. Counsel for Petitioner: Kenneth W. Campbell, Jr.  
Attorney at Law  
1808 Roselawn Ave.  
Monroe, LA 71201  
(318)-323-5523

7. I represented Dubach State Bank in litigation with Succession of Maxwell Green relating to offset by the bank of checking account funds in McVea, Administrator v. Dubach State Bank, Civil Docket No. 35,487, Third Judicial District for Lincoln Parish, LA,

This suit arose after the bank set off funds in the deceased's bank account against overdrafts of the deceased existing at the time of his death. After discovery and negotiations, this suit was compromised by the payment of all sums claimed by the bank.

- a. May 9, 1986.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge E. J. Bleich
- c. Opposing Counsel: W. Craig Henry  
Hudson, Potts & Bernstein  
P. O. Box 3008  
Monroe, LA 71210  
(318)-388-4400

8. Ed Lard v. Ford Motor Company, et al, Trial Court Docket No. C.D. 29,483, Third Judicial District, Lincoln Parish, State of Louisiana, (9/11/80).

Second Circuit Court of Appeal, State of Louisiana, Docket Number 14,568 (6/8/81).

I served as counsel for McHale Ford-Lincoln-Mercury, Inc., the seller, in this redhibition action against McHale and Ford Motor Company, the manufacturer. The plaintiff alleged McHale had sold him a used automobile with a redhibitory defect, specifically an oil pressure problem. Plaintiff also alleged that my client had contracted for an express 12,000 mile/one year new car warranty.

The trial court rejected plaintiff's demands, finding that the plaintiff failed to show that any defect existed at the time of the vehicle's manufacture and/or sale to plaintiff. The trial court also found that plaintiff failed to prove that my client sold the car with a new car warranty. Plaintiff appealed.

The Second Circuit Court of Appeal affirmed the decision, finding that the trial court correctly considered plaintiff's arguments and did not err in dismissing his claim.

- a. My representation began in June, 1979, and continued through June 8, 1981, when the appellate court rendered judgment.
- b. Court: Third Judicial District Court for Lincoln Parish, LA  
Judge O. L. Waltman, Jr.

Appellate Court: Second Circuit Court of Appeal, State of Louisiana

Panel: O. E. Price, Pike Hall, Charles Marvin

- c. Counsel for Plaintiff-  
Appellant:

Bobby Culpepper  
Attorney at Law  
525 East Court Avenue  
Jonesboro, LA 71251  
(318)-259-4184

Counsel for Co-Defendant-  
Appellee Ford Motor  
Company, Inc.:

James L. Pate  
Laborde & Neuner  
Suite 200  
1001 West Pinhook Road  
Lafayette, LA 70503  
(318)-237-7000

9. Christine Currie v. Ruston Coca-Cola Bottling Company, Inc.,  
Docket No. 11,535-1729, Ruston City Court, Lincoln Parish, State  
of Louisiana, (12/2/80).

I served as counsel for defendant, Ruston Coca-Cola Bottling Company, Inc., in this tort action for damages allegedly sustained by plaintiff as the result of consuming a Coca-Cola which contained a noxious substance. The trial judge rendered judgment for the plaintiff, but awarded only nominal damages. I was able, however, to successfully mitigate the plaintiff's claim by establishing that the



damages were aggravated by plaintiff. I was also successful in having plaintiff's claims for attorney's fees rejected based on the fact that the plaintiff's attorney had not properly pleaded her case.

- a. My representation began in August, 1979. The trial court rendered judgment December 2, 1980, and the suit was concluded in March, 1981.
- b. Court: Ruston City Court, Parish of Lincoln, State of Louisiana  
Judge Kenneth W. Campbell, Jr.
- c. Counsel for Plaintiff: Stephen K. Hearn, Jr.  
208 East Louisiana Avenue  
Ruston, LA 71270  
(318)-251-5100

10. Elizabeth Anne Howard Campbell v. Kenneth W. Campbell, Civil Docket No. 26,979, Third Judicial District Court for Lincoln Parish, State of Louisiana.

I represented Judge Campbell in a suit for legal separation filed by his spouse. The suit entailed the resolution of such issues as fault, child custody, child support, and a division of their community property. The suit was ultimately resolved by the plaintiff obtaining a legal separation and the resolution of all collateral issues.

- a. My representation was from January through May, 1976.
- b. Court: Third Judicial District Court, Parish of Lincoln, State of Louisiana  
Judge Fred W. Jones, Jr.
- c. Counsel for Plaintiff: O. L. Waltman, Jr.  
207 West Carolina Ave.  
Ruston, LA 71270  
(318)-255-2376

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

- a. Since becoming city judge in 1985, I have worked to improve the administration of justice. My activities have been focused in three primary areas: juvenile justice, criminal justice, and civil justice.

In the area of juvenile justice, I have voluntarily handled all juvenile cases in neighboring Union Parish since 1993 with Supreme Court approval. In addition, I have worked to make the juvenile court of Lincoln Parish more effective by providing stern punishment for repeat offenders and extensive rehabilitative services for first offenders. I worked with other agencies and members of the

community to establish numerous rehabilitative services including literacy training; public service work; jail visitation; a diversion program; counseling services for juveniles and their families; a mentoring program; and a recreational program.

In the area of criminal justice, I have helped develop policies to insure punishment and rehabilitation for all offenders. Punishment takes the form of fines, probation, public service work, or imprisonment for multiple offenders. I worked to enhance the use of probation to bring more sanctions to offenders. I also developed programs to provide education and counseling for those guilty of substance abuse, property crimes, driving offenses, and crimes of violence, including domestic abuse.

In the area of civil justice, I have worked to make justice affordable and prompt. Court costs have been kept at 1985 levels, and cases are typically heard within 30 days from the filing of an answer by the defendant.

- b. As a judge, I have been a leader and participant in numerous activities designed to enhance the administration of justice. I am a Fellow of the Louisiana Bar Foundation and have supported the Foundation with donations. I have served on the IOLTA Committee which evaluates requests for grants and allocates funds to subsidize the delivery of legal services to the poor and legal educational programs for the public.

I have served as a speaker at numerous continuing education programs for judges on topics such as rehabilitative programs for juveniles and programs for public evaluation of courts. Additionally, I have spoken at numerous public events on various topics, including juvenile justice and domestic violence.

I have been a member of the Louisiana City Judges' Association since 1985, serving in various offices, including that of president. This organization helps provide judges with continuing education and the opportunity to confer with other judges and officials concerning the administration of justice.

- c. I have also taught business law at Louisiana Tech University in Ruston, Louisiana, from 1992 until the present. I have instructed an average of 40 students per class during this time. Teaching has given me the opportunity to acquaint a large number of students with our basic legal concepts and with the practical application of these concepts. I have also been able to counsel and assist many students who have shown an interest in legal careers.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

To the best of my knowledge, the only such item is a state retirement account with Louisiana Public Employees Deferred Compensation Plan invested in mutual funds, of which my current investment is \$50,058.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will follow the Code of Judicial Conduct. In the event that I or someone in my immediate family has an economic interest in the subject matter in controversy or in a party in the proceeding or has an interest that could substantially affect the proceeding or in the event that I have personal knowledge or bias or have acted as an attorney in the matter, I will immediately disclose my disqualification. To the best of my knowledge, there should be no such matters of litigation, and the only financial arrangements that could pose a potential conflict of interest are my investments in James Management Company, Inc., James Real Estate, and Judd and Company. These investments are primarily property management entities which I have been managing but plan to assign all such management to my sister, Loralu James Conville.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

If possible and to the extent that it would be consistent with my service with the court, I would like to continue my teaching. Otherwise, I do not have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Form.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have been a candidate for Judge of the Ruston City Court, but I have been elected and reelected without opposition to serve since January 1, 1985.



AO-10 (b)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) James, Robert G.		2. Court or Organization U.S. Dist. Crt., W.D. LA	3. Date of Report 01/29/1998
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Nominee		5. Report Type (check type) X Nomination, Date 01/27/1998 Initial _____ Annual _____ Final _____	6. Reporting Period 01/01/1996 to 01/01/1998
7. Chambers or Office Address 401 N. Trenton St., Room 247 Ruston, LA 71270		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Judge	Ruston City Court, City of Ruston, LA
2 President & Secretary/Treas.	James Management Company, Inc.
3 Managing Partner	James Real Estate

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1	Louisiana State Employees Retirement System
2	Louisiana Public Employees Deferred Compensation
3	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1996	Lincoln Parish Police Jury (judgeship)	\$ 9,627.24
2 1996	City of Ruston (judgeship)	\$ 10,959.52
3 1996	Judiciary Department (judgeship)	\$ 27,460.71
4 1996	Ruston City Court (judgeship)	\$ 38,625.00
1996	James Management Company, Inc. (prof. services)	\$ 5,000.00

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

James, Robert G.

Date of Report

01/29/199

## IV. REIMBURSEMENTS and GIFTS — transportation, lodging, food, entertainment.

*Indicates those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)*

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements or gifts)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

*(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts)		
	EXEMPT		
2			
3			
4			

## VI. LIABILITIES

*(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities)		
1	Community Trust Bank (S)	Loan to James Real Estate - secured	L
2			
3			
4			
5			
6			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
James, Robert G.Date of Report  
01/29/1998

-- income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

## VII. Page 1 INVESTMENTS and TRUSTS

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period							
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure						
										(5) Identity of buyer/seller (if private transaction)			
		(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)									
NONE (no reportable income, assets, or transactions)													
1 Checking Account, Bank One			Interest	J	T	EXEMPT							
2 Timber Property, Vienna, LA			None	J	W	EXEMPT							
3 Timber Property, Union Parish, LA			None	J	W	EXEMPT							
4 50% int. Lake House, Farmerville, LA			None	K	W	EXEMPT							
5 James Real Estate (50 % int.)			None	M	W	EXEMPT							
6 Judd & Company (8.55% int.)			None	L	W	EXEMPT							
James Management Co., Inc. (100 % stock)			None	J	U	EXEMPT							
8 AIM Constellation Fund (IRA)			None	J	T	EXEMPT							
9 Fidelity Investments (IRA) Contrafund			None	K	T	EXEMPT							
10 Fidelity Investments (IRA) Growth & Income			None	K	T	EXEMPT							
11 Fidelity Investments (IRA) Low-Priced Stock			None	K	T	EXEMPT							
12 Fidelity Investments (IRA) Sptn. Market Index			None	K	T	EXEMPT							
13 Fidelity Investments (IRA) Diversified International			None	J	T	EXEMPT							
14 Fidelity Investments (IRA) Dividend Growth			None	K	T	EXEMPT							
15 Louisiana State Employees Retirement System			None	M	T	EXEMPT							
16 Louisiana Public Employees Deferred Compensation Plan			None	L	T	EXEMPT							
17 Fidelity Investments - Mutual Fund (select electronics)			None	J	T	EXEMPT							
1 Inc/Gain Codes: A=\$1,000 or less		B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000					
2 Col. B1, D4 F=\$50,001-\$100,000		G=\$100,001-\$1,000,000		H1=\$1,000,001-\$5,000,000		H2=\$5,000,001 or more							
3 Val Codes: J=\$15,000 or less		K=\$15,001-\$50,000		L=\$50,001-\$100,000		M=\$100,001-\$250,000		N=\$250,001-\$500,000					
(Col. C1, D3) O=\$500,001-\$1,000,000		P1=\$1,000,001-\$5,000,000		P2=\$5,000,001-\$25,000,000		P3=\$25,000,001-\$50,000,000		P4=\$50,000,001 or more					
3 Val Mth Codes: Q=Appraisal		R=Cost (real estate only)		S=Assessment		T=Cash/Market							
(Col. C2) U=Book Value		V=Other		W=Estimated									

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
James, Robert G.

Date of Report  
01/29/1998

## VII. Page 2 INVESTMENTS and TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

[illegible]



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

James, Robert G.

Date of Report

01/29/1998

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☐ NONE (No additional information or explanations.)

SECTION 6: Description, continued ...

by immovable property of James Real Estate

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

James, Robert G.

Date of Report

01/29/1998

## SECTION HEADING. (Indicate part of report.)

## SECTION 1. POSITIONS (cont'd.)

Position	Name of Organization/Entity
4 General Partner	Judd & Company
5 Business Law Instructor	Louisiana Tech University

## SECTION 3. NON-INVESTMENT INCOME (cont'd.)

Li. Date	Parties and Terms	Gross Income
6 1996	Louisiana Tech University (teaching)	\$ 5,850.00
7 1996	James Real Estate	\$ 27,729.00
8 1996	State of Louisiana (tax refund)	\$ 2,049.00
9 1996	Bossier Parish School Board (teaching)	\$ 1,000.00
10 1997	City of Ruston (judgeship)	\$ 21,109.76
11 1997	Judiciary Department (judgeship)	\$ 28,818.42
12 1997	Ruston City Court (judgeship)	\$ 40,918.00
13 1997	James Management Company, Inc. (prof. services)	\$ 14,000.00
14 1997	James Real Estate (est.)	\$ 27,729.00
15 1997	Louisiana Tech University (teaching)	\$ 5,850.00

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
James, Robert G.Date of Report  
01/29/1998

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

Robert G. James

Date

Jan. 29, 1998

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	5	286	66	Notes payable to banks—secured			
U.S. Government securities—add schedule				Notes payable to banks—unsecured			
Listed securities—add schedule				Notes payable to relatives			
Unlisted securities—add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule			
Real estate owned—add schedule	55	500	00	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts—itemize:			
Automobile and other personal property	20	000	00				
Cash value—life insurance	8	772	79				
Other assets—itemize: (See attached)	587	409	05				
				Total Liabilities	69	500	00
				Net Worth	607	468	50
Total Assets	676	968	50	Total liabilities and net worth	676	968	50
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As codorner, cosmaker or guarantor—Loan from Community Trust Bank to James Real Est.	69	500	00	Are any assets pledged? (Add schedule.)	NO		
On leases or contracts	NONE			Are you defendant in any suits or legal actions?	NO		
Legal Claims	NONE			Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax	N/A						
Other special debt	NONE						



## DETAILED SCHEDULE

## ASSETS

Checking Account		
Bank One, Ruston, LA	5,286.66	5,286.66
Real Estate		
20 acres timberland & wetland, Vienna, Louisiana	10,000.00	
13 acres timberland Union Parish, Louisiana	13,000.00	
50% interest in lake house located on Lot 3, 17, & 18, Anderson Subdivision, Farmerville, LA	32,500.00	55,500.00
Misc. Personal Prop.	20,000.00	20,000.00
Life Insurance (cash value)		
Lincoln National Life	1,351.61	
Equitable	7,421.18	8,772.79
Other Misc. Assets		
50% interest in James Real Estate	200,000.00	
8.55% interest in Judd & Company	60,000.00	
100% stock in James Management Company, Inc.	3,200.00	
IRA accounts		
AIM Constellation Fund	6,640.37	
Fidelity Investments		
Contrafund	16,334.40	
Growth & Income	19,223.39	
Low-Priced Stock	24,391.93	
Sptn Market Index	16,575.29	
Diversified International	8,563.50	
Dividend Growth	24,840.61	
Louisiana State Employees		
Retirement System--contrib.	114,160.84	
Louisiana Public Employees		
Deferred Compensation Plan (invested in mutual funds)	55,141.62	
Fidelity Investments		
Mutual Fund (select electronics)	10,548.72	
American Century Gift Trust		
Mutual Fund	15,724.75	
American Century 403B Plan		
Ultra Fund	5,557.68	
Fidelity Investments		
Life insurance annuity contract	6,505.95	587,409.05
TOTAL ASSETS		676,968.50
CONTINGENT LIABILITY		
Loan from Community Trust Bank to James Real Estate	69,500.00	69,500.00

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have provided counseling for senior citizens through Lawyer Pro Bono Project, serving approximately 10 hours per year over a four year period. Additionally, I have served as a founder, director, and legal advisor for the Domestic Abuse Resistance Team for Lincoln Parish, serving approximately 100 hours per year. Furthermore, I helped organize and serve as a director for Rise Literacy Training Program, and I have volunteered as a speaker for Ruston Alcohol and Drug Abuse Clinic, Louisiana Tech University, Grambling State University, and various social and civic organizations.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold a membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No, I do not hold a membership in any organization that invidiously discriminates on the basis of race, sex, or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

In June of 1997, an attorney wrote Senators Breaux and Landrieu and recommended me to fill the vacant federal judgeship in Monroe, LA. I thereafter wrote both senators expressing my interest. I subsequently met with staff members of both senators and Senator Landrieu in Washington, D.C. After these meetings, I solicited letters of recommendation and called various individuals soliciting their support. In July, I was interviewed by a representative of the senators in Monroe, LA, after furnishing references, samples of opinions, and other information. In August, I was interviewed by Senator Breaux. In early September my recommendation was sent to the President. Since then the Department of Justice, America Bar Association, and FBI have conducted background studies. I have gone to Washington, D.C. to meet with members of the Department of Justice, Office of Policy Development. I have been interviewed by an FBI field agent and with a representative of the ABA.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

I was never asked any questions relating to what opinion I might render on a particular case, issue, or question.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

It is my view that a judge should be faithful to the law. Our Constitution has survived for over 200 years with its premise of separation of powers. It is a judge's duty to interpret the law, not to create law. A judge should not use individual cases to impose his or her philosophies upon the masses.

It is the role of the judiciary to equitably decide the matter at hand, not to look for a solution to a larger problem. The democratic mechanism of popular elections, not the judiciary, should determine the imposition of rules and duties on broad classes and government bodies to the extent such rules and duties are within the spirit of the Constitution. Furthermore, the jurisdiction of the federal courts is limited to cases or controversies. If a party does not have a sufficient stake in the litigation, there is not a controversy involved such that the judiciary is empowered to act. Likewise, if an issue is only hypothetical or speculative, there is no controversy and thus no power to adjudicate.

By loosening the requirements of standing or ripeness, the limitations imposed by Article III of the Constitution are weakened by the branch whose duty it is to interpret and uphold the Constitution. However, while it is not within the judicial power to administer or execute laws nor to make those laws, the judiciary should become involved when an individual has suffered loss or injury due to a particular law or the administration of that law. It is then appropriate for the judiciary to interpret the law within the spirit of the Constitution and to determine if that law or its administration is contrary to the laws of the land.

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Raner Christercunean Collins

2. Address: List current place of residence and office address(es).

Residence	110 W. Congress, Division 22
Tucson, Arizona	Tucson, Arizona 85701 OFFICE

3. Date and place of birth.

July 8, 1952  
 Malvern, Arkansas 72104

- 4.
- Marital Status
- (include maiden name of wife, or husband's name). List spouses occupation, employer's name and business address(es).

Married Theresa Ann (Ollison) Collins—not currently employed outside the home.

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Arkansas Polytechnic College	Attended—August 1970 - May 1973
Russellville, Arkansas 72801	
B. A. Sociology	Awarded May 1973
University of Arizona College of Law	Attended—August 1973 - December 1975
Tucson, Arizona 85719	
Juris Doctor	Awarded December 1975

- 6.
- Employment Record
- : List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Business and Professional Corporations:

1973	Summer	Laborer	Reynolds Metals Company Jones Mills, Arkansas
1974	Summer	Law Clerk	Chandler, Tullar, Udall, and Richmond Tucson, Arizona
1974 to 1975	School Year	Student Advocate	Dean of Students' Office University of Arizona Tucson, Arizona



1975 to April 1976	Law Clerk	Pima County Attorney's Office Tucson, Arizona
April 1976 to August 1981	Trial Attorney	Pima County Attorney's Office Tucson, Arizona
August 1981 to November 1983	City Magistrate	City of Tucson, Arizona
Nov. 1983 to May 1, 1985	Attorney	Civil Division Pima County Attorney's Office Tucson, Arizona
May 1985 to November 1988	Full-time Superior Court Judge Pro Tempore	Pima County Superior Court Tucson, Arizona
Nov. 1988 to present	Superior Court Judge	Pima County Superior Court Division 22 Tucson, Arizona
1991 to 1994	Presiding Judge Juvenile Court	Pima County Juvenile Court Division 22 Tucson, Arizona

#### Community and Non-Profit Corporations:

Information and Referral Service—Board of Directors—Member, on Personnel and Finance Committee 1983 to 1984 and 1984 to 1985; Secretary 1984 to 1985

This is a non-profit organization which compiles a database of all services in Southern Arizona, publishes a directory of same, runs a Helpline, Lifeline Monitors, and offers a variety of services to the community.

The Haven, Inc.—Board of Directors—Member, Treasurer 1984 to 1985

this is a non-profit residential treatment facility for women. During my tenure on the Board, the average stay was 8 to 12 months and the main focus of treatment was alcohol.

Family Counseling Agency—Board of Directors, Member, May 1986 to April 1988

This non-profit agency provides a full-service counseling agency which deals with many social issues such as drug, family, divorce, and divorce recovery.

Sahuaro Girl Scout Council—Board of Directors, Member; April 1987 to March 1992

This is the policy-making board of our local Girl Scouts for Southern Arizona.

Black Student Support Group—Member (mid 1980's)

This was a volunteer position with the University of Arizona to provide a community support system for kids away from home and new to Tucson and the University community.

Alpha Phi Alpha—Member (inactive—active mid 1980's to 1994)

A graduate chapter that provided various community projects such as a program to encourage students remain in school called "Go to High School, Go to College".

Tanque Verde Optimist Club—1985 to 1986

American Red Cross—Board of Directors, member and chairman Personnel Committee; July 1988 to June 1991

Minority Bar Association (1980 to early 1990's)

Gideon Missionary Baptist Church—Trustee Board Member—1993 to 1996

YMCA Triangle Ranch, Board Member, 1994 to 1995

An arm of the YMCA which deals with the Summer Camp portion for the Y.

Tucson Police Department Steering Committee—March 1997 to present

This committee allows community leaders to offer suggestions as to how grant funds for computers may be used to make information more accessible to the public.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

## College:

Honor Scholarship  
United Steelworkers' Scholarship  
Who's Who in American Colleges and Universities  
Honor Graduate

## Law School:

Orals Winner—First Year Moot Court  
Chester H. Smith Memorial Scholarship  
William Spaid Memorial Award

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Bar Associations:

Arizona Bar Association—1976 to present  
Arizona Minority Bar Association—1987 to present  
American Bar Association—1976 to 1978

Judicial Committees:Chairperson 1996 Judicial Conference

This is our annual conference for which all the Judges of the state called Jurisdictions must attend. The conference provides about 12 to 14 hours of each judge's required continuing legal education for the year. My role was to coordinate the planning of the conference, dealing with setting up seminars and arranging for presenters. My focus was all judges, general jurisdiction and above.

Arizona Judicial College Board—1995 to Present; Associate Dean—1998

This Board is the policy-making and planning board for our State Judicial College. We are responsible for providing programs such as New Judge Orientation, a program that lasts up to 13 days, Legal Symposium, which provides continuing legal education for all judges in the State of Arizona. Our Judicial College is the institution responsible for statewide judicial training.

Superior Court Committee—1995 to Present

This is a committee appointed by the Chief Justice of our Supreme Court made up of judges and lay people that make recommendations to the Arizona Judicial council and the Supreme Court about legislation and policy affecting the State Court System.

Judicial Performance Review Committee—1994 to Present

By constitutional amendment this commission was set up to provide a vehicle to study and collect data on the performance of all judges placed on the bench by the Merit Selection process. That would be all 71 judges of Maricopa County Superior Court, 26 judges in Pima County Superior Court, 22 Court of Appeals judges, and 5 Supreme Court justices. Our data collection includes surveys of jurors, litigants, attorneys, and staff who appear before or work with the judge. We also solicit comments in public hearings. After all of this is compiled, we make a recommendation to the voters whether or not the judge meets the standards at the time of the judicial retention election and recommend retention or not. This is an appointed commission of judges and lay persons.

Juvenile Court Committee—1991 to 1993

This was a committee that I served on by virtue of my role as Pima County Presiding Juvenile Court Judge. This was made up of all presiding juvenile judges of the state, several Chief Probation Officers and lay people. We made efforts to coordinate statewide issues germane to the Juvenile Court.

Juvenile Justice Task Force—1992 to 1993

This committee was appointed by Chief Justice Stanley Feldman to make recommendation on ways to improve the Juvenile Justice System. The task force was made up of judges, lawyers, teachers, counselors, legislators, and community leaders.

Member, Search Committee for Director of Juvenile Department of Corrections—1992

This was a search committee appointed by the Governor to find a new Director of the State Department of Juvenile Corrections.

Member, State Bar Committee on Character and Fitness—1979 to 1986

The function of this committee is to screen applicants for admission to the State Bar of Arizona.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying Organization:

National Association for the Advancement of Colored People (NAACP)

Other Organizations:

Alpha Phi Alpha Fraternity (inactive)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the information for administrative bodies which require special admission to practice.

State of Arizona Bar	1976 to present
U. S. District Court of Arizona	May 1981

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Speeches attached:

1. Honor of Slain Police Officers
2. Graduation 1995
3. Secrist School Graduation
4. Speech on Role of Juvenile Court
5. National Honor Society Speech
6. Juvenile Outlook
7. State of Juvenile Court
8. Speech to Black Probation Officers
9. Youth Recognition Speech

13. Health: What is the present state of your health? List the date of your last physical examination.

I am in good health. My last physical examination was March 1998.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was a City Court Magistrate appointed by the Tucson City Council from August 1981 to November 1983. This involved presiding over trials of traffic law violations, violations of city ordinances, and misdemeanor violations of state law that the County Attorney chose not to prosecute. Trials would involve shoplifting, theft, prostitution, driving under the influence, and possession of small amounts of drugs, including marijuana.

I am currently a Pima County Superior Court Judge. I began this position in May 1985 as a Judge pro-Tempore appointed by the then Presiding Pima County Judge, the Honorable Thomas Meehan (deceased). This was a position where I performed all the duties of a Superior Court Judge on a full-time basis responsible for a criminal docket. This is a compensated position allowed by state statutes to help process criminal cases when the caseload exceeds the ability of the permanently funded judges to process them. In Arizona, a county may have one judge for each 30,000 in population.



I served in this capacity until I was appointed to a retained position in November 1988 by the Honorable Rose Mofford. This was accomplished through the merit selection process whereby applicants are screened by a standing selection committee which forwards a list of usually three to five names to the Governor who then chooses one. Once chosen, the judge stands for retention every four years. I was retained by a majority vote in excess of 80% of the voters in 1992 and 1996.

This is a general jurisdiction court handling civil, criminal, juvenile, domestic and probate matters. I have served in all capacities except probate. We typically rotate assignments every three years or so. There is no upper limit in dollars but cases of \$5,000 or less are handled by a lower court. The criminal jurisdiction covers all felonies and concurrent jurisdiction on all misdemeanors involving violation of a state statute. The juvenile jurisdiction encompasses all aspects of children such as delinquent behavior, incorrigible behavior, dependency, and severance. During my tenure there, judges decided whether a child would be transferred to be prosecuted as an adult. The law has been changed to make transfer mandatory now in certain cases. The domestic jurisdiction deals with dissolution, child custody, visitation, and support and maintenance (alimony). The probate court deals with all matters relating to death, and also guardianships and conservatorships.

I also served as Presiding Judge of the Pima County Juvenile Court from 1991 to 1994. This position was one in which I was chosen by a vote of my fellow judges to serve in this capacity and it was my responsibility to be in charge of all juveniles prosecuted in Pima County Juvenile Court which numbered as high as 11,000 and referrals involving about 4000 plus juveniles. The court was also responsible for all dependent and incorrigible children. I was in charge of a staff of detention officers, probation officers, and clerical staff that numbered about 280. I was also the "supervisor" for six other judges at the Juvenile Court. I was involved in developing budgets, policy, hiring and firing of staff, providing information to the State Legislature and the County Board of Supervisors. I worked with the community to do what I could in terms of crime prevention, public awareness, and planning for the future.

15. Citations: If you are or have been a judge, provide:

(1) citations for the ten most significant opinions you have written;

(1) I serve in a busy trial court and do not write many opinions. In fact, most opinions written would have been in Domestic Court where it was important to explain my reasoning. Listed below are names of opinions that are attached.

1. Sandra Kay Barney v. Larry Barney OV-7637, (1997). The plaintiff's attorney was Monica L. Stauffer, P. O. Box 1100, Morenci, Arizona 85540-1100, (520) 865-5337. The defendant's attorney was Kenyon Udall, 4200 W. 7<sup>th</sup> Street, Safford, Arizona 85546, (520) 348-9900.
2. State v. Jesús Garcia Perez CR 11735 (1986). The attorney for the state was Jessie Figueroa, U.S. Attorney, 110 S. Church, Suite 8310, Tucson, Arizona 85701, (520) 620-7300. The defendant's attorney was Fernando Gaxiola, 2847 S. Sixth Avenue, Tucson, Arizona 85713, (520) 628-7898.
3. Stoney Gene Golden v. Candice Sherri Golden D-55204 (1985). The attorney for the plaintiff was Kathleen McCarthy, 130 W. Cushing, Tucson, Arizona 85701, (520) 623-0341. The attorney for the defendant was Edward Linden, 5210 E. Williams Circle, #500, Tucson, Arizona 85732, (520) 745-8000.

4. Carol S. Flaherty v. Thaddeus Flaherty 215377 (1986). The attorney for the plaintiff was Thomas Niemeir, 3100 N. Campbell, Suite 101, Tucson, Arizona 85719, (520) 795-9975. The attorney for the defendant was Larry Condit, 376 S. Stone, Tucson, Arizona 85701, (520) 624-6638.
  5. State of Arizona v. Alex Cruz Mills CR 45334 (1995). The attorney for the state was Rick Unklesbay, Deputy Pima County Attorney, 32 N. Stone, Suite 1400, Tucson, Arizona 85701, (520) 740-5600. The attorney for the defendant was Stanton Bloom, 2525 E. Broadway, Suite 102, Tucson, Arizona 85716, (520) 321-9904.
  6. Ann Z. Ellerd v. Gary K. Ellerd D97063 (1994). The attorney for the plaintiff was Paul Saba, 2315 E. Speedway, Tucson, Arizona 85719, (520) 881-2881. The attorney for the defendant was C. Joy Watkins, 2135 E. Grant, Tucson, Arizona 85719, (520) 321-0101.
  7. Candice Stenman v. Russell Allan Stenman D96277 (1994). The attorney for the plaintiff was Fred Belman (deceased). The attorney for the defendant was John O'Dowd, 2500 N. Tucson Blvd., Suite 109, Tucson, Arizona 85716, (520) 327-4943.
  8. Toni Bradford v. Jon Bradford D97166 (1995). The attorney for the plaintiff was Robert Clark, 1161 N. El Dorado, #230, Tucson, Arizona 85715, (520) 885-3511. The attorney for the defendant was Lloyd Rabb, 3320 N. Campbell, #150, Tucson, Arizona 85719, (520) 888-6740.
- (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and
- (2) State v. Webb, 186 Ariz. 560, 925 P. 2d 701  
 This case was a Driving under the influence (DUI) case in which the court found that another judge who was taking a verdict for me erred in sending them to correct an inconsistent verdict. I sentenced on the later returned verdict and was reversed.
- State v. Miller, 161 Ariz. 171, 777 P.2d 234  
 This was a DUI case where the Appeals Court found that I erred when I ruled that the failure to inform the defendant of his right to an independent test meant the case should be dismissed.
- State v. Vermuele, 160 Ariz. 195, 772 P.2d 1148  
 In this DUI case the court ruled that I was wrong in defining the issue of what was meant by actual physical control.
- State v. Vincent, 159 Ariz. 418, 768 P.2d 150  
 A procedure was approved that allowed minor child witnesses to testify in a room outside of the defendant's presence. They had been witness to their mother's murder. Court ruled that although defendant was watching on TV and in contact with his lawyer by phone the whole time, it was a violation of the right to confrontation. The procedure had been permitted by statute.

**State v. Vess, 157 Ariz. 236, 756 P.2d 333**

A procedure was approved that allowed minor child witnesses to testify in a room outside of the defendant's presence. Court ruled that although defendant was watching on TV and in contact with his lawyer by phone the whole time, it was a violation of the right to confrontation. The procedure had been permitted by statute.

**State v. Phillips, 152 Ariz. 533, 733 P.2d 1116**

This case was a Leaving the Scene of an Accident case. He hit an elderly lady and caused serious damages. By law restitution had to be ordered. The Supreme Court used this case to decide that a defendant must know how much the restitution would be before he pleads guilty.

**State ex rel. Dean v. City court of City of Tucson, 141 Ariz., 361, 687 P.2d 369**

I was reversed here as a City Court Magistrate for ordering a jury trial on a reckless driving charge.

- (3) citation for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(3) None

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a law clerk to a Judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

3. the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the nature of your connection with each;

From June 1975 to April 1976, I served as a Law Clerk with the Pima County Attorney's Office. The address of the Pima County Attorney's Office is 32 N. Stone, Tucson, AZ 85701.

From April 1976 to August 1981, I served as a deputy county attorney with the Pima County Attorney's Office in the Criminal Division. The address of the Pima County Attorney's Office is 32 N. Stone, Tucson, AZ 85701.

In November 1983, I returned to the Pima County Attorney's Office as a Deputy County Attorney in the Civil Division. I gave legal advice to our Sheriff, the County Recorder, the Elections Department, the Clerk of the Court, the Superintendent of Schools, and the Board of Supervisors. This involved representing various county departments on negotiating contracts, personnel issues, and legal interpretation of many matters. My court appearances were not as frequent as before; however, the reason for a lot of my legal advice was to keep my clients out of court. The address of the Pima County Attorney's Office is 32 N. Stone, Tucson, AZ 85701.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my practice from 1976-1981 was criminal prosecution of all types of cases from misdemeanor to homicide.

From November 1981 to May 1983 I was in the Pima County Attorney's Civil Division where I represented various county department and officials.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

When I was a prosecutor, I represented the people of the State of Arizona for Pima County.

When I was in the Civil Division, I represented various county departments and officials and gave legal advice. I gave legal advice to our Sheriff, the County Recorder, the Elections Department, the Clerk of the Court, the Superintendent of Schools, and the Board of Supervisors. This involved representing various county departments on negotiating contracts, personnel issues, and legal interpretation of many matters. My court appearances were not as frequent as before; however, the reason for a lot of my legal advice was to keep my clients out of court.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

- c. 1. 1976 to 1981—appeared in court on a daily basis.  
1983 to 1985—less frequently; four or five times a month

2. What percentage of these appearances was in:

- (a) federal courts;  
a. Federal courts—15%

- (b) state courts of record;  
b. State courts—84%



- (c) other courts.
- c. Appellate courts—1%

3. What percentage of your litigation was:

- (a) civil;
  - a. Civil—10%
- (b) criminal.
  - b. Criminal—90%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried in excess of 75 cases to verdict as sole counsel; two others as associate.

5. What percentage of these trials was:

- (a) jury
  - a. jury—90%
- (b) non-jury
  - b. non-jury—10%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. State of Arizona vs. Genaro Celaya in Pima County Superior Court, 135 Ariz. 248, 660 P.2d 849 (1983), trial date was February 1981.

Original charges were: (1) armed robbery, (2) unlawful order to sell narcotics, and (3) murder—first degree. Number one and number three were alleged to be of a dangerous nature. I was co-counsel with Richard Rollman. We were both deputy prosecutors for the Pima County Attorney's Office. Mr. Celaya was defended by Albert Dover and Larry Fleishman, with the Public Defender's Office. The case was tried before the Honorable Richard Royston (deceased).

The case involved the shooting of John Walker, an undercover narcotics officer with the Arizona Department of Public Safety, at the Tucson International Airport in November of 1979.

Mr. Celaya was a former informant for the Drug Enforcement Agency. He claimed in his defense self help, self defense, and apparent authority. The shooting was the result of an attempted rip-off of a drug transaction. Mr. Celaya used the help of others to set up the deal and went to the airport alone.

My area of concentration was with the accomplices who were all called to testify for the State and the opening statement of the closing argument. Because of Mr. Celaya's background as a drug informant, the investigation of the case took more than 15 months and involved over 100 potential witnesses.

Mr. Celaya was convicted of murder and robbery and sentenced to 25 years to life in prison. The verdict was overturned by the Arizona Supreme Court for the trial courts failure to give an instruction on Defendant's theory of the case. 135 Ariz. 248 660 P.2d 849 (1983).

Albert Dover is now the Honorable Albert Dover and is located at 201 Church Street, Suite 7, Nevada City, California 95959, (916) 265-1311. Larry Fleischman can be reached at 6079 E. Grant, Tucson, Arizona 85712, (520) 751-1630. Richard Rollman can be reached at 2195 E. River Road, Suite 201, Tucson, Arizona 85718-6586, (520) 577-1300.

2. State vs. Nelson Record AKA Raymond Nelson in Pima County Superior Court, 131 Ariz. 150, 639 P.2d 340 (1981)

This was a case in which I was sole counsel for the Pima County Attorney's Office. It was tried before the Honorable Thomas Meehan (deceased). The defendant was represented by Mr. Michael Pollard who was then with the Pima County Public Defender's Office. The case involved 14 counts of sexual assault, two counts of kidnapping and two counts of armed robbery. The defendant abducted two young ladies and drove them to a deserted area where the crimes were committed. He was convicted on 16 counts and sentenced to consecutive sentences totaling 126 years in prison. The case on appeal dealt with whether or not my closing argument was too emotional. The appeals court held that it was not.

Michael Pollard can be reached at 103 E. Alameda, P. O. Box 27210, Tucson, Arizona 85726, (520) 791-3260.

3. State vs. Donald Johnson in Pima County Superior Court, 121 Ariz. 545 (App.) 592 P.2d 379 (1979), trial date was April 1978

I was sole counsel in this case as a deputy prosecutor for Pima County. It was tried before the Honorable Ben Birdsall (deceased). Mr. Johnson was represented by Michael Addis of the Public Defender's Office. The defendant was charged with three counts of attempted murder. Mr. Johnson tried to hire someone to kill his adoptive parents and grandmother. Mr. Johnson did not realize that the person he hired was an agent of the Federal Bureau of Investigation. The Court of Appeals ruled that the State need not be able to prove the defendant's statements of prior bad acts to use them in State vs. Johnson.

Michael Addis can be reached at 300 N. Main Street, Suite 201, Tucson, Arizona 85701, (520) 882-0662.

4. State vs. Jack Rock in Pima County Superior Court, 27 Ariz. (App.) 430 555 P.2d 898 (1976).

I handled this case as sole counsel for the Pima County Attorney's Office. The case was one that was bargained and the plea accepted by the Honorable Robert Buchanan (retired). Mr. Rock was represented by Jeffrey Bartolino. The case involved the embezzlement of a car by the defendant and was charged as a theft by embezzlement under the old theft statute in existence at the time. I filed a special action to overturn the granting of the motion to dismiss.

Jeffrey Bartolino can be reached at 33 N. Stone Avenue, Tucson, Arizona 85701.

5. State vs. Donnie Matthews, Gilbert Matthews, Rayford Strong, and Tommy Bennett in Pima County Superior Court, September 1980, tried in Pima County Superior Court  
This was a case I tried as sole counsel before the Honorable Harry Gin (retired). The defendants were represented by K. C. Stanford, Dean Christoffel, Michael Blum, and Michael Pollard. The case involved the robbery of the Marana Lounge in Marana, Arizona. The case is probably only of significance to me because of the difficulty involved with the handling of the case by the Marana Marshall's Office. I had to reinvestigate the case and develop a theory to get the evidence discovered after a search of the get-a-way vehicle admitted because the telephonic search warrant obtained by the Marana officers involved was not tape recorded. All of the defendants were convicted and received sentences ranging from one year in jail to ten years in prison.

K. C. Stanford can be reached at 110 W. Congress, Tucson, Arizona 85701, (520) 740-3336. Dean Christoffel can be reached at 335 N. Wilmot, Suite 500, Tucson, Arizona 85711, (520) 790-7337. I do not know how to reach Michael Blum. Michael Pollard can be reached at 103 E. Alameda, P. O. Box 27210, Tucson, Arizona 85726, (520) 791-3260.

6. Ann Downey vs. Tanque Verde School District No. 13 CIV 82-179 in U. S. District Court for the District of Arizona in April 1984

This case involved a school teacher who was dismissed and claimed that the dismissal was because of her exercising her First Amendment rights. I was co-counsel with Leonard Everett who represented the members of the school board as individuals and the two school principals. I represented the District and the School Board. Plaintiff's counsel was Ann Haralambie. The plaintiff's contract was not renewed by the school board and plaintiff claimed this was because of complaints she made about the way the school was handling the Title One Reading Program. She claimed that her complaining lead to a series of bad evaluations and, of course, a recommendation of not renewing her contract. The case was tried before the Honorable Alfredo Marquez. She sought back pay for two years, reinstatement, clearance of her records, and other monetary damages. The jury returned a verdict of one-year's salary and clearance of records against the School District, the Superintendent, and a school principal. This verdict was ultimately set aside for all except the school principal. Because of a prior agreement with the insurance company, the District was still responsible for one-half (1/2) of the award.

Leonard Everett can be reached at 177 N. Church, Presidio Suite, Tucson, Arizona 85701-1118, (520) 628-7777. Ann Haralambie can be reached at 3443 N. Campbell, Suite 115, Tucson, Arizona 85719, (520) 327-6287. The Honorable Alfredo Marquez can be reached at U.S. District Court, 44 E. Broadway, Tucson, Arizona 85701, (520) 620-7122.

7. Anthony C. vs. Pima County et al CIV 82-501 Tuc ACM in U. S. District Court for the District of Arizona, April 1985

I spent the year of 1984 - 1985 as a Deputy County Attorney in the Civil Division of the Pima County Attorney's Office. This was a lawsuit involving the Pima County Juvenile Court and its detention facility. Southern Arizona Legal Aid and the National Youth Law Center filed a class-action suit alleging various conditions at the detention center were violating the rights of juveniles housed at the detention center. I replaced Harold Higgins as sole counsel on behalf of the defendants in April of 1984. The counsel for the Southern Arizona Legal Aid plaintiffs were William Morris, Susan Rabe, and William Bell of the National Youth Center. The complaints were about strip searches, classification, medical and psychiatric care, recreation, use of restraints,

and a number of other complaints dealing with the care provided and the privileges allowed the juveniles being housed at the Juvenile Court center. I spent most of the last year negotiating a settlement of this case. The settlement calls for certain changes in procedure and \$9000 in damages and \$8000 in attorney's fees. The case was tried before the Honorable Alfredo Marquez.

William Morris can be reached at 64 E. Broadway, Tucson, Arizona 85701, (520) 623-9465. Susan Rabe can be reached at 2621 E. 4<sup>th</sup> Street, Tucson, Arizona 85716, (520) 795-7673. The Honorable Alfredo Marquez can be reached at the U.S. District Court, 44 E. Broadway, Tucson, Arizona 85701, (520) 620-7122.

8. Perkins vs. Reed et al. CIV 83-659 in U. S. District Court for the District of Arizona, October 1984

This was a case in which I was sole counsel. The plaintiffs were represented by John Balentine of Southern Arizona Legal Aid. The claim was that actions of two Pima County Sheriff's Office deputies amounted to an eviction from a motel without certain due process rights being followed. The plaintiffs were renting on a week-to-week basis and had been locked out by the manager of the motel. I represented the Sheriff's Office and the deputies. The motel manager settled out of court and we tried the issue of whether or not there was a "state action". This was tried before the Honorable Richard Bilby. The verdict was for my clients, the defendant Sheriff's deputies whom I represented as a Deputy County Attorney in the Pima County Attorney's Office.

John Balentine can be reached at 2033 E. Speedway, Tucson, Arizona 85719, (520) 322-9100. The Honorable Richard Bilby can be reached at U.S. District Court, 44 E. Broadway, Tucson, Arizona 85701, (520) 620-7111.

9. State vs. Nazario Montoya in Pima County Superior Court, 1979

This was a robbery case that I tried as a Deputy County Attorney for Pima County in the Pima County Superior Court before Honorable Robert Royston (deceased). The defendant was represented by Leslie Miller, then of the Pima County Public Defender's Office. The case was difficult because it involved a strong-armed robbery of a man while he was crossing the street from one bar to another. I had to maintain contact with this victim, who was an alcoholic, and convince him to remain in Tucson for about three months while the case was being prosecuted. Once the trial started, I had to convince the jury that this alcoholic victim was a credible witness. I was successful in doing so and the defendant was convicted. Judge Royston is deceased. Leslie Miller is now the Honorable Leslie Miller, Pima County Superior Court, Division 3, 110 W. Congress, Tucson, Arizona 85701. (520) 740-8215.

10. State vs. Cross in Pima County Superior Court, 1978

This was a case that I tried as a Deputy County Attorney for Pima County in Pima County Superior Court before the Honorable Robert Buchanan, now retired. The defendant was represented by Allen Minker, then a Deputy Public Defender for Pima County. He is now the Honorable Allen Minker, Superior Court Judge for Greenlee County, Clifton, Arizona 85533 (520) 865-3872. This was an attempted robbery case in which the defendant was accused of trying to rob an adult bookstore while armed with a piece of cactus. The store clerk foiled the attempt by beating the would-be robber with a newspaper rack and chasing him away. I had to convince the jury to take the case seriously even though the facts were somewhat comical. The defendant was convicted.



19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I gave legal advice to various County Departments and officials as a Deputy County Attorney from 1983 to 1985. Issues discussed would have dealt with lay-offs, employee grievances, abatement of nuisances, policies, tactics, and procedures.

I also served as Presiding Judge of the Pima County Juvenile Court from 1991 to 1994. This position was one in which I was chosen by a vote of my fellow judges to serve in this capacity and it was my responsibility to be in charge of all juveniles prosecuted in Pima County Juvenile Court which numbered as high as 11,000 and referrals involving about 4000 plus juveniles. The court was also responsible for all dependent and incorrigible children. I was in charge of a staff of detention officers, probation officers, and clerical staff that numbered about 280. I was also the "supervisor" for six other judges at the Juvenile Court. I was involved in developing budgets, policy, hiring and firing of staff, providing information to the State Legislature and the County Board of Supervisors. I worked with the community to do what I could in terms of crime prevention, public awareness, and planning for the future.

## FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have a deferred compensation with the Public Employees Benefits Service Corporation (PEBSO) through my current employer which I can only draw upon without penalty when I reach the age of 59½ years.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

If there were any conflict of interest, I would recuse myself. There are no categories of litigation or financial arrangements that are likely to present potential conflicts-of-interest. I will follow the Federal Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not held a position or played a role in a political campaign.

# **FINANCIAL STATEMENT NET WORTH**

Provide a complete, current net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks			\$7,700.00	Notes payable to banks—secured	1997 Buick		\$29,600.00
U.S. Government Securities—(Savings Bonds—Series EE)	Face Value—\$85,000	Estimated Value	50,000.00		1990 Honda		7,500.00
Listed securities—add schedule			0		Heat Pump		6,100.00
Unlisted securities—add schedule			0		Computer		1,450.00
Accounts and notes receivable:			0	Accounts and bills due			
Due from relatives and friends			0	Unpaid income tax			0
Due from others			0	Other unpaid tax and interest			0
Doubtful			0	Real estate mortgages payable—add schedule			\$52,000.00
				First Union Mortgage Corporation			
Real estate owned—add schedule	Residence		\$120,000.00	Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts—itemize:			
Autos and other personal property			\$53,000.00	Credit cards	(Est.)		\$1,500.00
Cash value—life insurance			\$3,079.95				
Other assets—itemize:							
Credit Unions			\$8,000.00				
IRA's			45,200.00				
Deferred Compensation			106,000.00				
Household Furnishings	Estimate		\$15,000.00	Total liabilities			\$98,350.00
Various Electronics	Estimate		2,500.00	Net worth			\$312,129.95
Total Assets			\$410,479.95	Total liabilities and net worth			\$410,479.95
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	1995 Honda	Ends 3/31/98	\$200.00	Are any assets pledged (Add schedule).			No
On leases or contracts				Are you defendant in any suits or legal actions?			No
Legal Claims				Have you ever taken bankruptcy?			No
Provision for Federal Income Tax			0				
Other special debt			0				

AO-10 (w)  
Rev. 1/98**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial) Collins, Raner C.		<b>2. Court or Organization</b> District of Arizona	<b>3. Date of Report</b> 05/11/1998
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Federal District Court Nominee		<b>5. Report Type (check type)</b> X Nomination, Date 05/11/1998 Initial _____ Annual _____ Final _____	<b>6. Reporting Period</b> 01/01/1997 to 05/11/1998
<b>7. Chambers or Office Address</b> 110 W. Congress, Division 22 Tucson, Arizona 85701		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)

<input checked="" type="checkbox"/> X	POSITION	NAME OF ORGANIZATION / ENTITY
	<b>NONE</b> (No reportable positions.)	
1	_____	_____
2	_____	_____
3	_____	_____

**II. AGREEMENTS** (Reporting individual only; see pp. 14-16 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> <b>NONE</b> (No reportable agreements.)	
1 03/06/9	Member, Elected Officials Retirement Fund--entitled to collect 4% of salary for each year served to a maximum of 20 at age 62. I have 9+ years of service
2	_____
3	_____

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> <b>NONE</b> (No reportable non-investment income.)		
1 1998	Pima County	\$ 17,140.00
2 1998	State of Arizona	\$ 20,141.00
3 1997	Income Tax Refund--State of Arizona	\$ 916.00
4 1997	State of Arizona	\$ 44,042.00



**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting

Collins, Raner C.

Date of Report

05/11/1998

**SECTION HEADING.** (Indicate part of report)

Information continued from Parts I through VI, inclusive.

**PART 3. NON-INVESTMENT INCOME** (cont'd.)

Line	Date	Source and Type	Gross Income
5	1997	Pima County \$	42,979.00
6	1996	State Refund \$	895.00
7	1996	Pima County \$	39,805.65
8	1996	State of Arizona \$	47,935.00

**FINANCIAL DISCLOSURE REPORT**Name of Person Reporting  
Collins, Raner C.Date of Report  
05/11/1998**IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1		
2	Exempt	
3		
4		
5		
6		
7		

**V. GIFTS**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1	Exempt		
2			
3			

**VI. LIABILITIES**

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			
6			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Collins, Raner C.Date of Report  
05/11/1998VIL Page 1 INVESTMENTS and TRUSTS— income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Estate value at end of reporting period		D. Transactions during reporting period  Exempt				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, interest)	(1) Value Code (J-F)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-F)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)					Exempt				
1 Wells Fargo Bank Savings Account (J)	A	Interest	J	T	None				
2 Tucson Old Pueblo Credit Union--IRA Account (F)	B	Interest	K	T	None				
3 Tucson Old Pueblo Credit Union IRA Account (S)	B	Interest	K	T	None				
4 Tucson Old Pueblo Credit Union Savings Account (J)	A	Interest	J	T	None				
5 Tucson Old Pueblo Credit Union Savings Account-(J)	A	Interest	J	T	None				
6 Pima Federal Credit Union Savings Account (J)	A		J	T	None				
7 U.S. Savings Bonds (J)	A	Interest	L	W	None				
8 McDonald Corp Stock (J)	A	Dividend	J	T	sold	aug 9	J	B	
9 Arizona State Credit Union (J)	A	Interest	J	T	none				
10 TEP Stock (J)	A	Dividend	J	T	sold	Aug97	J	A	
11 PebecoDeferred Compensation Plan (F)Pima County	B	Dividend	K	U	none				
12 Pebeco Deferred Compensation Plan (J) State	D	Dividend	L	U	none				
13									
14									
15									
16									
17									
1 Incl/Own Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Collins, Raner C.	Date of Report 05/11/1998
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.***(Indicate part of report.)*

I am a member of the State Elected Officials Retirement Fund. I have a little over 9 years of service. I am eligible to receive 4% of my salary for each credited year of service at age 62.

I can choose what type of investment my deferred account is invested in but have no other power to direct the account.



**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Collins, Raner C.	Date of Report 05/11/1998
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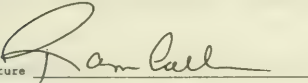
**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

5-11-98

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## GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each..

I, as a sitting judge, can not do legal work for anyone other than family members. I do, however, participate in speaker bureaus and regularly speak at schools. The Speakers' Bureau is set up by our Superior Court Information Officer. I also regularly speak on my own at high schools and junior high schools.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I am not a member of any organization which discriminates on the basis of race, sex, or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There was no selection commission. It was a very valuable process. It was done by interviews conducted by Congressman Ed Pastor and Senator Jon Kyl. I have also undergone the ABA, FBI, and Department of Justice background checks.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
  - e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.
5. Judges must be aware of what an important role they play in our democracy. The system works because of the doctrine of separation of power. A judge must be aware of issues such as standing and maintaining focus on what the issue at hand really is that must be decided.

A trial court judge must be able to follow and understand precedent and the principle of stare decisis on which our system relies. Trial court judges are not to overstep their authority and usurp the role of the legislature or executive branch.

## QUESTIONS AND ANSWERS

**JUDGE KIM McLANE WARDLAW  
RESPONSES TO ADDITIONAL FOLLOW-UP QUESTIONS  
FROM SENATOR STROM THURMOND**

1. Judge Wardlaw and Mr. Kelly, in response to one of my written questions, you stated that you did not believe any decision of the past thirty years was among the worst cases ever decided. I also recognize your commitment to following the law. However, please list at least one Supreme Court decision in the past thirty years that you believe was incorrectly decided and explain why.

I disagreed with the majority's interpretation of Section 7 of the 1909 Copyright Act in *Stewart v. Abend*, 495 U.S. 207 (1990), principally for the reasons stated in Justice Stevens' dissent.

*Stewart v. Abend* concerned the copyright to the movie "The Rear Window," which was based upon a short story entitled "It Had to Be Murder." The Court held that the continued use of the derivative work infringed the renewal rights of the owner of the underlying work unless consent was obtained. In this case, the author of the underlying work predeceased the vesting of renewal rights and the executor had assigned those rights to one Abend. Therefore Stewart, who held the rights to the movie, could not continue to distribute it without a license from Abend.

Justice Stevens, relying on the plain language of Section 7 in the context of the 1909 Act as a whole, interpreted it to mean that a copyright in a derivative work extends to both the new material provided by the derivative work and material of the underlying work, thereby creating a "new estate" in the derivative work that is independent of the underlying work. The majority, however, rejected this contention and was drawn into a lengthy discussion of Section 7. The majority stated that the portion of Section 7 which declares that the publication of the derivative work shall not affect the copyright in the underlying work applies whether the underlying work is protected by a common law or statutory copyright, and whether the publication of the derivative work is with or without copyright notice. In addition to the problems of statutory construction noted by Justice Stevens, the majority's analysis is problematic because if it had been applied to the very facts of *Stewart*, a different result would have been compelled. That is, if it had been applied to the copyright status of "It Had To Be Murder," one would have to conclude that the story was not invested with statutory copyright when the movie was published. The story was published only in the derivative work, and the dictum says this would not affect its common law copyright status. That being so, it would have become invested with statutory copyright by operation of law on January 1, 1978 (the effective date of the new Act) for a single, fixed term, and the license of the motion picture rights to Stewart's predecessor would have survived. So, under the dictum, judgment should have gone to Stewart, not Abend, as it did.



2. Judge Wardlaw, in response to one of my questions, you stated that you were opposed to some positions of the Women Lawyers Association of Los Angeles took while you were involved in leadership positions. Can you give examples of positions you publicly opposed and why?

I expressed disagreement with various positions taken by the Women Lawyers Association of Los Angeles. Typically I did so at meetings of its Board of Governors when the position was under discussion. Once a position was voted upon, however, it was the position of the organization as a whole - not necessarily the view of any individual member. I would thereafter keep my disagreements private. I would not have publicly opposed a position taken by the organization, and cannot think of an example where I did so.

3. Judge Wardlaw, in your role as Vice President of the Women Lawyers Association of Los Angeles, did you express any public positions regarding the nomination of Clarence Thomas to the Supreme Court. Please explain.

I do not believe I expressed any public position regarding whether the nomination of Clarence Thomas should be confirmed by the Senate. I did, however, express to a reporter from the Los Angeles Times the view of many women that the full Senate vote scheduled that day (October 8, 1991) on the nomination should not proceed until the Senate Judiciary Committee held a hearing on the serious charges of sexual harassment by law professor Anita Hill made public two days earlier. The nominee himself requested a delay of the vote so that the charges might be resolved, and the Senate Judiciary Committee reconvened and held hearings before the nomination was voted upon.

**JUDGE KIM McLANE WARDLAW  
RESPONSE TO ADDITIONAL FOLLOW-UP QUESTION  
FROM SENATOR MIKE DeWINE**

Judge Wardlaw, during your hearing on June 18, I asked you to "explain or describe what you [thought] were the significant cases in which the Women's Lawyers Association (WLLA) of Los Angeles filed amicus briefs during the time you were the president from 1993 to 1994 and, also, what role you played during that time in the selection of the cases." Your response was that you were the president, and that there was a "separate amicus brief committee that would take in requests for writing briefs." You also responded that you did not sit on the committee.

In further reviewing the questionnaire to the Judiciary Committee, I noticed that you responded you were "Amicus Briefs Committee Chair (1987-88)."

I would like to rephrase the question I posed during the hearing, and ask that you please explain, describe, and cite all of the cases in which the WLLA of Los Angeles filed amicus briefs during the time you served as the Amicus Briefs Committee Chair. Please describe the arguments the WLLA made in its amicus briefs during this 1987-88 period. Also, please describe the role you played in selecting those cases during your tenure as chair of that committee. If you opposed the WLLA's filing of any of those amicus briefs, or the arguments made by the WLLA, please explain why.

Senator DeWine, I apologize if my response to your question at the hearing was narrower in any way than the scope of your intended question. I understood that the question, and the ensuing colloquy, referred to my term as President of Women Lawyers' Association of Los Angeles ("WLALA") during the year 1993-94, and not to the year when I served as Amicus Briefs Co-Chair for the organization from September 1987 to August 1988. I am happy to be able to respond to this question now.

When I was a co-chair of the Amicus Briefs Committee, it essentially consisted of the two co-chairs. The procedure we followed at the time was to receive requests to prepare briefs, review the requests, and make recommendations to the Board. I have no independent recollection of any briefs filed that year, other than the one brief that I actually worked on and of which I kept a copy, *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). However, in an effort to refresh my recollection, I have reviewed what amicus materials were maintained by WLALA and conducted an on-line search, which revealed two additional briefs filed in either 1987 or 1988. I have no independent recollection of these briefs; nor did I personally work on them. I did not find the actual briefs in those cases, and, as to the 1987 case,

am not certain that the brief would have been filed while I was co-chair of the committee, but I am including a description of all three cases out of an abundance of caution.

1. *New York State Club Ass'n, Inc., v. City of New York*, 487 U.S. 1 (1988).

WLALA filed a joint amicus brief with the City of Los Angeles and the City of Wilmington on behalf of defendant City of New York, in a case filed by a consortium of 125 private clubs challenging a New York City law that forbade discrimination by certain private clubs on the basis of race, creed, color, national origin, or sex. WLALA et al. argued in favor of the constitutionality of the ordinance, contending that the New York State Club Association member clubs did not have the constitutional right to discriminate against women and minorities, and that the law did not violate the constitutionally protected rights of association, speech, privacy, or equal protection. The United States Supreme Court rejected the private clubs' facial challenge and held that the law could constitutionally be applied to at least some of the clubs by virtue of their nonprivate nature, and that while a nonprivate club might encompass some private association, it did not as a whole have the "constitutional immunity to practice discrimination when the government has barred it from doing so". *Id.* at 12. Finally, the Court held that the law did not encroach "in any significant way" upon the ability of individuals to form associations that advocated public or private viewpoints, and that the exemption of certain benevolent and religious corporations from the law did not violate the Equal Protection Clause.

2. *Jonathan Club v. California Coastal Commission*, 243 Cal. Rptr. 168 (Cal. App. 2 Dist. 1988), *reh'g denied* (Jan. 29, 1988), *review denied and ordered not to be officially published* (May 5, 1988), *appeal dismissed*, 488 U.S. 881 (1988).

WLALA filed an amicus brief on behalf of defendant/respondent California Coastal Commission. The case arose out of the Coastal Commission's imposition on the Jonathan Club ("Club") of a membership condition precluding discrimination on the basis of race, sex, or religion as a requirement for the issuance of a development permit in connection with leased state lands. The Court held that the Club's exclusive use of the leased state property was sufficient entanglement with the state under the equal protection clause of both the federal and California Constitutions to justify a finding of state action, which allowed the imposition of the membership condition on the Club. The Court also held that the Coastal Commission had the statutory authority to impose the membership condition under a provision of the California Government Code

3. *California Federal Savings & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987).

WLALA filed an amicus brief on behalf of defendant Mark Guerra (an appointee of Gov. George Deukmejian), in his capacity as Director of the California Department of Fair Employment and Housing. The question before the Court was whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (the "PDA"), pre-empted a state statute that required employers to provide leave and reinstatement to employees disabled by pregnancy. WLALA filed on behalf of Defendant in support of upholding the California law as consistent with Title VII as amended by the PDA. The Court did so, holding that Title VII provided a floor beneath which pregnancy disability benefits could not drop, rather than a ceiling above which they could not rise, and that the California law was consistent with Title VII's goal of achieving equal employment opportunities by ensuring that women would not lose their jobs on account of pregnancy disability.

I would not have opposed the filing of any of these briefs because I supported, in principle, the position WLALA asserted in each case. I cannot say, however, that I agreed with every word or the expression of every argument in each brief, as I did not review each brief at the time, and each brief was the product of a collaborative effort.



**JUDGE KIM McLANE WARDLAW  
RESPONSE TO ADDITIONAL FOLLOW-UP QUESTIONS  
FROM SENATOR SESSIONS**

- 1 Did you have any role in the decision of the Women Lawyers' Association of Los Angeles to file amicus curiae briefs in *Planned Parenthood of California v Swoap*, 173 Cal. App. 3d 1187 (1985) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)?

No. I did not participate in any decision to approve or disapprove their filing, nor did I have any involvement in their drafting or filing. In fact, I saw each of these briefs for the first time on June 30, 1998.

- 2 Do you agree with the positions that the Women Lawyers' Association of Los Angeles took in these two cases?

No. Both briefs contained arguments which may have been appropriate at the time, given the facts presented and the then-controlling authority, but subsequent United States Supreme Court authority, most specifically *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Rust v. Sullivan*, 500 U.S. 173 (1991), has since settled the law with respect to federal constitutional challenges to state regulation and funding of abortion. The plurality opinion in *Casey* held that the medical emergency definition at issue did not impose an undue burden on a woman's abortion right; upheld the informed consent provision which included a twenty-four hour waiting period; struck down the spousal consent requirement, but reaffirmed the validity of parental notification or consent provisions; and upheld the recordkeeping and reporting requirements.

In *Rust*, the United States Supreme Court issued a ruling on the federal funding of abortion which supercedes the constitutional arguments made by WLALA in *Swoap* (which the California Court of Appeals, striking down a state law provision restricting abortion funding, did not reach.) In *Rust*, the Court held that a provision of Title X of the Public Health Service Act, which disallowed the use of federal funds appropriated for family-planning services in programs where abortion was a method of family planning, was a permissible and constitutional construction of Title X. 500 U.S. at 187-91, 200. The Court specifically held that the provision did not violate the Fifth Amendment rights of women seeking to terminate pregnancies reasoning that the Government has no constitutional duty to subsidize abortion merely because the activity is constitutionally protected. 500 U.S. at 201.

**JUDGE KIM McLANE WARDLAW**  
**RESPONSES TO FOLLOW-UP QUESTIONS FROM SENATOR JOHN ASHCROFT**  
**GENERAL QUESTIONS FOR ALL NOMINEES**

1. Which current Supreme Court Justice do you most admire and why?

The current Supreme Court Justice I particularly admire is Justice Sandra Day O'Connor. Because Justice O'Connor oversees the Ninth Circuit Court of Appeals and usually attends the circuit conferences, I have had the opportunity to hear her speak on a variety of issues confronting the Supreme Court and the Ninth Circuit and have been extremely impressed by her intelligence, wit, and common sense approach to both legal and administrative issues.

2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

Chief Justice John Marshall has most influenced my thinking regarding the constitutional separation of powers through several of his early opinions for the Court, which together laid the foundation for the role of the federal courts in our three-branch system of government. Most significantly, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall established the authority for judicial review of the constitutionality of executive and legislative acts and the authority for the federal courts to interpret the Constitution itself. The opinion further established the principle that Article III of the Constitution enumerates the scope of the federal courts' original jurisdiction, which Congress may not expand by legislative act. Other significant opinions Marshall authored on this subject include *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (striking a state law as a violation of the Contracts Clause of the Constitution); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (defining standards for constitutional interpretation and establishing implied powers of Congress); and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (defining Congress' commerce power).

3. What does the discretionary power of the judiciary mean to you?

The discretionary power of a federal judge is strictly confined by the Constitution, Congress, judicial precedent and the federal rules. Thus, courts may exercise discretionary power only within very limited parameters. Courts have discretionary power with respect to certain procedural matters, such as pretrial matters, discovery issues, and evidentiary rulings. In addition, courts may exercise discretion in controlling and managing proceedings in the courtroom. However, there is no real substantive discretionary power.

4. What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

None. I am aware of no rights unprotected by the Constitution. Further, it is not the province of the judiciary to create new constitutional rights.

5. Which law review article or book has most influenced your view of the law?

I regularly turn to *Melville B. Nimmer & David Nimmer, Nimmer on Copyright* (Matthew Bender & Co., Inc. ed., 1998). This treatise provides a comprehensive analysis of copyright principles, and outlines all sides of issues while focusing on the controlling authority. Intellectual property cases consume up to 25% of my time, given the jurisdiction of the Central District of California, which not only includes the entertainment industry, but is in an important area of high-technology growth. Because Professor Mel Nimmer taught me the law of contracts and copyright, I know his treatise to be trustworthy and reliable.

6. What role do you think legislative history - by which I mean the various committee reports, hearing transcripts and floor statements - should play in the interpretation of the text of a statute?

The legislative history of the statute should be the place of last resort in statutory construction. First, the plain meaning of the words of the statute must be examined in the context of the statute as a whole. If the text of the statute is clear, legislative history would play no role in its interpretation. Only after consideration of prior judicial interpretations and analogous precedent if the language of the statute remains ambiguous, *i.e.*, reasonably capable of sustaining more than one meaning, would a court look beyond the language of the statute to congressional intent. In attempting to examine Congressional intent through legislative history, however, one should use great caution. Hearing transcripts and floor statements are the least reliable basis for construction of congressional intent because the oral statements of individuals in those settings can vary substantially from the intended meaning of Congress as a whole. Probably the best kind of legislative history for consideration of Congressional intent are the various committee reports because they are the product of extended group activity and consensus, and have developed over time with an awareness that they might become a source for discerning Congressional intent. Even then one should be very cautious in considering and relying upon anything beyond the plain meaning of the statute and controlling precedent.

**JUDGE KIM McLANE WARDLAW**  
**RESPONSES TO FOLLOW-UP QUESTIONS FROM SENATOR ASHCROFT**  
**SPECIAL QUESTIONS FOR JUDGE WARDLAW**

1. Is it your view that the will of the people and the consent of the governed is only expressed when the legislature acts rather than when it does not act?

No. The legislature also makes decisions not to enact legislation, and in so doing fulfills its role in a representative democracy. It is up to the legislature and not the courts to enact laws and make policy.

2. What does a judge do about a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court?

A judge's duty is to apply the law to the facts of the case before the court. It is wrong for a judge to put any personal or moral conviction before the law or to allow any personal predilection to influence the outcome of a decision in any way. In the very extraordinary circumstance that a judge would be unable to set aside a deeply held view, that judge should recuse himself from deciding the matter.



**JUDGE KIM McLANE WARDLAW**  
**RESPONSES TO FOLLOW-UP QUESTIONS FROM SENATOR SESSIONS**

Please identify anyone who helped you answer the following questions:

While my law clerk, Amy Nemko, helped me to research some of these questions, and I discussed some of the questions with Department of Justice personnel, the answers are my own.

1. In your opinion, what is the greatest Supreme Court decision in American history?

As I testified at my June 18, 1998 hearing, *Brown v. Board of Education*, 347 U.S. 483 (1954) is the best Supreme Court decision in American history because it prohibited the racial segregation of schoolchildren.

2. What is the worst Supreme Court decision?

As I also testified at the hearing, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) and *Korematsu v. United States*, 323 U.S. 214 (1944) are the worst Supreme Court decisions because both cases deprived United States citizens of their full rights of citizenship.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

The late William P. Gray, District Court Judge for the Central District of California, for whom I had the privilege to serve as a law clerk from 1979 to 1980, is the federal judge who most influenced me. Although I clerked for him but a year, he remained a mentor and friend until his passing. He was widely respected, and always prepared, but did not make up his mind until each matter had a full and fair hearing. He maintained discipline and decorum in the courtroom while remaining patient and kind, and demonstrating courtesy and respect for each individual he met. He was a Republican appointed to the bench by a Democratic President - a tribute to his fairness, objectivity, impartiality, and strongly held view that it was wrong to let any personal beliefs or feelings interfere with a correct application of the law.

4. You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.

Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes. Article III of the Constitution creates and vests the judicial power of the United States in the Supreme Court, and delegates to Congress the authority to create additional inferior courts. Such delegation of authority to create lower federal courts by implication permits Congress to prescribe the scope of their jurisdiction, which includes the authority to limit that jurisdiction. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."). Congress has not vested the full scope of Article III jurisdiction in the lower federal courts, and has in fact limited their jurisdiction in certain instances. See *id.* at 444 (upholding Congress' authority to prohibit diversity jurisdiction from being created by assignment).

5. Last year, Congress using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

No. The overwhelming weight of authority holds that all of the provisions of the Prison Litigation Reform Act of 1995 ("PRLA" or "the Act") are constitutional. See, e.g., *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997); *Klein v. Coblenz*, 1997 WL 767538 (10th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1998), *cert. denied*, 117 S. Ct. 2460 (1997). It should be noted, however, that the Ninth Circuit has held that one of the provisions of the PRLA, 18 U.S.C.A. § 3628(b)(2), is unconstitutional because it encroaches on the judicial power in violation of the principle of separation of powers. *Taylor v. United States*, 1998 WL 214578 (9th Cir. May 4, 1998). As to that provision, this Court is bound to follow the law of the Ninth Circuit and await Supreme Court resolution of the conflict among the circuits. I see no basis for departing from the analysis of the majority of the Courts of Appeals as to any other provision.

6. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

Yes. The Supreme Court upheld the constitutionality of the habeas corpus reform provisions adopted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996, finding that those provisions violated neither the Exceptions Clause nor the Suspension Clause of the Constitution. See *Felker v. Turpin*, 518 U.S. 651 (1996).

7. If confirmed, you will preside over many employment discrimination cases as a federal judge.

In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Peña* decision and subject that racial preference to the strictest judicial scrutiny?

Yes. In *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), the Supreme Court held that government racial preferences are subject to the highest standard of judicial scrutiny, and are presumptively unconstitutional unless narrowly tailored to meet a compelling state interest. As with all Supreme Court precedent, I would faithfully follow the Court's mandate in *Adarand* in a suit challenging a racial preference, quota, or set-aside.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

It is extremely difficult for any government program or statute to survive the strict scrutiny standard, which is the highest level of constitutional scrutiny.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. Any law properly enacted by voter referenda or initiative is subject to the same level of judicial deference and constitutional scrutiny as are acts of a legislature. As enactments of law, both are entitled to the presumption of constitutionality.

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

No. The Ninth Circuit upheld the constitutionality of the California Civil Rights Initiative, also known as Proposition 209, stating that as a matter of "'conventional' equal protection analysis, there is simply no doubt that Proposition 209 is constitutional." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997). The Supreme Court denied certiorari of this case, 118 S. Ct. 397 (1997). As a result, I regard the decision of the Ninth Circuit upholding the constitutionality of this Initiative a matter of correctly settled law.

**RESPONSES TO FOLLOW-UP QUESTIONS FROM  
SENATOR CHARLES E. GRASSLEY TO JUDGE KIM WARDLAW**

1. What are your views on citizen initiatives, particularly in California? In addition, do you give them the presumption of constitutionality and are they given the same weight as laws passed by the legislature.

The California initiative process is a significant part of California's rich and unique political history. It was one of a sweeping series of reforms enacted through the leadership of Governor (later Senator) Hiram Johnson during a five-year period beginning in 1911. These reforms were a reaction against political machines or special interests and were designed to "arm the people to protect themselves," according to Governor Johnson. (Quoted in Gladwin Hill, *Dancing Bear: An Inside Look at California Politics* (1968)). His reforms included the initiative (authorizing citizen enactment of laws), the referendum (authorizing citizen rejection of legislation), and the recall (authorizing citizens to oust unsatisfactory elected officials.)

Citizen initiatives, like referenda, through direct political participation, allow the citizens to legislate as opposed to relying on their elected representation. They are properly enacted laws and are entitled to the same level of deference as are any laws passed by a legislature. See *City of Eastlake v. Four City Enterprises, Inc.*, 426 U.S. 668, 679 (1976) ("As a basic instrument of democratic government, the referendum process does not, in itself, violate the due process clause of the fourteenth amendment when applied to a rezoning ordinance.") Moreover, they are entitled to the same presumption of constitutionality as any other legislative act.

2. What is your opinion on allowing cameras in federal courts to record the proceedings for the public?

The issue of permitting cameras in the courtroom requires a balancing of the public's interest in access against a defendant's Sixth Amendment right to a fair trial. Cameras in and of themselves do not necessarily distort the judicial process nor interfere with fair trials, but may affect witnesses' willingness to testify, jurors' willingness to serve, and the judge's ability to control the courtroom, all of which may affect the nature of the proceedings. Cameras are not permitted in courtrooms of the United States District Court for the Central District of California.

3. Have you ever taken any public position opposing the confirmation of any other judicial nominee? If so, please provide the specific facts and circumstances involved.

I do not believe that I have taken any public position opposing the confirmation of any other judicial nominee. I do recall, however, that I responded to a reporter's question about the reaction of women to the then scheduled vote of the United States Senate on the confirmation of Supreme Court nominee Clarence Thomas. At the time, the sexual harassment charges by law school professor Anita Hill had just been made public, and it appeared that the vote would proceed without a hearing on them. I expressed the view of many women that a hearing should be held before the vote was taken. Later, the confirmation vote was postponed, the Senate Judiciary Committee reconvened, and additional hearings fully consistent with the Senate's important role of advice and consent were conducted.

4. In your opinion, does Congress have the authority to limit or eliminate prisoner lawsuits under 42 U.S.C. 1983?

Yes. In *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), the Supreme Court acknowledged that Congress has already limited Section 1983 civil rights actions by prison inmates through the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The PRLA contains provisions to discourage prisoners from filing frivolous, malicious, or meritless actions and to permit federal courts to dismiss such actions on their own motion. In addition, the PRLA creates procedural disincentives for such suits, such as requiring inmates to pay all filing fees. As with all statutes enacted by Congress, the PRLA is entitled to the presumption of constitutionality, and has been upheld as constitutional by all the Courts of Appeal to consider those provisions, except, as to one provision only, the Ninth Circuit.



**JUDGE KIM McLANE WARDLAW**  
**RESPONSES TO FOLLOW-UP QUESTIONS FROM SENATOR STROM THURMOND**

- 1 Judge Wardlaw and Mr. Kelly, there has been much controversy about judges overturning the will of the people as determined through voter initiatives in California, such as Proposition 209. What deference, if any, should judges show to the voters when reviewing the Constitutionality of voter initiatives? Please explain.

Voter initiatives such as Proposition 209 constitute properly enacted laws, just as laws enacted by a legislature. As such, they are entitled to the presumption of constitutionality and the same level of judicial deference and constitutional scrutiny as are acts of a legislature. In the case of Proposition 209 specifically, the Ninth Circuit has upheld the Act's constitutionality. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). The Supreme Court denied certiorari, 118 S.Ct. 397 (1997). As a result, I regard the decision of the Ninth Circuit upholding the constitutionality of this Initiative a matter of correctly settled law.

2. Judge Wardlaw and Mr. Kelly, what role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters.

None. The role of the judiciary is not to make public policy or to legislate, but rather to decide cases and controversies appropriately before it.

3. Judge Wardlaw and Mr. Kelly, what do you believe was the worst Supreme Court decision in the past thirty years and why?

As a sitting Federal District Court Judge, I feel that it would be inappropriate for me to rate cases that the Supreme Court has decided during the time period suggested. My job is to follow the law of the Supreme Court whether or not I disagree with it. That being said, I can think of no case decided by the Supreme Court within the last thirty years that I would consider among the worst cases ever decided, such as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Korematsu v. United States*, 323 U.S. 214 (1944).

4. Judge Wardlaw, I understand that you have held various leadership positions in the Women Lawyers Association of Los Angeles, including President from 1993-1994. Did the organization take any public positions or file any amicus briefs during your involvement as a leader that you did not support? Please explain.

Yes. While I cannot reliably recall every public position Women Lawyers' Association of Los Angeles ("WLALA") may have taken during my involvement, I do know that as a member of its Board of Governors and as an officer, I expressed disagreement with various positions it took.

I joined WLALA, and became an officer of the organization, because I supported its core mission of working to advance women within the legal profession and to "give back" by helping the disadvantaged in our community. The public positions and amicus briefs of the organization to which I recall lending my support were directed to these goals. When I became President of WLALA, I dedicated myself to focusing the organization on its core mission. In my year as President, WLALA adopted an inner-city elementary school, established a domestic violence program in conjunction with the Los Angeles District Attorney's office which assisted abused women in securing injunctive relief, held its first annual conference to educate and train women litigators, and published a survey on the status of women lawyers in Los Angeles.

During my tenure as a member of WLALA's Board of Governors, there were a variety of standing and ad hoc committees through which the Board's substantive work, including development of policy and amicus positions, was conducted. The Board itself ranged from 25 to 50 members at any given time. Theoretically, authorization to adopt any recommended policy position or to submit an amicus brief required a majority vote of those governors in attendance at the particular meeting where a committee's work was presented. However, because the organization consisted of many volunteers who were otherwise occupied by the pressures of law practices and family, it cannot be said that any position taken by the Board represented the considered view of even a majority of the Board. In my own case, due to the exigencies of my national law practice, there were several lengthy periods during which I was unable to attend meetings, and may not have known that the Board had decided to support a particular position.

My term as President of WLALA ended in August 1994, four years ago. None of the positions WLALA may have taken has affected in any way my ability and commitment to faithfully interpret and apply the law to the individual facts presented to me as a judge.

JOHN D. KELLY'S RESPONSE TO ADDITIONAL FOLLOW-UP QUESTION  
BY SENATOR STROM THURMOND

QUESTION:

1. Judge Wardlaw and Mr. Kelly, in response to one of my written questions, you stated that you did not believe any decision of the past thirty years was among the worst cases ever decided. I also recognize your commitment to following the law. However, please list at least one Supreme Court decision in the past thirty years that you believe was incorrectly decided and explain why.

RESPONSE: I believe that City of Boerne v. Flores, US 117 S Ct. 2157 was wrongly decided. I believe that the Religious Freedom Restoration Act of 1993 did not exceed the enforcement power possessed by Congress under § 5 of the Fourteenth Amendment. Rather, in my opinion, the Act was a proper exercise of the power of Congress to protect the free exercise of religion.

JOHN D. KELLY'S RESPONSES TO FOLLOW-UP QUESTIONS  
BY SENATOR JOHN ASHCROFT

QUESTION:

1. Which current Supreme Court Justice do you most admire and why?

RESPONSE: While I have not focused on the individual qualities of the members of the Supreme Court, Justice Souter has always impressed me as a thoughtful and gentle person, who is devoted to the Constitution.

QUESTION:

2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

RESPONSE: My understanding of the constitutional doctrine of separation of powers has not been significantly influenced by any one judge or justice. Rather, my educational background, my experiences and observations as a trial lawyer, together with my long-time interest in American history have all contributed to my understanding and commitment to the separation of powers doctrine.

QUESTION:

3. What does the discretionary power of the judiciary mean to you?

RESPONSE: As an appellate judge, I understand that my function would be to make sure that district court judges have not abused their discretionary authority. United States District Court judges are extended limited discretionary authority in various matters such as sentencing of prisoners within the range prescribed by the Federal Sentencing Guidelines, and admissibility of expert testimony. The exercise of discretionary power by the judiciary does not extend to changing or modifying existing law to accomplish some result or objective that a judge may believe to be desirable. As an appellate judge, I would be vigilant to prevent such undertakings.

QUESTION:

4. What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

RESPONSE: I believe that all important rights are already protected by the Constitution.

## QUESTION:

5. Which law review article or book has most influenced your view of the law?

RESPONSE: My view of the law has not been significantly influenced by any law review articles or shaped by any one book. My experience as an attorney representing clients in all kinds of cases and controversies is the dominant influence regarding my view of the law. I practice in a jurisdiction (North Dakota) where many legal issues have not been resolved by the state's supreme court. I, therefore, often refer to legal treatises such as Restatement of the Law, Contracts in the various areas in which I practice.

## QUESTION:

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

RESPONSE: I believe that legislative history should not ordinarily play a significant role in interpreting legislative enactments. Rather, the plain meaning of the language of the law and controlling judicial precedent are of primary importance in statutory interpretation. Legislative history ought to be the last resort, and if necessary to use, committee reports ought to be given greater consideration than individual comments of legislators.

JOHN D. KELLY'S RESPONSES TO FOLLOW-UP QUESTIONS  
BY SENATOR JEFF SESSIONS

Please identify anyone who helped you answer the following questions: While I have spoken to representatives of the Department of Justice concerning my answers, the answers provided reflect my own views with regard to the questions presented.

## QUESTION:

1. In your opinion, what is the greatest Supreme Court decision in American history?

RESPONSE: During my lifetime, the court's decision in Brown v. Topeka probably has had the most profound effect on the people and public institutions of this country.

## QUESTION:

2. What is the worst Supreme Court decision?

RESPONSE: Looking back in history, Dred Scott stands out as a decision that conflicts with the direct language used in the Constitution.

## QUESTION:

3. Which Supreme Court justice or federal judge has most influenced your judicial philosophy?

RESPONSE: My understanding of the rule of law and its role in our society has not been significantly shaped by any individual supreme court justice or federal judge.

## QUESTION:

You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.

Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as Congress may from time to time ordain and establish."



4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

RESPONSE: Yes, under the qualification noted in the question, I believe that Congress has such power.

QUESTION:

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

5. Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

RESPONSE: The Prison Litigation Reform Act is, of course, entitled to a presumption of constitutionality. Moreover, in Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), the Eighth Circuit upheld the constitutionality of provisions the Act under attack in the case. If I were to be confirmed as a member of the Court of Appeals for the Eight Circuit, I would follow the precedent.

QUESTION:

6. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

RESPONSE: The law is entitled to a presumption of constitutionality. Moreover, the United States Supreme Court decision in Felker v. Turpin, 116 S.Ct. 2333 (1996), upheld the constitutionality of the provisions of Anti-Terrorism and Effective Death Penalty Act under attack in the case. I would treat the decision as binding precedent.

QUESTION:

If confirmed, you will preside over many employment discrimination cases as a federal judge.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny.

RESPONSE: Yes, I will follow the United States Supreme Court decision in Adarand v. Peña.

QUESTION:

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

RESPONSE: In my opinion, it is very difficult for any government program or statute to survive strict scrutiny.

QUESTION:

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

RESPONSE: No. I believe that a law established either through initiative or referendum is subject to the same degree of scrutiny as a law passed by a state legislature. This means application of the same presumption of constitutionality.

QUESTION:

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?



RESPONSE: My reading of the Ninth Circuit opinion in Coalition for Economic Equity v. Wilson, 122 F.3d 692, cert. denied, 118 S.Ct. 397 (1997) indicates that Proposition 209 clearly passes constitutional muster.

**JOHN D. KELLY'S RESPONSES TO FOLLOW-UP QUESTIONS  
BY SENATOR CHARLES E. GRASSLEY**

**QUESTION:**

1. As a nominee to the Eighth Circuit, what qualities or attributes will you bring to the circuit that will enhance the court?

RESPONSE: I consider myself to be a practical-minded person who possesses common sense and good judgment. For over 35 years, I have represented clients involved in real cases and controversies. I have always tried to present my client's cause in a fair and effective manner. As an appellate judge, I would do my best to see that the law was appropriately applied and that the parties were given a fair opportunity to present the facts.

**QUESTION:**

2. In your opinion, does Congress have the authority to limit or eliminate prisoner lawsuits under 42 USC 1983?

RESPONSE: I believe that Congress has the authority to limit prisoner lawsuits and has done so to some extent under the provisions of the Anti-Terrorism and Effective Death Penalty Act.

**QUESTION:**

3. In the past, I have been advised by at least one circuit court chief judge to take into consideration a nominee's potential prospective time of service on the bench when considering a nominee. In other words, there is the argument that, in order for taxpayers to receive a reasonable return on their investment in a judgeship, which can include considerable funds in salary, training and retirement benefits, a nominee should be ready and willing to spend a number of years on the bench. We've had a recent episode where a circuit court judge spent less than three years on the bench and then took retirement.

Since it will be possible for you to retire from the bench within a very short time, can you assure the committee that this will not be the case?

RESPONSE: I am physically and mentally able to serve as a circuit court judge and, if confirmed, my intention is to serve as a judge for many years. I am not now and never have been interested in retirement as an alternative to actively continuing to participate in the legal profession.

**QUESTION:**

4. What is your view of allowing cameras in federal courts to record proceedings for the public?

RESPONSE: I believe that the public is entitled to know what goes on in a courtroom and to follow court proceedings in an appropriate fashion. Based on my own experience, I would have no problem with broadcasting appellate court arguments. I do have strong reservations with regard to televising or broadcasting proceedings in a trial court.

**QUESTION:**

5. I understand you are, or were, involved with Common Cause. Have you publicly advocated any positions championed by Common Cause? If so, I would appreciate the specific facts and circumstances involved.

RESPONSE: My involvement with Common Cause has been limited to sending in yearly membership checks. I have never publicly advocated any position championed by Common Cause.

**JOHN D. KELLY'S RESPONSES TO FOLLOW-UP QUESTIONS  
BY SENATOR STROM THURMOND**

**QUESTION:**

1. Judge Wardlaw and Mr. Kelly, there has been much controversy about judges overturning the will of the people as determined through voter initiatives in California, such as Proposition 209. What deference, if any, should judges show to the voters when reviewing the Constitutionality of voter initiatives? Please explain.

RESPONSE: State law, as enacted or approved by a vote of the people, is entitled to the same deference afforded enactments by a state legislature. I would extend the same presumption of constitutionality to a state law, without regard to the process used to enact the law.

**QUESTION:**

2. Judge Wardlaw and Mr. Kelly, what role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

RESPONSE: I do not believe that judges have any role in developing public policy because a legislature has refrained from acting. Inaction by a state legislature may well reflect its considered judgment that additional legislation is not appropriate or helpful. Legislative inaction does not vest a judge with any authority to act where it otherwise would be inappropriate.

**QUESTION:**

3. Judge Wardlaw and Mr. Kelly, what do you believe was the worst Supreme Court decision in the past thirty years and why?

RESPONSE: None of the United States Supreme Court decisions issued during the past thirty years that I have read rival Dred Scott in terms of being a bad decision.

**Responses of Ralph E. Tyson to Follow-Up Questions from Senator  
John Ashcroft**

Which current Supreme Court Justice do you most admire and why?

I respect and admire all of the current Justices of the Supreme Court for their accomplishments and the fact that each has reached the pinnacle of a legal career.

Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

I cannot honestly say that any judge or justice has had an influence on my thinking regarding the constitutional separation of powers.

The separation of powers between the Executive, Legislative and Judicial branches of our government is one of the core principles of our system of government and one of the reasons why our system has endured for over 200 years. Continued respect by each branch of government for the constitutional powers and prerogatives reserved to the other two branches of government is essential if our system of government is to endure.

What does the discretionary power of the judiciary mean to you?

United States District Court Judges have a duty to follow the law as set forth in the Constitution and Acts of Congress as construed by the United States Supreme Court and the Circuit Court of appeal. District Judges do not have the discretion to accept or reject established law or precedent or to create law. On the other hand, however, judges do have discretion in areas such as case management, the application of rules of procedure and evidence and, to the extent allowed by the Sentencing Guidelines, limited discretion in criminal sentencing.

What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

I cannot think of any rights that I feel should be, but are not, protected by the Constitution.

Which law review article or book has most influenced your view of the law?

My view of the law has not been shaped by any single law review article or book, but by 25 years of experience--15 years as a prosecutor and practitioner and 10 years as a judge in City Court, District Court and the Circuit Court of Appeal.

What role do you think legislative history--by which I mean the various committee reports, hearing transcripts and floor statements--should play in the interpretation of the text of a statute?

In interpreting the text of a statute a Court should first look to the plain language of the statute and any applicable Circuit Court of Appeal or Supreme Court precedent. When the plain language of a statute is ambiguous and there is no controlling precedent, legislative history may assist the Court in interpretation, but the judge must be careful to consider the entirety of the legislative history and not just isolated statements, reports or transcripts of legislative proceedings.

#### Responses of Ralph E. Tyson to Follow-Up Questions from Senator Jeff Sessions

Please identify anyone who helped you answer the following questions.

The substance of the following answers reflects my beliefs. I was assisted by personnel in the Department of Justice in matters of the style and form in which my answers should be presented.

1. In your opinion, what is the greatest Supreme Court decision in American history?

In my opinion, Brown V. Board of Education is the greatest Supreme Court decision in American history.

2. What is the worst supreme Court decision?

In my opinion, the worst Supreme Court decision in American history is Dred Scott v. Sandford.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?



My judicial philosophy has not been influenced by any particular Supreme Court Justice or federal judge but, rather, by my 25 years of experience consisting of 15 years as a prosecutor and practitioner, and 10 years as a judge in City Court, District Court and the Louisiana Circuit Court of Appeal.

You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts.

Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes. The power to "ordain and establish" a court necessarily includes the power to delineate the jurisdiction of that court.

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

5. Do you have any concerns about the constitutionality of the Prison Litigation Reform Act?

No, I do not have any concerns about the constitutionality of the Prison Litigation Reform Act.

6. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

It is my opinion that the 1995 Habeas Corpus Reform is constitutional. Further, all of the Circuit Courts that have considered the act have also found it to be constitutional, as has the United States Supreme Court in Felker v. Turpin, 518 U.S. 651 (1996).

If confirmed, you will preside over many employment discrimination cases as a federal judge.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

I will follow the dictates of Adarand v. Peña.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

In my opinion, strict scrutiny is the highest level of analysis that can be exacted by a Court. It will be very difficult for programs and/or statutes imposing race-based classifications to satisfy this high standard.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

I do not believe that voter referenda should be scrutinized more closely than laws enacted by legislatures. Referenda are entitled to the same presumption of constitutionality that is accorded to legislative enactments.

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

As a Louisiana trial judge, my knowledge of the provisions of the California Civil Rights Initiative is derived primarily from news reports on that issue. However, as I understand that the initiative was validly enacted by vote of the people, I believe that it should be accorded the same presumption of constitutionality that is accorded to legislative enactments. It is also my understanding that the 9th Circuit has upheld the provisions of the California initiative in Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir., 1997).

**Responses of Ralph E. Tyson to Follow-Up Questions from Senator Strom Thurmond**

**PANEL II**

The following questions are for each of the four district court nominees:

1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act. What is your view of courts acting in this manner?

It is my opinion that such conduct by a court does not represent a proper exercise of the judicial function.

2. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

Louisiana has several criminal statutes which contain mandatory minimum sentences and I have never had any qualms about imposing a sentence pursuant to those provisions. I would not have any reluctance to impose a mandatory minimum criminal sentence as a Federal judge.

3. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

Until 1995, Louisiana District Courts were required to impose felony sentences pursuant to guidelines enacted by the Louisiana Legislature and, as a criminal district judge, I followed that law. I did not then, nor do I now, have any concerns regarding the propriety of sentencing guidelines on the state or federal level as I feel that they are a valid exercise of the legislative power to define and punish crime.

4. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific efforts do you intend to implement to encourage the speedy resolution of your cases?

I believe that a judge can facilitate the movement of cases in his or her court by setting realistic deadlines for discovery and amendment of pleadings and enforcing those deadlines. The use of scheduling orders and settlement conferences will also encourage the parties to talk to each other and thereby possibly foster an atmosphere which is conducive to settlement or, at the least, to limit the issues which must be resolved at trial.

5. What do you believe was the worst Supreme Court decision in the past thirty years and why?

In my opinion, no decision of the Supreme Court in the last thirty years is comparable to the decision rendered in Dred Scott v. Sandford, which held that slaves were the constitutionally protected property of their masters.



**Dan A. Polster's Responses to Follow-up Questions from Senator Ashcroft: June 22, 1998**

**1. Which current Supreme Court Justice do you most admire and why?**

I admire Justice Ginsburg. Since becoming a Justice, she has established a reputation for thoughtful and balanced opinions.

**2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?**

John Marshall. In the early stages of our democracy, Chief Justice Marshall was called upon to create the jurisprudence that defined the central role of the federal judiciary: independent, yet fully respectful of the powers of the other two co-equal branches of government. His decisions have survived to this day, guiding our country's leaders for two centuries.

**3. What does the discretionary power of the judiciary mean to you?**

While the authority of a federal trial judge is generally limited by statute and appellate court and Supreme Court precedent, there are a few areas where the trial judge has discretion to act. Examples include management of cases, evidentiary rulings during trial, decisions involving the credibility of witnesses, and the discretion afforded by the Sentencing Guidelines (sentencing within the applicable Guideline range).

**4. What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?**

I believe that the Constitution protects those rights which distinguish our country from all others, and I am comfortable with the Constitution as it stands.

**5. Which law review article or book has most influenced your view of the law?**

Federal Courts, by Hart and Wechsler, significantly influenced my view of the law. This was the leading casebook on the federal judiciary when I attended law school. The cases and principles set forth by the authors both stimulated my interest in federal practice and shaped my views as to the limited role of the federal judiciary in our constitutional framework.

Dan Polster/Sen. Ashcroft (cont.)

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6. What role do you think legislative history--by which I mean the various committee reports, hearing transcripts and floor statements--should play in the interpretation of the text of a statute?

If the question presented can be decided by analyzing the plain meaning of the statute, I would decide the issue without reference to the legislative history.

If the wording of the statute is ambiguous, the legislative history, depending upon how extensive it is, might be one place to look. There is always a danger, however, of assuming the recorded views of one or a small number of legislators necessarily represents the interpretation of the majority.

Dan A. Polster's Responses to Follow-up Questions from Senator Sessions: June 22, 1998

The answers to these questions are mine alone. I showed drafts of my responses to my wife and to attorneys at the Department of Justice.

1. In your opinion, what is the greatest Supreme Court decision in American history?

I believe Brown v. Board of Education was the best Supreme Court decision in history.

2. What is the worst Supreme Court decision?

I believe Plessy v. Ferguson was the worst Supreme Court decision in history.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

William Thomas, who retired earlier this year at age 86 after nearly 50 years on the bench, the past 30 on the federal district court for the Northern District of Ohio. Over 500 people came to a lunch earlier this month to pay tribute to Judge Thomas. He was lauded for the quality of his decision making, his integrity, and his judicial temperament. He treated every lawyer and litigant in his courtroom with courtesy and respect. When you walked out of his courtroom, regardless of the outcome, you knew that justice had been served.

4. You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between Congress and the federal courts. Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

5. Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act. Do you have concerns about the constitutionality of the Prison Legal Reform Act?

This statute, like all other acts of Congress, is presumed to be constitutional. In Hadix v. Johnson, the Sixth Circuit Court of Appeals has recently ruled on one aspect of this statute, and has determined that it was constitutional. I would be bound to follow any Supreme Court and

Sixth Circuit precedent. As a general matter, I believe that the federal courts should have a very limited role in managing state prisons.

6. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

This statute, like all other acts of Congress, is presumed to be constitutional. In Felker v. Turpin, the Supreme Court upheld the constitutionality of one aspect of this statute. While I would of course be required to analyze the specific facts of any case that came before me, I have no basis at this time to believe that this statute is unconstitutional.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

Yes.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

It would be extraordinarily difficult. There are few examples in recent jurisprudence of a government program or statute surviving strict scrutiny.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. I believe that all laws, regardless of the mode of passage, should be analyzed under the same standard.

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

This statute enjoys a presumption of constitutionality. It was recently upheld by the Ninth Circuit Court of Appeals in Coalition for Economic Equity v. Wilson, and the Supreme Court denied certiorari. In the absence of any Supreme Court or Sixth Circuit precedents, I would weigh very heavily the opinion of the Ninth Circuit as to this statute's constitutionality.

Dan A. Polster's Responses to Follow-up Questions of Senator Thurmond: June 22, 1998

1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act. What is your view of courts acting in this manner?

As a general proposition, I do not believe it is a judge's role to second-guess a decision by Congress or a state legislature to act, or not to act, in response to a particular social problem. The judge's role is to decide an actual case or controversy, not to initiate policy.

2. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

I believe that mandatory minimum criminal sentences are one component of an effective criminal justice system, and I will impose whatever sentence the law requires.

3. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

I am very familiar with the Federal Sentencing Guidelines, since I have worked with them as a prosecutor on a daily basis since 1987. I believe that the Guidelines have injected an important element of predictability and uniformity in federal criminal sentences which has increased their deterrent aspect and has enhanced the public's perception that the federal criminal justice system is fair and effective.

4. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific efforts do you intend to implement to encourage the speedy resolution of your cases?

I believe it is the judge's responsibility to promote the prompt and fair resolution of all civil cases by settlement, if at all possible, and if not, by trial. I will impose fair but firm deadlines, and will try to decide dispositive motions promptly. Most civil cases won't settle by themselves;



Dan Polster/Sen. Thurmond (cont.)

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I will be active in attempting to bring the parties together.

5 What do you believe was the worst Supreme Court decision in the past thirty years and why?

McNally v. United States, decided in 1987. The Supreme Court rejected 50 years of federal jurisprudence by virtually every trial and appellate court that had considered the issue in holding that the federal mail and wire fraud statutes, 18 U.S.C. Sections 1341 and 1343, did not encompass a scheme to defraud the public of the intangible right to the honest services of its employees.

Less than two years later, Congress passed 18 U.S.C. Section 1345, a "legislative fix" which expressly provides that the "intangible rights" theory can be used in mail and wire fraud prosecutions.

Robert G. James' responses to Follow-up Questions from Senator Ashcroft

1. Which current Supreme Court Justice do you most admire and why?

I admire Justice Sandra Day O'Connor. I appreciate her common sense, fact-based approach to case resolution.

2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

I appreciate Justice Scalia's position concerning separation of powers. His opinions reflect that the separation of power concept is central to our scheme of government and that the authority of the judiciary is clearly limited.

3. What does the discretionary power of the judiciary mean to you?

The reality is that trial court judges have very little discretion. Trial judges do have limited discretion in matters such as evidentiary rulings and case management. Also the federal sentencing guidelines allow judges limited discretion in the sentencing process.

4. What, in your view, is the single most important right not protected by the Constitution. In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

There are no rights except those articulated in our Constitution. I cannot think of any additional rights that should be protected.

5. Which law review article or book has most influenced your view of the law?

As a child, I read To Kill A Mockingbird. It brought to my awareness the importance of law in our society. The story demonstrated the ability of a court to resolve a dispute through a determination of the facts and an application of the law without regard for prejudices and passions.

6. What role do you think legislative history - by which I mean the various committee reports, hearing transcripts and floor statements - should play in the interpretation of the text of a statute?

I believe that all statutes should be presumed to be constitutional. In interpreting a statute, I believe that a court should look first at the plain words of the statute. In the rare case where the plain words of the statute are not clear, I would then look to precedent. If there was no case law directly on point, I would attempt to find analogous precedents. If the meaning of the statute was still unclear, I would lastly look to legislative history.

Robert G. James' responses to Follow-up Questions from Senator Sessions

Prior to my hearing before the Senate Judiciary Committee, I had generalized discussions with staff of the Justice Department, friends and colleagues. No one has suggested any answers to me. All answers contained herein are my personal opinions.

1. In your opinion, what is the greatest Supreme Court decision in American history?

I believe the case of *Brown v. Board of Education* is the greatest decision rendered by the Supreme Court.

2. What is the worst Supreme Court decision?

The specific case I find the most disturbing is the *Korematsu* case.

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

My first appearance in federal court was before Judge Hunter, who is now a senior judge for the Western District of Louisiana. This experience helped me realize the important role temperament plays in the judicial process. Judge Hunter was courteous, fair, patient and used common sense. I vowed that if I ever became a judge, I would have these principles as part of my judicial philosophy and try to live by them.

4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

I believe that Congress has the power to limit the jurisdiction of the lower federal courts. The lower federal courts are courts of limited jurisdiction. They have only the power to hear the types of cases they are authorized by Congress to hear.

5. Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

As a judge, I would presume all acts of Congress to be constitutional. I know of no grounds for concern about the constitutionality of the Prison Legal Reform Act. There have been numerous cases implementing the Prison Legal Reform Act and to my knowledge there has been no successful challenge to the constitutionality of the act. The Fifth Circuit denied a challenge to the constitutionality of the act in *Arthur X. Carson v. Gary L. Johnson*, 112 F.3d 818 (5th Cir. 1997), which precedent would be binding on me.

Robert G. James' responses to Follow-up Questions from Senator Sessions, cont.

6. In your legal opinion, is the 1995 Habeas Corpus Reform Act constitutional?

As a judge, I would presume all acts of Congress to be constitutional. The case of *Felker v. Turpin*, 116 S. Ct. 2333 (1996) has upheld the constitutionality of the 1995 Habeas Corpus Reform Act. In addition to being bound by this precedent, I am not aware of any grounds for concern about the constitutionality of the act.

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Peña* decision and subject that racial preference to the strictest judicial scrutiny?

As a trial court judge, I would always follow relevant precedent of the Supreme Court and my Court of Appeals. Accordingly, I would follow the precedent established by the Supreme Court in *Adarand v. Peña* and subject racial preferences to the strictest judicial scrutiny.

8. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

In my opinion, it would be extremely difficult for any government program or statute to survive the strict scrutiny test.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

I do not believe that voter referenda should be scrutinized more closely than statutes

10. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

Initiatives, like statutes, are entitled to a presumption of constitutionality. I am not aware of any federal or state constitutional provision which is violated by the California Civil Rights Initiative. Also, the Ninth Circuit has upheld the constitutionality of the initiative in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), cert. denied 118 S.Ct. 397 (1997).

Robert G. James' responses to Follow-up Questions from Senator Thurmond

1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act. What is your view of courts acting in this manner?

It is not the job of the courts to solve social problems. Courts exist to resolve specific disputes. The failure of the legislature to act on any issue in no way authorizes a court to address that issue.

2. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

Mandatory minimum criminal sentences are mandated by various statutes. As a trial court judge, I would be bound to obey those statutes. I would have no reluctance in imposing a minimum sentence established by statute.

3. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

The Federal Sentencing Guidelines were established by Congress. As a trial court judge, I would be bound to follow these guidelines. I have no objection to the guidelines and their application. They set forth the will of the people as expressed by their elected representatives. In addition, they bring consistency to the sentencing process. Both the government and a defendant know in advance what the sentence will be if a plea is entered or a conviction is obtained.

4. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific efforts do you intend to implement to encourage the speedy resolution of your cases?

As a trial court judge for thirteen years, I have always worked to see that cases were quickly resolved. I realize that justice delayed is often justice denied. To expedite cases, I require discovery to be completed within a short period of time. I also require status conferences to resolve issues that might delay trial and to assist the parties in possible settlements. In addition, it is my policy to render opinions within thirty days of submission. If I become a Federal judge, I will implement these efforts and others to encourage the speedy resolution of cases.



Robert G. James' responses to Follow-up Questions from Senator Thurmond, cont.

5. What do you believe was the worst Supreme Court decision in the past thirty years and why?

I believe the worst Supreme Court decision in the past thirty years was in the case of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). This case restricted the protections enjoyed under the free exercise clause of the first amendment.

6. Judge James, in a ruling regarding a criminal case involving Steve Allen in May 1990, you stated, "We handle a lot of juvenile cases in the Court I'm in...where children have been abused and neglected, and sometimes I have second thoughts as to whether or not the judicial system is really the appropriate system to deal with these type of problems." Do you believe that cases involving child abuse and neglect are not appropriate for criminal court? Please explain.

I believe that people who have abused or neglected children should be subject to criminal prosecution. If they are proven guilty of these offenses, I believe stern punishment is appropriate. Unfortunately, cases of abuse or neglect only come to criminal court after the abuse or neglect has occurred. At that point, the court can only punish the offender and provide future protection for the child. The child, however, has still suffered the abuse or neglect. To prevent abuse or neglect before it occurs, I believe that other institutions, such as family, church, schools and community, have to act to ensure the safety of children.

Responses for Raner C. Collins to  
Written Questions Submitted by Senator Ashcroft

- 1 Which current Supreme Court Justice do you most admire and why?

The current Supreme Court Justice that I most admire is Justice Sandra Day O'Connor. She is, of course, from my state, Arizona. She was the first female justice of the United States Supreme Court. I cannot help but wonder how difficult a situation that must have been. She entered the practice of law at a time when few women were doing so, and now being the first woman on the Supreme Court I would suspect that some have tried to put the future and hopes of all womankind on her shoulders. She seems to me to have been a good judge, focusing on the facts of the case and the precedents that have been set before her.

- 2 Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

The Federal Judge that has influenced my thinking the most regarding the separation of powers is the Honorable John M. Roll who is currently serving in the District Court of Arizona in Tucson. I have known Judge Roll for over twenty years, and I know how hard he works and his dedication to his job. I know when he is faced with ruling on a case, he keeps foremost in mind his limitations and obligations.

- 3 What does the discretionary power of the judiciary mean to you?

The discretionary power of the judiciary means to me when a judge has to rule on various evidentiary matters such as use of prior convictions, other admissible evidence, limiting cross examination, or direct examination, and the overall conduct of matters in the courtroom. It also comes into play in deciding when using the federal guidelines where within a specified range a sentence should be imposed.

- 4 What, in your view, is the single most important right not protected by the constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

I cannot think of some right at this time that is not protected by the Constitution. I cannot think of a policy matter that I wish to see protected by the Constitution.

- 5 Which law review article or book has most influenced your view of the law?

The book that has influenced my view of the law the most is a book entitled "Trial Techniques, a compendium of course materials." I used this book to learn how to try a case from a prosecutor's perspective. This was the first building block after law school that I used, and, therefore, it was the foundation for future endeavors in the law.

- 6 What role do you think legislative history—by which I mean the various committee reports, hearing transcripts and floor statements—should play in the interpretation of the text of a statute?

I would first look at the plain meaning of the statute and see what can be derived from that. I would then look for other possible analogous authority from other cases in my circuit as well as others. If there were any Supreme Court cases that were analogous, I would also consider them. I would consider legislative history if I could not find the above precedents, but I would also bear in mind that the legislative history does not necessarily tell the whole story.

**Responses for Raner C. Collins to  
Written Questions Submitted by Senator Sessions**

Please identify anyone who helped you answer the following questions.

The following answers are entirely my answers. I have conferred with the Department of Justice. My wife, Theresa, has typed the answers to the questions.

1. In your opinion, what is the greatest Supreme Court decision in American history?

In my opinion, the greatest Supreme Court decision in American history is Brown v. Board of Education 347 U.S. 483 (1954)

2. What is the worst Supreme Court Decision?

I believe the worst Supreme Court Decision was Dred Scott v. Sanford 60 U.S. 393 (1856)

3. Which Supreme Court Justice or federal judge has most influenced your judicial philosophy?

The federal judge who has influenced my judicial philosophy the most is District Judge John Roll of the District Court of Arizona

You have been nominated to an Article III judgeship. As you know, Article III describes the relationship between congress and the federal courts.

Article III, Section 1 of the Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

4. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

I believe that Congress has the power to limit the jurisdiction of the federal courts as long as it does so in a constitutional fashion.

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act

5. Do you have any concerns about the constitutionality of the Prison Legal Reform Act?

All legislation must start with the presumption of it being constitutional. I would have no concerns at this time about the constitutionality of the Prison Litigation Reform Act. The majority of circuit courts have held this constitutional. However, recently the Ninth Circuit in Taylor v. U.S.A. Westlaw 214578 (May 4, 1998) held a portion unconstitutional. I would be bound to follow the Ninth Circuit until it reverses itself or until the Supreme Court resolves the conflict.



- 6 In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

All legislation must start with the presumption of it being constitutional. I would have no concerns at this time about the constitutionality of the 1995 Habeas Corpus Reform. See Felker v. Turpin 116 S.Ct. 2333 (1996).

If confirmed, you will preside over many employment discrimination cases as a federal judge

7. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

I would follow the case of Adarand v. Peña in ruling on a case of this type and subject that racial preference to the strictest judicial scrutiny.

- 8 In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

In my legal opinion, under Adarand it would be difficult for a case to survive this scrutiny. The case that survived would have to have a compelling governmental interest and be narrowly tailored to deal with this governmental interest.

9. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. I believe as a matter of constitutional law that a voter referendum must start with the same presumption of constitutionality as a statute passed by a legislature

- 10 Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The California Civil Rights Initiative has the presumption of constitutionality. I am not aware of any federal or state constitutional provisions that the California Civil Rights Initiative violates. See Coalition for Economic Equity v. Wilson 122 F.3d 692 (9<sup>th</sup> Circuit 1997). Cert. Denied 118 S. Ct. 197 (1997).

**Responses for Raner C. Collins to  
Written Questions Submitted by Senator Strom Thurmond**

Panel II

The following questions are for each of the four district court nominees:

1. We frequently hear the argument that the courts act in response to various social problems because the legislature has failed to act. What is your view of courts acting in this manner?

I believe the courts must be very hesitant to act in this manner. Courts must take into account that sometimes the failure to act by the legislature is an exercise of their discretion not to act. Courts must realize that the failure to act by the legislature does not transfer the power to act to the court.

2. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal Judge?

I believe that mandatory minimum sentences can be used to promote equal treatment and prevent a wide disparity in sentencing by judges. I would not be reluctant to impose them as a Federal Judge. I have had to apply mandatory minimum sentences as a state court judge.

3. As you probably know, the sentencing of criminal defendants in Federal Court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

I am not familiar with all of the federal sentencing guidelines but I know that the intent was to prevent wide disparity in sentencing of defendants and were intended to promote more equal treatment of defendants so that a person being sentenced in New York, for instance, would face roughly the same sentence as one being sentenced in Texas or Arizona for the same crime. I cannot give you any comment as to their flexibility or lack thereof. I would follow the federal sentencing guidelines if confirmed as a District Court Judge.

4. Many complain that a case takes too long to wind its way through the courts. As a Federal judge, what specific efforts do you intend to implement to encourage the speedy resolution of your cases?

I would set specific times to monitor the case's progress, such as discovery deadlines, motion deadlines, and the use of pretrial and settlement conferences. I would also rule promptly on motions that might have a bearing on the ultimate outcome of a case so that lawyers need not wait on my rulings to go to the next step.

5. What do you believe was the worst Supreme Court decision in the past thirty years and why?

I cannot think of what would be the worst Supreme Court decision in the past thirty years. In my role first as a lawyer and now as a state court judge, I read the Supreme Court cases to learn how to apply the law, and I do not make judgments as to whether the opinion was good or bad. The cases I listed in response to other questions without the time period are cases of historical significance that I learned of well before my entry into law school.



**NOMINATIONS OF TIMOTHY B. DYK (U.S. CIRCUIT JUDGE); DAVID R. HERNDON, REBECCA R. PALLMEYER, JEANNE E. SCOTT, CARL J. BARBIER, GERALD BRUCE LEE, NORA M. MANELLA, PATRICIA A. SEITZ (U.S. DISTRICT JUDGES)**

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**THURSDAY, JULY 16, 1998**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The committee met, pursuant to notice, at 2:04 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine presiding.

Also present: Senators Feinstein and Durbin.

**OPENING STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR  
FROM THE STATE OF OHIO**

Senator DeWINE. The hearing will come to order.

Let me first apologize to those of you who are standing and those who are out in the hallway. These hearings don't usually attract quite this much attention.

We do have a full agenda today. We have eight different nominations. What we are going to do is to break this down into three panels. We will start with the Members of Congress who are here, and we will just start right away.

It is my understanding, Senator Feinstein, you and, I guess, Congressman Mack both have to leave.

Senator FEINSTEIN. I don't know Congressman Mack, but I know Senator Mack.

Senator DeWINE. I am sorry. Senator Mack. [Laughter.]

Well, you know, he and I were Congressmen together.

Senator FEINSTEIN. Congressman Mack was named after a stadium.

Senator DeWINE. We were Congressmen together for a few years.

Senator Feinstein, would you like to start?

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR  
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I very much appreciate this opportunity. And to both you and Senator Durbin, in 1994 I had the pleasure of recommending to the Attor-

ney General the appointment of Nora Manella—actually, as U.S. attorney in the largest U.S. Attorney's Office in the Nation, that of Los Angeles. And subsequent to that, I have had the pleasure of recommending her appointment as a district court judge to the President.

Nora Manella, I think you will find, has bipartisan and law enforcement support and the hands-on experience to serve ably on the Federal court. She has been a civil litigator, a Federal prosecutor, a State court judge, both municipal and superior, and is now the chief Federal law enforcement officer for the Nation's largest district. She manages a staff of over 450 employees, including 240 attorneys, serving 16 million people.

I want to provide some details about Ms. Manella's background. She graduated Phi Beta Kappa from Wellesley. She received her law degree from the University of Southern California. She received the Order of the Coif and was editor for the Law Review.

Upon graduation from law school, she clerked for John Minor Wisdom on the Fifth Circuit Court of Appeals and worked in Washington as legal counsel to the Senate Judiciary Subcommittee on the Constitution.

For 4 years, Nora practiced complex corporate litigation with the international law firm of O'Melveny and Meyers in Washington and Los Angeles before becoming an assistant U.S. attorney in the office she now heads. For 8 years, as assistant U.S. attorney, Nora prosecuted Federal felonies ranging from bank robbery, murder, and narcotics conspiracies, to tax and commodities fraud.

In 1990, Governor Deukmejian appointed Nora to the Los Angeles Municipal Court. Two years later, Governor Pete Wilson elevated her to the superior court. She also sat by designation of the chief justice on the State court of appeal.

Since 1994, Nora has managed the largest U.S. Attorney's Office. Significant prosecutions include the convictions of nearly two dozen members of the Mexican Mafia in the first RICO case ever brought in the district against a violent criminal organization, and Zorro II, a nationwide narcotics initiative that led to the arrests of over 150 defendants and the seizure of over 6 tons of cocaine.

Nora's nomination to the district court enjoys broad, bipartisan support, including the endorsement of California's attorney general, and former Congressman, Dan Lungren, and both Republican Governors, who appointed her to the State court bench.

Governor Wilson had this to say about Nora Manella's tenure as a State judge, and I would ask that the letter be entered into the record, if I might.

[The letter follows:]

GOV. PETE WILSON,  
Sacramento, CA, June 17, 1998.

Re nomination of Nora Manella, U.S. District Court (C.D. CA).

Hon. ORRIN G. HATCH,  
Chairman, U.S. Senate Committee on the Judiciary, Dirksen Senate Office Building,  
Washington, DC.

DEAR ORRIN: On March 31, 1998, President Clinton nominated Nora Manella, the United States Attorney for the Central District of California, to be United States District Judge for the same district. I would like to take this opportunity to add my name to the long list of friends and public officials endorsing Ms. Manella's nomination.



As you may be aware, Ms. Manella has enjoyed a long and distinguished career as a public servant both in Washington, D.C. and in the State of California. She has served in both the state and federal systems.

In 1990, my predecessor, Governor George Deukmejian, appointed Ms. Manella to the Los Angeles Municipal Court. I elevated her to the Los Angeles Superior Court in 1992. Judge Manella served with distinction on those courts, earning a reputation as a restrained judge possessing a due regard for the limited role of courts in our constitutional system.

In 1993, President Clinton nominated Ms. Manella to her current position as United States Attorney for the Central District of California, which includes metropolitan Los Angeles. In that role, Ms. Manella has earned an impressive record as both a tough crime fighter and a capable administrator. Among other things, she has managed an increase in the number of prosecutors in her office—today managing the largest U.S. Attorney's Office in the nation. And of particular importance to her community, she established a multi-agency Metropolitan Task Force on Violent Crime to help prosecute violent offenders in the most crime-ridden Southern California neighborhoods.

As you know, I have wholeheartedly supported your efforts to protect the nation's federal courts from judicial activists who would bend the law to their personal whim, rather than interpret and apply the law as written by the people and their duly elected representatives. I agree that the integrity of our judicial system depends upon judges who respect their limited constitutional role. Nora Manella will be such a judge. I was proud to appoint her to the State of California's highest trial bench, and I am proud to support her nomination to the federal district court.

At a moment in our history when federal judges in my State and elsewhere meddle all too frequently in the democratic process, Ms. Manella will be a welcome addition to our federal courts. As such, I offer my endorsement and urge the Judiciary Committee's prompt attention to her nomination.

Sincerely,

PETE WILSON.

Senator FEINSTEIN. Judge Manella served with distinction on the State courts, earning a reputation as a restrained judge, possessing a due regard for the limited role of courts in our constitutional system. She enjoys exceptional support in the law enforcement community, has been endorsed by the California chiefs of police, as well as the heads of the major State, Federal, and local law enforcement agencies.

The FBI Assistant Director in Charge, Timothy McNally, states that in his 25 years in law enforcement, "I can say without hesitation that Nora Manella is the best U.S. attorney I ever worked with."

Finally, former Reagan-appointed district court judge and U.S. attorney, Lane Phillips, noting the breadth of her background in both civil and criminal litigation, wrote, "In virtually every key category, intelligence, temperament, demeanor, fairness, written work product, and judgment, Nora is a perfect choice. She is well known as an independent judge with an extraordinary intellectual candle power—in short, a perfect merits-based nominee to the U.S. District Court."

Mr. Chairman, I think that in Nora Manella you have a most unusual human being, and I believe that when you, particularly knowing your interest, Mr. Chairman, have an opportunity to question her, that that will shine forth. I very much thank you for this opportunity, and I highly commend her to you.

Senator DEWINE. Senator, thank you very much.

Senator Mack.

**STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM  
THE STATE OF FLORIDA**

Senator MACK. Senator DeWine, Senator Durbin, thank you for holding this hearing today and giving me an opportunity to be with you. I wonder if I could turn to Senator Graham and ask him if he would introduce the nominee and her family.

Senator GRAHAM. Thank you, Senator Mack. Thank you, Mr. Chairman, Senator Durbin. I would like to introduce the nominee, Mrs. Patricia Seitz; her husband, Mr. Alan Greer; her brother, Rick Seitz; and a long-time family friend and managing partner of her former law firm, Mr. Joe Klock. If they would please stand?

Senator DEWINE. Would you all like to stand up? Thank you very much.

Senator MACK. Mr. Chairman, I am pleased to be here today to recommend Pat Seitz for confirmation to the position of U.S. district judge for the Southern District of Florida. Ms. Seitz would be a welcome presence on the Southern District bench to help alleviate the heavy caseload which that district currently faces.

I also want to thank the committee once again for your responsiveness to the pressing needs of Florida's judiciary. Throughout this Congress, our nominees have enjoyed swift passage from nomination to confirmation, and the committee is to be commended for its fine work.

Ms. Seitz is a widely respected attorney who has had a varied and distinguished career in both the Florida legal community and here in Washington, DC. One of Ms. Seitz' significant accomplishments was to serve as president of the Florida Bar in 1993 and 1994. Ms. Seitz is the first woman to hold this position, an accomplishment which, combined with many other efforts on behalf of women, has led her to be described by some as a pioneer in our State.

After a successful 22 years as an associate and partner at the Miami firm Steel, Hector and Davis, Ms. Seitz came to Washington to serve as chief counsel to Gen. Barry McCaffrey at the Office of National Drug Control Policy. Her public service in this area, which most would consider a genuine national crisis, is an activity to be commended. I have been told that it came at great personal sacrifice to Ms. Seitz since her family remained in Florida during the time of her service here in the Nation's capital.

Ms. Seitz is well rounded, well qualified, and a respected attorney. I have heard from numerous folks in the Florida legal community that Ms. Seitz would make an excellent Federal district judge.

Senator Graham, with the help of his judicial advisory commission, examined Ms. Seitz' qualifications and found her to be a highly qualified nominee. His assessment of Ms. Seitz is important to me, and I respect the process he has established for making his recommendations for judicial nominees. Ms. Seitz deserves confirmation by this committee and the full Senate.

Again, I want to thank the committee for providing me with the opportunity to introduce Ms. Seitz and for your support in our efforts to address Florida's serious judicial shortage. I encourage you to vote Pat Seitz out of committee favorably as soon as possible, and I thank you, Mr. Chairman.

Senator DEWINE. Senator Mack, thank you very much.



Senator Graham.

**STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM  
THE STATE OF FLORIDA**

Senator GRAHAM. Thank you very much, Mr. Chairman, Senator Durbin. Much of what I have to say is duplicative of what Senator Mack has just said, so I would ask that my full statement be included in the record, and I will summarize.

Senator DEWINE. It will be made a part of the record.

Senator GRAHAM. Before I proceed, I want to thank my good friend and colleague, Senator Mack, for his presence today, for his tireless efforts on behalf of the State of Florida and the needs of its Federal judiciary. I also echo Senator Mack's praise for the work that this committee has done on behalf of those nominees from Florida.

We continue to face a full-blown Federal judicial crisis in our State. Just to cite a few statistics, at the end of last year, nearly 1,800 criminal cases were pending in the Middle District of Florida. More than 6,200 civil cases had yet to receive final disposition. Since 1991, filings in the district to which Mrs. Seitz has been nominated, the Southern Judicial District of Florida, have increased by over 30 percent. These numbers would have been much worse had it not been for the attention that the Judiciary Committee has given to the President's nominations. I am pleased to say that in the last 2 years alone, due to that sensitivity, you have confirmed six new Federal judges for Florida. The very reason that we are here today is that the Senate recently confirmed former Federal District Judge Stanley Marcus for a seat on the U.S. Court of Appeals for the Eleventh Circuit less than 50 days after he was nominated for that position. His elevation has created the vacancy that will be filled by Mrs. Seitz.

Mrs. Seitz is a lady that I have had the privilege of knowing for almost her entire legal career. During her 25 years of legal career, she has demonstrated a mastery of complex areas of the law, a personal dedication to the betterment of the legal community and the civic life of Florida, and an abiding commitment to public service. This combination of qualities makes her especially well prepared for service as a Federal district court judge.

She was a member of one of the most highly respected law firms in our State, Steel, Hector and Davis, from 1974 to 1996, where she had a variety of legal experiences which have prepared her for the complexity of service on the Federal district court. In addition to that distinguished private practice career, she has also demonstrated an exemplary commitment to public service and civic leadership.

As Senator Mack has mentioned, she was the first woman to serve as president of the Florida Bar Association. She had many accomplishments during her tenure. One that she is probably particularly pleased with is that when she entered the office, the bar association had a \$200,000 deficit; when she left, it had a \$600,000 surplus. She is probably someone that we might use in the legislative branch of the Federal Government.

She has had a strong determination to prepare for the future, as reflected in her commitment to the training of future generations

of lawyers. She has served as an adjunct professor of trial advocacy at the University of Miami Law School and a member of the National Institute of Trial Advocacy Faculty.

As Senator Mack has said, in addition to all of that, she has most recently served as the chief counsel to Gen. Barry McCaffrey in the Office of National Drug Control Policy. In that critical position, she helped to develop a team of professional legal staff, focus that office on the unique challenges of interdicting the flow of drugs into the United States.

Mr. Chairman, throughout her career, Patricia Seitz has been respected by her peers, recognized for her outstanding public service, praised for her skill and exemplary competence in the legal arena. I have no doubt that this pattern of distinction will continue once she is sworn in as a Federal district court judge. I join my colleague in urging speedy attention by this committee to this nomination and confirmation by the full Senate.

[The prepared statement of Senator Graham follows:]

#### PREPARED STATEMENT OF U.S. SENATOR BOB GRAHAM

##### INTRODUCTION OF PATRICIA SEITZ TO THE SENATE JUDICIARY COMMITTEE

Mr. Chairman, it is a tremendous privilege to introduce Patricia Seitz for your consideration as the next federal judge in the Southern District of Florida.

Before I begin, I want to thank my good friend and fellow Floridian Connie Mack for his presence here today and his tireless efforts on behalf of Florida's federal judicial nominees. I also want to echo Senator Mack's praise of the Judiciary Committee's faithful dedication to the review and approval of judicial candidates.

As Senator Mack mentioned, Florida is in the midst of a full-blown federal judicial crisis. At the end of 1997, nearly 1800 criminal cases were pending in our state's fast-growing Middle Judicial District. More than 6200 civil cases had yet to receive final disposition. Since 1991, filings in the Southern Judicial District have increased by 30 percent.

But as distressing as these numbers are, they would be even worse had the members of this committee not moved quickly to fill judicial vacancies in Florida's federal courts. In the last two years alone, your sensitivity to Florida's needs has led to the confirmation of six new federal judges—Robert Hinkle and Stephan Mickle in the Northern District, Richard Lazzara in the Middle District, and Alan Gold, Don Middlebrooks, and William Dimitrouleas in the Southern District. In fact, the very reason that we are here today is that the Senate approved former Federal District Judge Stanley Marcus for a seat on the U.S. Court of Appeals less than fifty days after he was nominated in September of 1997.

Patricia Seitz is the latest in this long line of outstanding judicial nominees. During her twenty-five year legal career, she has demonstrated a mastery of the law, a personal dedication to the betterment of Florida's legal community, and an abiding commitment to public service. This combination of qualities makes her especially well-prepared for service as a federal district court judge.

From 1974 to 1996, Ms. Seitz was an attorney in the highly respected South Florida law firm of Steel, Hector, and Davis, where she gained experience in many of the highly complex legal issues that will come before her in the federal court system.

In addition to her distinguished career in private practice, Patricia Seitz has demonstrated an equally exemplary commitment to public service and civic leadership. In 1993, as Senator Mack mentioned, she became the first woman to serve as President of the Florida Bar Association. In addition to turning the Florida Bar's \$200,000 deficit into a \$600,000 surplus in less than one year, Ms. Seitz worked to improve lawyer relations, generate enthusiasm for pro bono work, and refocus the legal community's attention on important long-term issues.

That determination to prepare for the future is also reflected in her commitment to training future generations of lawyers. During her distinguished career, Ms. Seitz has been an Adjunct Professor of Trial Advocacy at the University of Miami Law School and a member of the National Institute of Trial Advocacy faculty.



These qualifications alone would justify Patricia Seitz' nomination to the federal bench. But what makes her particularly well prepared for this position is her close familiarity with legal issues that inordinately affect the Southern Judicial District.

As all of you know, South Florida has long been ground zero in our nation's war on drugs. Patricia Seitz has been a loyal soldier on the front lines of that conflict. From May 1996 to October 1997, she worked for General Barry McCaffrey as the Chief Legal Counsel at the Office of National Drug Control Policy. In that important position, Ms. Seitz helped to develop a team of professional legal staff and focus the office on the unique challenges of interdicting the flow of drugs through the Caribbean.

Mr. Chairman, throughout her career, Patricia Seitz has been respected by her peers, recognized for her outstanding public service, and praised for her skill and competence in the legal arena. I have no doubt that this pattern of distinction will continue once she is sworn in as a federal judge.

Thank you.

Senator DEWINE. Senator Graham, thank you very much.

It is my understanding that Senator Warner has to leave to chair a hearing. We will turn now to Senator Warner and Senator Robb.

### STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. We are in Armed Services next door, Mr. Chairman, and I will leave to my distinguished colleague such requirements as to go into details. But I think my colleague and I would agree that—Judge Lee, won't you stand, please? There represents a man who has dedicated his life to preparing for this job, and I have never seen a better qualified one.

Having said that, Mr. Chairman, I submit my statement.

[The prepared statement of Senator Warner follows:]

#### PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman, it is my distinct pleasure to join my colleague from Virginia, Senator Robb, in supporting the nomination of Judge Gerald Bruce Lee for Judge of the U.S. District Court for the Eastern District of Virginia at Alexandria.

Judge Lee has been an active member of the legal profession for twenty-two years. He conducted over 300 trials as a litigator for fifteen years prior to beginning his current service as a trial judge of the Fairfax Circuit Court, the largest and busiest trial court in Virginia. This experience in both jury and non-jury trials has given Judge Lee a wide range of experience in such diverse legal matters as commercial law, products liability, personal injury, medical malpractice, contracts, and criminal law. His service on the bench since his appointment in 1992 has earned him the respect of the legal community for his handling of complex civil cases, his efforts to improve the court's use of technology, and his commitment to public service. In fact, I was especially impressed to learn that Judge Lee was personally responsible for making Fairfax court information available to the public via the Internet.

Judge Lee is also an active member of the Virginia Judges Judicial Conference, for which he chairs the Circuit Court Judicial Education Committee and serves on the Circuit Court Judges Bench Book Committee. Judge Lee's responsibilities include overseeing the ongoing training and continuing education programs for 150 state trial judges. As Committee Chairman, Judge Lee has conducted and presented more than 40 seminars, lectures, and mock trials for national, state, and local bar organizations. Judge Lee is also an accomplished author of several legal articles on trial advocacy.

Judge Lee's dedication to the legal profession is also evident in the many professional leadership positions that he has held. Judge Lee has served as Chairman and a co-founder of the General Practices of Law Section of the Virginia State Bar, President of the Northern Virginia Black Attorneys Association, Chairman of the Alexandria Bar Association Judicial Selection Committee, and Chairman of the General Practice Solo and Small Firms Section of the American Bar Association.

Judge Lee has also served his community as a member of the Operations Committee of the Metropolitan Washington Airports Authority Board of Directors. Furthermore, in 1995, Representative Tom Davis recognized Judge Lee on the floor of the House of Representatives for earning the Fairfax County Human Rights Award for



his service as a mentor providing community awareness on social justice through a variety of volunteer programs.

Judge Lee's fair and responsible jurisprudence has earned him the highest rating of every state and local bar organization in Virginia that offers such ratings. Additionally, I have received numerous letters in support of Judge Lee by magistrates, judges, sheriffs, state legislators, and Members of Congress of both parties.

Judge Lee's personal motto is, "To whom much is given, much is expected." Mr. Chairman, as a judge, a trial lawyer, and a citizen of his community, Gerald Bruce Lee has conducted himself admirably in accordance with this motto, and I believe he has demonstrated that he possesses the makings of a fine federal jurist. I therefore respectfully ask the members of the committee to join me in supporting his confirmation.

Senator DEWINE. Senator Warner, thank you very much. Your statement will be made a part of the record of the committee.

Senator Robb.

#### **STATEMENT OF HON. CHARLES S. ROBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator ROBB. Thank you, Mr. Chairman, Senator Durbin. I am not sure that I could improve on that very succinct and unqualified statement, and I appreciate that. Let me just ask, in addition, Judge Lee has Mrs. Lee and a number of members of the family. If you would just stand at the same time, I won't go into individual introductions at this time, but we are very pleased that they could all join us.

I am pleased and, indeed, grateful to my senior colleague, Senator Warner, as well as Congressman Bobby Scott—I don't know if he is here yet, but he is coming, and he wholeheartedly joins us in this particular nomination.

I am pleased to formally present for your confirmation process to fill the vacancy in the Eastern District of Virginia Judge Gerald Lee. I am confident that Judge Lee will serve on the Federal bench with the same distinction that has characterized his professional and personal life and all of his achievements to date.

I would also like to thank Chairman Hatch for scheduling this hearing and including Judge Lee in it.

Judge Lee has served as a circuit court judge for the nineteenth judicial circuit in Fairfax, VA, since 1992. Prior to serving on the bench, Judge Lee was in private practice in northern Virginia from 1976 to 1992. He received both his law degree and a bachelor of arts degree from American University in 1976 and 1973, respectively. Every bar association that reviewed the potential nominees gave Judge Lee their highest rating. In some cases he was their only endorsement.

Judge Lee has written significant legal opinions in the areas of creditors rights, civil conspiracy, product liability, punitive damages and tort cases, real property, and search and seizure. Judge Lee led the effort to expand public access to information about the Fairfax courts through the Internet and to better use technology to reduce administrative costs to the judicial system.

Judge Lee currently chairs the Judicial Education Committee and is responsible for ongoing training and continuing education programs for 150 State trial judges. He has lectured at over 50 continuing legal education seminars and has written many legal articles, including an article for the American Bar Association's American Law Institute entitled "A Road Map of Effective Trial Tactics."

He has lectured at both the College of William and Mary and their Marshall School of Law as well as George Mason University on topics ranging from civil and criminal procedure to trial advocacy.

Beyond working with his colleagues in the legal community, Judge Lee has reached out to help at-risk youth and taken the time to address community groups, student groups, and churches. In 1995, Judge Lee was awarded the Fairfax County's Human Rights Award for his mentoring activities and other valuable efforts in the community.

Throughout his legal career, Judge Lee's motto has been: To whom much is given, much is expected. His professional achievements in civic involvement over the last 20 years certainly epitomize that philosophy.

Finally, what does not appear on his written record or resume is Gerald Lee's personal history. Judge Lee grew up in southeast Washington, DC. He was the first member of his family to attend college. In fact, he was 16 years old before he ever met a person who had graduated from college. He was fortunate at that time to have joined a mentoring program where the possibilities for the future were first revealed to him. He made the most of that revelation, understood the importance of education, and went on, as I said, to college and law school at American University.

His life and his contributions to the legal profession are truly inspirational. I am only sorry that Judge Lee's father, who passed away quite suddenly and was buried on the very day Judge Lee found out that he was scheduled for this hearing, will not be with us in person to celebrate this important moment with him. I am sure, however, that Judge Lee's service on the Federal bench will be a living testament to the values, pride, and encouragement of his father.

With that, Mr. Chairman, I would ask that any statement by Congressman Scott be included in the record.

Senator DEWINE. It will be made part of the record.

Senator ROBB. And I thank you again for making this opportunity available and commend with the same enthusiasm and without qualification as my distinguished senior colleague, Senator Warner, Judge Lee for confirmation to the Eastern District of Virginia in the Federal court.

Senator DEWINE. Senator Robb, thank you very much.

Senator Kerry.

#### **STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator KERRY. Mr. Chairman, thank you very much, Senator Durbin. It is my great pleasure to introduce to the committee Timothy Dyk, who has been nominated by the President to serve on the U.S. Court of Appeals for the Federal Circuit.

Mr. Dyk is an outstanding candidate in every respect, Mr. Chairman. He was born in Massachusetts, left the State for a period of time, and then returned to go to undergraduate school at Harvard, graduating in 1958, and subsequently to Harvard Law School, from which he graduated in 1961, having served on the Harvard Law Review. His ties to Massachusetts go considerably further back, all



the way to the Pilgrims. After law school, he came to Washington for one of the most privileged law experiences, as we all know, serving as a clerk on the Supreme Court. He worked there with Justices Reed and Burton and did such an outstanding job, he was asked by the Chief Justice to serve for another year as the Chief's law clerk.

He then continued public service as the special assistant to the Assistant Attorney General for the Tax Division, moved into the private sector where he served for some 25 years at the distinguished law firm of Wilmer, Cutler and Pickering here in Washington. He specialized in communications law and in litigation and during that time somehow found time to serve as an adjunct professor of law at the Georgetown Law Center, at the University of Virginia Law School, and also the Yale Law School.

Since 1990, he has been a partner at the Washington office of Jones, Day, Reavis and Pogue where he served as chair of the issues and appeals section, a litigation group, and I might say that as part of his work, he has briefed and/or argued a number of cases before the Federal Circuit for which the President has nominated him and is therefore very knowledgeable about the various subject matter within its jurisdiction.

I also know that he has over the years appeared before 10 of the 13 Federal courts of appeals around the country, and he has argued 8 times before the Supreme Court of the United States. So he really comes before the committee with, I think, about as complete and distinguished law career as one could find.

He is accompanied today by a good friend of mine, his wife, Sally; two of his children who I might introduce, Caitlin, who is sitting in the second row back, and Abraham, his son, who got his red hair, I am told, from Miles Standish back in Massachusetts; and his granddaughter, Rebecca, is somewhere lurking around behind there.

Joining him from Rochester, NY, are his sister and brother-in-law, Penelope and Anthony Carter, and I am very, very privileged to introduce his mother, Ruth, who is here, also a graduate of a Massachusetts college, Wellesley College, and she just recently celebrated her 97th birthday.

Senator DEWINE. Welcome. Thank you. [Applause.]

Senator KERRY. I don't know whether to give the credit to Wellesley or Massachusetts or something else.

Mr. Chairman, just as an aside, I would say that within the breadth of all of that experience, he actually has had some appellate experience. He recently served as a supreme court justice at his son's high school moot court, and he heard his own son, Abraham, argue the opposing side to the one that he had argued before the court of appeals and that he had won. He had the great judgment and wisdom to abstain in the vote, and Abraham's argument carried the day notwithstanding. So maybe you can find out how he would have voted had he voted.

He has found time for a significant number of public service efforts outside of just practicing law. I am told his favorite one of those, Mr. Chairman, is serving as a coach to the Little League team, which he has continued to do even after his son had graduated from it, and graduated into being the assistant coach with

him. So I think this is an individual committed to public service who has long wanted to serve on the court system of the country, and who is embraced by the Chamber of Commerce, the National Association of Manufacturers, a host of groups of broad, bipartisan nature, and there is no question in my mind that the President has nominated a person of outstanding capacity who will contribute to the judicial system of the country.

Senator DEWINE. Senator Kerry, thank you very much. I appreciate that.

We will now turn to Senator Breaux, Senator Landrieu, as well as Congressman Jefferson.

Senator BREAUX. Mary was here first. Why don't you let her go first?

#### STATEMENT OF HON. MARY L. LANDRIEU, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LANDRIEU. That is very gracious of my senior Senator. Thank you very much. Mr. Chairman, thank you for conducting this hearing, and I particularly want to thank my colleague, Senator Durbin, for his great work in trying to move these nominations forward. We were just here a month ago for Judge James and also for Judge Tyson from Louisiana, and we are pleased to be here today for Mr. Carl Barbier.

I am proud to be able to appear on behalf of Carl Barbier from New Orleans, LA, a graduate of Loyola Law School, cum laude, I may add; very active throughout his career in law school, the highest grades in many of his classes, and very active at that time and has continued for more than 29 years.

He is joined here by his wife of 31 years, Peggy McDonald Barbier. Peggy, where are you? If you would stand to be recognized? Thank you for being here. Their children couldn't come, the three of them, on short notice, but they, of course, are very proud.

As I said, he comes before this committee with 29 years of experience as a clerk, as an attorney, brings a unique perspective in that to the court. I have known him for many years. He served with distinction in our legal—the bar association on many different committees, not the least of which is served as special counsel to the Louisiana State Bar for our Committee on Professional Responsibility.

I have the highest confidence that he will be an asset to this bench. He will make us all proud, and I am very proud to recommend him to you today.

I have a more formal and longer statement I would like to submit for the record.

Senator DEWINE. It will be made part of the record.

Senator LANDRIEU. Thank you, Mr. Chairman.

[The prepared statement of Senator Landrieu follows:]

#### PREPARED STATEMENT OF HON. MARY L. LANDRIEU

Actively engaged in the practice of law since 1971 both as a solo practitioner and as a partner in the law firm of Badeaux, Discon, Cumberland and Barbier. In addition, he was employed as a law clerk for the Louisiana Court of Appeals, Fourth Circuit, from July, 1969 through July, 1970 and the United States District Court for the Eastern District of Louisiana from August, 1970 through 1971. His distin-



guished 29 years of experience in the legal profession will serve him well as a Federal district judge.

In 1970 Carl Barbier was awarded his juris doctor degree cum laude from Loyola Law School in New Orleans. He was a member of the Loyola Law Review from 1967 to 1970 and served as associate editor from 1969 to 1970. In addition, he received awards for the highest grade in his successions class as well as his legal ethics class and was a member of the National Jesuit Honor Society, Alpha Sigma Nu.

Carl Barbier has a distinguished career in law and public service.

Among the professional associations to which Carl Barbier has held membership are the Federal Bar Association for the Fifth District and the Louisiana State Bar Association where he has been a member since 1970. Also, he participated in a special legislative committee on the State Tort Claims Act from 1990-1991. In addition, Carl Barbier has served on several judicial-related committees for the United States District Court for the Eastern District of Louisiana. In 1982 he was appointed to the committee on disciplinary rules and from 1984 through 1989 he served as a member of a standing committee on rules of disciplinary enforcement. In 1989 he was appointed as a member of a merit selection panel to make recommendations to the court regarding the reappointment of a United States magistrate and was appointed as a member of the committee to review applications and recommend three finalists to the court for the position of United States magistrate. Furthermore, he was special counsel to the committee on bar admissions for approximately 16 years and has been a member of the house of delegates since 1994. Finally, he has served as a board member for the Legal Aid Society.

It is important to note that during his career, Carl Barbier has also served with distinction outside the legal profession. He has been very active in his community and has performed various civic activities for the St. Andrew the Apostle Church as well as the Holy Spirit Church. Also, he served on the Louisiana Insurance Rating Commission from 1992-1996 and the Governor's Task Force on Reduction of Auto Insurance in 1996.

Carl Barbier has been married for 31 years to Peggy Elizabeth McDonald and has three children: Kelly, Brett and Brandy. His wife, Peggy Elizabeth McDonald is in attendance today.

I have found Carl Barbier to be very professional and competent as an attorney and community leader. Moreover, I am confident he possesses the necessary judicial temperament to serve on the United States District Court for the Eastern District of Louisiana.

In sum, I believe that Mr. Barbier possesses the integrity, appropriate demeanor and aptitude for legal scholarship that will enable him to serve with distinction if he is confirmed.

Mr. Chairman, Carl Barbier is imminently qualified to serve as a judge to the United States District Court for the Eastern District of Louisiana and I strongly urge the committee to act favorably on his nomination.

Senator DEWINE. Senator Landrieu, thank you very much.  
Senator Breaux.

#### **STATEMENT OF HON. JOHN B. BREAUX, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator BREAUX. Thank you, Mr. Chairman and Senator Durbin. It is also a privilege for me to come before this committee once again to, first, thank the committee for arranging this hearing and for the good work that the committee is doing in getting nominees out as we approach the latter part of this session. And I think that it is very important that we recognize that and thank you for the good work in that area.

Senator Landrieu has pretty much covered the educational background of this nominee. He has one thing in common with everybody who comes up. They all are extremely qualified. They are all extremely bright. They have all been to great law schools. They have all been Order of the Coif and on the Law Review and all of that. And so they all bring a tremendous amount of talent to this committee, or they wouldn't be here from an educational standpoint.

But I think it is also very important that they also bring human qualities, the qualities of being involved in the community, the qualities of being married to a wonderful person for 31 years, the qualities of being involved in things other than just the law, because the things that come before the district court are things that involve all aspects of life. It is not just unique, hypothetical legal decisions that have to be made, but human decisions. So it is very important that the people we nominate and confirm for these important positions be people who have a broad understanding of what life is about, what society is about, what a democracy is about, as well as having, as everyone knows, a real understanding of what the law is all about. And Carl Barbier, I would suggest, possesses all of those qualifications.

And it is also unique, I mean, it is unique when a person can be supported by both sides of the legal profession. In that, I mean both by the plaintiff's bar as well as by the defense bar. And Carl Barbier has that type of support. People from both sides know that one thing they can count on is that he is going to be fair, that he is not just going to be for one side or the other.

Finally, he has broad-based political support, not just Democratic support but also a number of Republican elected officials who have written letters in support or have made calls to this committee and have said that, while he is not our nominee because of the system, he would be our choice to be confirmed. And that type of broad-based support I think also is very important, so I enthusiastically add my name to that list.

Senator DEWINE. Senator Breaux, thank you very much.  
Congressman Jefferson, thank you for joining us.

#### **STATEMENT OF HON. WILLIAM J. JEFFERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA**

Mr. JEFFERSON. Thank you, Mr. Chairman. I am in the not unaccustomed position of having had my two Senators say everything that needs to be said about a nominee before I am able to speak, but I thank you, Mr. Chairman and Senator Durbin, for permitting me to say something to this committee this morning.

It is very important what John and Mary have said. I can't add very much to what they have said, actually. I want to say this, though: that while, as John has said and as Mary has pointed out, Carl Barbier possesses wonderful academic and legal preparation requirements for this job, as John has pointed out quite well, he possesses all the other skills, the human skills that a good judge needs to have. I want to recall a point that a judge made who I had the luxury, the privilege, the high honor of clerking for, Judge Alvin Rubin, who was a very distinguished district court judge some years ago, who put it this way. He said a judge must be more than a thinking machine. And while Carl has tremendous analytical skills and will be a lawyer who can think through any problem with any other lawyer who appears before his bench, he won't just be that. He will be someone who can stand in the shoes of litigants who stand before the court because he has experienced the life of the community. He has experienced the life of real people. And he will be able to put himself in that position and try and make a

judgment that is fair to all of those who appear before his bar and his bench.

So I feel very confident, as my Senators do, that Carl Barbier will be an excellent choice for the district court, and I certainly hope that his confirmation is speedily forthcoming.

Thank you.

Senator DEWINE. Congressman, thank you very much for joining us.

Let us now turn to Congressman Ramstad. Thank you very much for being with us.

**STATEMENT OF HON. JIM RAMSTAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA**

Representative RAMSTAD. Thank you, Mr. Chairman and Senator Durbin. It is a privilege—

Senator DEWINE. Thank you for your patience as well.

Representative RAMSTAD. It is a privilege to be before you on behalf of the nomination of Patricia Ann Seitz to the U.S. District Court for the Southern District of Florida. Both Florida Senators Mack and Graham have spoken eloquently on her behalf, and I will be very brief. I ask that my complete statement be made part of the record.

Senator DEWINE. It will be made part of the record.

Representative RAMSTAD. Let me just summarize by saying Patricia Seitz is one of our Nation's best and brightest lawyers and legal minds, and Patricia Seitz will be one of our Nation's best Federal judges.

My family and I have known Pat and Alan Seitz for many, many years, and I can also attest to her high ethical standards and her high personal character.

It is often said that the best judges have both a head and a heart for justice, and I can assure you, Mr. Chairman and Senator Durbin, that Pat Seitz has both the intellect and the necessary temperament, the compassion, to be an excellent Federal judge.

I had the privilege of working with Pat on a professional level when she was Director of the Office of Legal Counsel for the Office of National Drug Policy, and it was a real privilege to work with someone of her caliber on our Nation's No. 1 problem.

So I heartily endorse the nomination of Pat Seitz. She certainly has the qualifications, the character, and the temperament to be an outstanding U.S. district court judge, and I urge your swift confirmation.

Thank you again, Mr. Chairman and Senator Durbin.

Senator DEWINE. Congressman, we appreciate your comments. Thank you for coming.

Let me invite a very patient Senator Carol Moseley-Braun to come up and introduce our next nominee.

**STATEMENT OF HON. CAROL MOSELEY-BRAUN, A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator MOSELEY-BRAUN. I am very pleased to be with you this afternoon and to join this huge complement of the Senate Judiciary Committee to consider the nominations of David Herndon, Rebecca Pallmeyer, and Jeanne Scott, all nominees for the U.S. District



Court in Illinois. I am very proud to introduce such excellent nominees to the Judiciary Committee.

These three Illinoisans represent the highest caliber of public servants. They are here today because they possess the legal credentials, the character, the temperament, and the experience necessary to serve as Federal judges.

As you may know, Mr. Chairman, Senator Durbin and I established a Judicial Nominations Commission to help us locate the most qualified individuals to fill the vacancies on the Northern, Central, and Southern District Courts in our State. The commission publicized the U.S. District Court vacancies widely, thoroughly considered the questionnaires of all of the applicants, and extensively interviewed and investigated the candidates and recommended three candidates to us for each vacancy.

After this extensive search and deliberation, this merit selection process, and our personal interviews of the finalists for each vacancy, we were very pleased to forward to the President the names of Mr. Herndon, Ms. Pallmeyer, and Ms. Scott.

David Herndon served as an Illinois Circuit Court judge since 1991. Before that, he spent almost 15 years in private practice, developing significant experience in complex litigation. He is very highly respected by his peers, both professionally and personally, and he will be a credit to the Federal bench.

In addition to his superior legal ability, he has demonstrated a real commitment to the community. When he was president of his law firm, he entered into an agreement with legal services to provide a number of hours of pro bono work for the community and made certain that referrals were handled by attorneys with expertise in the specific area of concern. He has also personally provided legal services to his church as needed.

I would like at this moment to introduce Mr. Herndon, who is here with his family, his brother, John, his parents. I have a list of names here. This is why the room is so crowded, Mr. Chairman. His parents, Sam and Mary, his daughter, his son, and his fiancée and family and extended family. The Herndons are all here. Thank you very much.

Senator DEWINE. Well represented. Thank you.

Senator MOSELEY-BRAUN. The second nominee, Mr. Chairman, is Rebecca Pallmeyer and Rebecca Pallmeyer served as a U.S. Magistrate Judge for the Northern District since 1991. Before that, she was an Administrative Law Judge for the Illinois Human Rights Commission of Chicago. Her experience on the bench has proven her to be a diligent, intelligent jurist who is adept at handling complex issues. She is particularly good in dealing with people and I know she will make an excellent Federal judge.

Her accomplishments are not confined just to the courtroom. In 1994, Chief Justice Rehnquist appointed her to a 3-year term on the Judicial Resources Committee, the policy-making body of the U.S. courts, and she is active in bar association activities. Furthermore, she is committed to serving the greater community and acts as a sponsor and mentor to a student at Providence St. Mell's High School, which is on the west side of Chicago.

Finally, I have to say that Rebecca is a graduate of the University of Chicago Law School, like myself, and I guess Senator



Ashcroft is not here today. We will not hold that against her, but I am sure that Senator Ashcroft would extend a warm welcome to our fellow maroon. I guess that is what we call ourselves.

In any event, Rebecca is here with her parents, Ruth and Paul Pallmeyer, her brother, Tom, and his wife, Carol, and daughter Kristen, and Rebecca's husband, Don McAdams, and their two daughters, Ruth and Amanda. Welcome.

Finally, Mr. Chairman, Judge Jeanne Scott has served on the Illinois Bench since 1979 and she is currently the Division Chief of Civil Litigation. Before that, she was in private practice and an Assistant State's Attorney. Judge Scott is held in extremely high regard by her peers, who praise her outstanding integrity, superior intellect, and broad knowledge of the law. She has a reputation for being fair and efficient and she will be a great asset to the Central District of Illinois.

Judge Scott has presided over student mock trials at the University of Illinois and has participated in a number of continuing legal education seminars. She has worked to increase pro bono efforts in the Springfield area and has volunteered with Habitat for Humanity and other community efforts.

Judge Scott is here with her brother, Richard, his wife, Lyne Scott, nieces Nancy and Karen, and her husband, Craig Ames, and a friend, Susan Larkin.

Mr. Chairman, the challenges faced by these nominees are formidable. Every district in Illinois faces backlogs and delays and serious problems by virtue of less-than-full staffing. The Northern District currently has four vacancies and it is experiencing serious trial delays as a result. In the Southern District, the chief judge was unable to hold a civil trial for over a year. The Central District has also been forced to delay major civil trials because the docket is so crowded.

I am confident, however, that Judge Herndon, Magistrate Judge Pallmeyer, and Judge Scott understand the challenges they face and that they will have the stamina as well as the temperament and the qualifications necessary to meet those challenges. While their backgrounds may differ, these nominees share a common interest in public service and in giving back to their communities. That public spirit, along with their undisputed legal acumen and their reputations for fairness, will make them important additions to the bench in Illinois and to our country's judiciary.

I want to thank the committee for hearing these witnesses today and for the prompt action. I look forward to the committee's action in confirming these nominees, or recommending the confirmation of these nominees.

I turn now to my colleague from central Illinois.

Senator DEWINE. Congressman Shimkus, thank you for joining us.

#### **STATEMENT OF HON. JOHN M. SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS**

Representative SHIMKUS. Thank you, Mr. Chairman, Senator Durbin, and Senator Moseley-Braun. I have my whole Senate delegation here, and it is very appropriate.

I am here to speak on behalf, first, of Judge David Herndon, who I have known for many years now as a resident of Madison County, and I would ask that my statement be submitted in total and I will just summarize, since Carol has done such a tremendous job of introducing everybody and going over the particulars.

The one thing I want to say about Judge Herndon is that if you would ask him what is the most important thing in his life, he would say his family. Now that he is about to embark on extending his family, the challenges of the Federal bench probably are not too formidable. So I would encourage you to look at his confirmation. He is also an active and lifelong member of St. Paul United Methodist Church, where he serves on the Parish Staff Relations Committee and he teaches Sunday School.

Judge Herndon has a reputation of fairness in a nonpartisan manner, and this has been stated, quoted by some of his peers and colleagues. He has also been called tough, fair, willing to listen, and possesses a strong work ethic, and because of the backlog, we know that that will be an important ingredient.

The latest Illinois State Bar Association lawyer poll had Judge Herndon rated the highest of his peers in legal ability, temperament, and court management, attest to his abilities. Judge Herndon has been successful in being tough on crime, slapping a 20-year prison sentence on a date rape case which is going to set the standard for that serious of all crimes for all those in the area. The local newspapers of that area applauded his courtroom decision, as did many of us who are in the area.

That tough on crime stance is very important because the Southern Illinois District has a high volume of drug trafficking cases and also this is the longest, the oldest vacancy, having been open since 1992, so I appreciate your consideration of Judge Herndon.

I would also be remiss if I did not mention esteemed Jeanne Scott, nominated to the Central District of Illinois, especially since I represent part of the Central District. Judge Scott and Judge Herndon are prime examples of judicial fairness and integrity and I want to commend them both. I want to commend both of my Senators and the President for the wise choices they have made in selecting these two individuals. Thank you for your consideration of Judge Herndon and Judge Scott.

[The prepared statement of Mr. Shimkus follows:]

#### PREPARED STATEMENT OF REPRESENTATIVE JOHN M. SHIMKUS

Thank you Mr. Chairman. I am honored to appear before the Committee in support of Judge Herndon's nomination to the U.S. District Court for the Southern District of Illinois.

The most important aspect of David Herndon's life has nothing whatsoever to do with a courtroom, it is his family and particularly his children, Alicia and Neil, of whom he is very proud. He left a successful law practice because of the amount of time it took him away from that family. Having been divorced a few years ago, David is engaged to Christy Keller and is looking forward to expanding his family with her and her two children, Nicky and Jimmy.

David Herndon is the son of educators, Mary and Sam Herndon, and his brother Jim is the Superintendent of Schools at Roxana, Illinois, the school from which David graduated.

He inherited a concern for education and is active with the Southern Illinois University Law Board of Visitors and Alumni Board, the Southern Illinois University Edwardsville Alumni Board, the Roxana Schools foundation and is a major contributor to the NAACP scholarship program.



He is an active and lifelong member of the St. Paul United Methodist Church, where he serves on the Parish Staff Relations committee and has served on the Administration Board, as well as a Sunday School teacher of 1st, 2nd, 5th, and 6th grade students.

He has the support of many of my neighbors, one recently said of Herndon that he "has a reputation of fairness in a non-partisan manner." Judge Herndon is described by his contemporaries as "tough, fair, willing to listen and possesses a strong work ethic. He is ethical and has found favor with our business community as a reasonable moderator."

In the latest Illinois State Bar Association lawyer poll, those who practice in Judge Herndon's courtroom ranked him above all other associate judges in legal ability (94.94 percent), temperament (98.42 percent) and court management (99.47 percent).

Judge Herndon has also been described as "a proponent of law and order with a keen sense for family protection issues." An editorial in the Edwardsville Intelligencer commented on the sentence Judge Herndon handed down on a "date rape" case by saying: "Violent crimes deserve stiff penalties. The sentence handed down by Associate Judge David Herndon \* \* \* is appropriately severe. Judge Herndon slapped [the defendant] with a 20 year prison sentence. Violent crimes deserve stiff penalties." The Telegraph, an Alton, Illinois newspaper, opined that sentences such as this should encourage young women to report date rapes, knowing they will be dealt with in a serious fashion. I am pleased and honored to support Judge Herndon's nomination.

Observing wide variations in the dispositions of traffic cases, Judge Herndon was the moving force in Madison County to establish guidelines for fines in those cases, demonstrating his desire for fairness and consistency.

The District Court for the Southern District of Illinois, which has a very high volume of drug trafficking cases, suffers a serve backlog, due in part to the fact that the vacancy for which judge Herndon has been nominated has been open since 1992, the oldest such vacancy in the country.

I would be remiss if I didn't make special mention of another central Illinois nominee, the esteemed Jeanne Scott nominated for the Central District of Illinois Judgeship. Judge Scott and Judge Herndon are prime examples of judicial fairness and integrity and I want to commend both of my Senators—Senator Durbin serving on this committee—and the President for the wise choices they have made in selecting these two individuals.

Thank you for your consideration of Judge Herndon and Judge Scott.

Senator DEWINE. Congressman, thank you very much.

Thank you all very much.

Senator MOSELEY-BRAUN. I thank the chair. I am a little nervous about the idea of bar association polls, that the pollsters are extending their business. They did not have enough, I guess, with us. Now they are going into polling on the bench. But thank you very much, Mr. Chairman.

Senator DEWINE. Let me turn to your colleague now, Senator Durbin.

#### **STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman. It is, indeed, humbling to sit here and to hear the qualifications of all the men and women who are seeking these positions on the Federal bench. I am reminded of one of my closest friends in Springfield, IL, a gentleman by the name of Gene Callahan, who once said that he missed Phi Beta Kappa by two grades, A and B. [Laughter.]

So I am humbled when I consider the academic and legal credentials of all those who have gathered here today.

I joined with Senator Carol Moseley-Braun in establishing a commission, a joint commission that we use to choose nominees in our State. It was done by consensus throughout the State and we are very proud of the nominees that we have chosen.

It goes without saying that each and every one of the people that comes before us has extraordinary academic and legal credentials. They would not even be considered seriously for such an appointment without them. During the interview process, though, we tried to take it another step, to try to learn a little bit more about the people behind these titles and try to establish a work ethic, a temperament, a heart, if you will, and in each of these cases, we found the three nominees for the Illinois bench to be extraordinary.

I can remember meeting Magistrate Pallmeyer for the first time, I believe it was May a year ago, and she made such a favorable and positive impression in a very strong field of candidates that when it was over, I turned to my colleague, Senator Moseley-Braun, and said, there is one person here I am certain of and it is Rebecca Pallmeyer. I have never for a moment doubted her qualities and her ability to serve on the Federal bench, she made such a good impression.

The same could be said of Judge Herndon, who went through the process twice, and although we did not choose him the first time, it was a close call, judge, and we debated it long and hard. And then, fortuitously, another opportunity presented itself and both Senator Moseley-Braun and I decided that this was our chance to give you an opportunity to serve on the Federal bench. Again, like Magistrate Pallmeyer, Judge Herndon has demonstrated that he cares about people, that he understands the concept of justice.

The last person which I will make reference to is the one that I know the best. Judge Jeanne Scott, if you can believe this, before I was elected to Congress, Senator DeWine, I was just one of the attorneys who practiced before Judge Scott in Springfield, IL, and she was known then as a person with a background as a prosecutor, as an associate judge, and as a circuit judge who really was respected. When she made a decision, you knew that it was a decision based on her view of the law and concept of justice, no favoritism involved.

If you knew the Scott family, and a lot of them are represented here today, you would understand why. Her father, Morris Scott, was a hero of mine and many in the Springfield area for the fantastic record of public service that he gave to our area, and his daughter has not strayed far from that model and I am proud today to count her as a friend and prouder still that she will succeed an outstanding jurist, Judge Richard Mills, on the district court in the city of Springfield.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Durbin, thank you very much.

That completes our first panel. Let me invite our second panel to come up and I will introduce you as you are coming up.

Senator DURBIN. Mr. Chairman, I am sorry to interrupt you, but while you are introducing them, if we could place in the record statements from Congressman Bobby Scott as well as the minority leader on this committee, Senator Leahy.

Senator DEWINE. They will be made a part of the record of the committee.

Senator DURBIN. Thank you, Mr. Chairman.

[The letter of Mr. Scott follows:]



CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, DC, July 14, 1998.

Hon. PATRICK J. LEAHY,  
*Senate Judiciary Committee Ranking Member, 224 Dirksen Senate Office Building,  
Washington, DC.*

DEAR RANKING MEMBER LEAHY: I write in support of the nomination of Judge Gerald Bruce Lee of the Fairfax County Circuit Court for appointment to the United States District Court for the Eastern Division of Virginia.

I have known Judge Lee about 20 years. He has served the Bar and the Bench in several capacities—the general practice of law, Commissioner in Chancery, enforcement of legal ethics and standards, judge—that reflect upon his competencies and integrity. While serving as such, he has developed a reputation among his peers for excellence and professionalism, as indicated by his ratings from a long list of bar associations representing a cross-section of the legal profession throughout the state.

Based on the record of Judge Lee's accomplishments and my observance of him over the years I have known him, I believe that he would make a fine addition to the federal bench. Therefore, I enthusiastically support his nomination for appointment to the United States District Court for the Eastern Division of Virginia.

Please let me know if I can provide you with further information regarding my support for Judge Lee's nomination.

Very truly yours,

ROBERT C. "BOBBY" SCOTT,  
*Member of Congress.*

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

Tomorrow marks the 209th anniversary of the Judiciary Act of 1789, the legislation that first established the lower federal courts. It is appropriate that this week the Judiciary Committee hold another in a series of confirmation hearings for judicial nominees to fill the scores of vacancies that persist in our federal courts today.

This is the eighth judicial nominations confirmation hearing this year. Today we will hear from eight of the 35 nominees who are pending before the Committee in need of a hearing. We are receiving additional nominations every week. I hope that we are returning to the pace that the Committee set in February and March when we held two hearings a month. I look forward to seeing another group of nominees receive their hearing before the August recess.

I am encouraged that eight nominees are included in the hearing today and thank the Senator from Ohio for agreeing to chair this important hearing and for his characteristic patience and courtesy. I also want to commend all of the Senators who have sent statements and those who are attending this hearing today to support these fine nominees.

The Chief Justice of the United States Supreme Court has called the number of judicial vacancies "the most immediate problem we face in the federal judiciary." The Senate continues to tolerate 74 vacancies in the federal courts with another nine on the horizon—almost one in 10 judgeships remains unfilled. We need to do better here in the Judiciary Committee and the Senate needs to act more promptly in considering these nominees. The Senate is not acting responsibly to end the judicial vacancies crisis. It has not even kept up with normal attrition over the past two years, let alone taken the type of concerted action needed to end the judicial vacancies crisis. The numerous, longstanding vacancies in some courts are harming the federal administration of justice. The Chief Justice pointedly declared in his 1997 Year End Report: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."

Only 33 judicial nominees have been confirmed by the Senate all year. There are currently 10 qualified nominees for judicial vacancies on the Senate calendar. All have been reported favorably by the Judiciary Committee, some were reported months ago. Unfortunately, over the last weekend, the Republican Leader of the Senate indicated that the Senate will not be considering these or other nominations and that he has put them "on the back burner."

I trust that the Committee will proceed promptly to report these eight nominees to the Senate. I hope that the Republican leadership of the Senate will reverse its course and that the Senate will proceed to consider and confirm these nominees without delay.

Senator DEWINE. The second panel consists of Timothy Dyk, of the District of Columbia, to be U.S. Circuit Judge for the Federal Circuit; Judge David R. Herndon, of Illinois, to be U.S. District Judge for the Southern District of Illinois; Judge Rebecca R. Pallmeyer, of Illinois, to be U.S. District Judge for the Northern District of Illinois; and Judge Jeanne Scott, of Illinois, to be the U.S. District Judge for the Central District of Illinois.

I invite you to continue to stand and raise your right hand, please. Would you please state your name, do you swear the testimony you shall give in the hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. DYK. I do.

Judge HERNDON. I do.

Judge PALLMEYER. I do.

Judge SCOTT. I do.

Senator DEWINE. You may be seated.

Let me again welcome everyone here today and welcome particularly the families of the nominees. Sometimes we have to state the obvious, or sometimes it is helpful to state the obvious. This is, as you all know, one of the steps in the process of becoming a Federal judge. It is, in a sense, the tip of the iceberg. We do not have, particularly with eight people here today, the opportunity to ask extensive questions. We hope our questions are relevant. We hope they are somewhat, at least, probing. But it is only the tip of the iceberg.

As the nominees know, they have already gone through a long process to get here. They have already spent a great deal of time filling out a very lengthy and probing questionnaire and they have answered a number of questions. So the public part of this is what we are seeing today. As the nominees know probably better than anybody else, there has been a long process to get here and there will be a process beyond this, of course, as well.

Let me just start, going from my left to right, and start with Mr. Dyk and ask each one of you to make any kind of statement that you would like to make. If there is anyone in your family who has not been introduced, now would be a great time to do that, and if you want to introduce them a second time, that will be fine, as well. Mr. Dyk, we will start with you and then we will just proceed right down the panel.

#### TESTIMONY OF TIMOTHY B. DYK, OF THE DISTRICT OF COLUMBIA, TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. DYK. Thank you, Senator. I would like to first thank the committee for giving me a hearing. I appreciate that very much, and just briefly, I would like to say that I regret that my father, Walter Dyk, is not here today. He died a number of years ago and it would have been a privilege to have him. I would like to thank my family and my colleagues from Jones Day and my colleagues for coming here today and I will spare the committee further introductions.

Senator DEWINE. Judge Herndon.

**TESTIMONY OF HON. DAVID R. HERNDON, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS**

Judge HERNDON. Thank you, Mr. Chairman. First of all, let me thank you for demonstrating your willingness to chair this meeting and taking your time to see to it that we have this appropriate airing of our views. Senator Durbin, I appreciate not only your presence but your introduction, and I certainly appreciate the words of Senator Carol Moseley-Braun and Congressman Shimkus.

My family has been introduced except Jimmy and Nicky were referred to as "and her family," and so I want to just be sure we mention Jimmy and Nicky.

But I do want to state, Senator, that I greatly appreciate not only the committee's asking me here today but also appreciate those people that are so important to me that have been introduced. I appreciate so much their love and support and am happy to be here with them. With that, Senator, I have no other opening statement. Thank you.

Senator DEWINE. Judge.

**TESTIMONY OF HON. REBECCA R. PALLMEYER, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS**

Judge PALLMEYER. Mr. Chairman, Senator Durbin, I also am extremely honored and grateful to be here and very grateful to Senators Durbin and Moseley-Braun for my selection.

I am very happy to have my family members with me here today, my parents, my husband, and our children, and I know that my brother, who is here, is joined by another brother and three sisters back home in wishing me the best and I appreciate their support.

Senator DEWINE. Thank you very much.

Judge Scott.

**TESTIMONY OF JEANNE E. SCOTT, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF ILLINOIS**

Judge SCOTT. Thank you, Mr. Chairman. I am grateful for the opportunity to be here and I thank you and the members of the committee for this hearing.

You have heard the introductions. I will not go through my family again, other than to say that my parents are very much on my mind today. Thank you.

Senator DEWINE. I appreciate it very much.

**QUESTIONING BY SENATOR DEWINE**

Mr. Dyk, let me start with you, if I could. In a 1994 Federalist Society roundtable discussion entitled, "Do We Have a Conservative Supreme Court," do you recall making statements about Justice Scalia's plain meaning approach to interpreting laws as being conservative, but a more expansive analysis as being moderate? In your response, you also stated that, "The notion is that Congress speaks only through the words of the statute and that this is a mechanical approach." You further explain that, "A Senator or a Congressman is much more likely to read the committee report than



the legislation itself, so the committee report could actually be more reliable than the words of the statute." I wonder if you would be so kind as to elaborate on this response.

Mr. DYK. Surely, Senator. I do recall the statement, and obviously, as a subordinate Federal judge, I would follow the Supreme Court's direction to rely on the plain language primarily. I do agree with that completely. At the same time, I think sometimes cases get into a bit of a dueling dictionary, and under those circumstances, I think it is appropriate often to look at the central purpose of the legislation, as the Supreme Court did, for example, this last term in the *Moscarello* case involving the question of whether carrying a firearm would include carrying a firearm in the vehicle, and after reviewing the dictionaries and press statements, the Court finally concluded that, yes, it did encompass carrying the firearm in the vehicle because the purpose of the statute was to require the criminal to leave his gun at home.

So I do think that statutory purpose and background do have a role to play as to legislative history, but I certainly agree that the primary meaning of the statute is to be gleaned from the plain language that Congress uses.

Senator DEWINE. And that recent Supreme Court decision, again, just to clarify for me, demonstrates to you what?

Mr. DYK. It demonstrates to me the importance of looking at the purpose of the legislation, which in this instance was to cause the criminal to leave the gun at home. So any ambiguities in the meaning of "carry" were resolved in favor of broader construction of the statute, which would punish having a gun in the car.

Senator DEWINE. I wonder if we could take this one step further and talk about a case that might be before you that was a case of first impressions where there was not Supreme Court precedent and there was not circuit precedent, I wonder if you could describe for us your process of analysis. You have done this a little bit, but I wonder if you could just elaborate on it.

Mr. DYK. Surely, Senator. Obviously, if there were a case in point from the Supreme Court or from the circuit, one would follow that, but if there were not, I would look to analogous precedent in the Supreme Court and in the Federal circuit, the other circuits, and if it were a statutory construction case, I would look at the language of the statute and go through the process that I have just described to you. If it were a constitutional case, I would look at the language of the Constitution, at the principles embodied in the Constitution, and at prior precedent in an attempt to resolve the case in the narrowest possible way, because I think, as I also said in that Federalist Society panel, I think judges need to be very careful not to write more broadly than is necessary.

Senator DEWINE. It sounds like that was an interesting panel.

Mr. DYK. It was a wonderful panel. Judge Bork was there and others, yes.

Senator DEWINE. Let me just, if I could, continue on this train of thought and ask you another question about that same panel. You made the following statement. I will ask you if you recall it. If you want me to put it in better context, I will. I think I have the transcript here. Let me just give you a quote and ask if you could maybe expand on it.



"*Roe* and the flag burning cases reflect a moderate Court in the area of civil constitutional law." I wonder if you could explain, what did you mean by that?

Mr. DYK. Well, I think the reference to the flag burning case was following the earlier precedent in that area, in that I think I characterized moderate jurisprudence, conservative jurisprudence, as following the precedent, and I think the same thing is true with respect to the Court's decision to rely on *stare decisis* in relation to the *Roe* case. Having that precedent on the books, it was appropriate to follow it, and that was the view I was expressing.

Senator DEWINE. You have expressed some strong opinions in regard to the issue of cameras in the court. You have been involved in that.

Mr. DYK. Yes, for many years.

Senator DEWINE. Yes. I have some interesting quotes from you, and I just wonder if you could just tell me where you think we should go in this area. You have already expressed your opinion about it, but I would like for you to elaborate a little bit and explain what public policy advantages you see in opening up the Federal courts to cameras.

Mr. DYK. Senator, the Supreme Court, of course, told us in the Richmond newspapers case and later cases about the importance of openness in the judicial system and how that served not only to educate the public, but even more important, that it served the system itself. Along that line, I think that having cameras in the courts allows the public that cannot visit the court, that does not read about it in the newspapers, to see the functioning of the judicial system, and I have always thought it was critical that the public understand how the system functions, for good or bad, and that having the cameras there gives information to a wide body of the public that would otherwise not receive it.

Senator DEWINE. One of the counterarguments might be—and I must say, Mr. Dyk, I happen to agree with you, just as an aside, sort of irrelevant to the question—but one of the counterarguments that is made is that cameras in the courtroom change conduct. Judges act differently. Lawyers act differently. Jurors might act differently. How do you react to that?

Mr. DYK. Well, those concerns, of course, have been expressed, and genuinely so, by many people. The experience in the State courts, which have had cameras in many States for a number of years, has been that the judges who have presided at those trials, who have had the experience, have thought that there was not an adverse effect on trial participants and that, indeed, having cameras there can make the judges, the witnesses, the jurors, the lawyers behave better than they otherwise would.

Senator DEWINE. Better?

Mr. DYK. Better.

Senator DEWINE. Let me—go ahead.

Mr. DYK. I am sorry, Senator. I think that few judges would go to sleep with a camera in the courtroom. [Laughter.]

Senator DEWINE. One never knows. One never knows. Strange things do happen.

Let me just conclude—and then I will turn it over to Senator Durbin, along this line, on a quote that you made which I think is particularly interesting. This is your quote and your words.

In times past in this country, people who wanted to find out about a case could go down to the courthouse and watch and learn. That is not feasible anymore. Now, people who want to watch the Federal courts will be confined to secondhand reports.

I think that expresses it very well.

Mr. DYK. Thank you, Senator.

Senator DEWINE. Senator Durbin.

#### QUESTIONING BY SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Dyk, let me say at the outset, I had an interesting experience a week ago. I was last Saturday in Lake Forest, IL. A mature lady came up to me and said that she had always been fascinated with politics and if she had been born 20 years sooner, she would have been a candidate. I said, well, can I be so bold to ask your age, and she said, "I am 87 years old." I said, oh, congratulations. She said, "Well, I am a Wellesley grad, you know, and we live a long, long time." It is a testament to your mother and her presence here today and it says something about Wellesley. I never heard it before, and now I have two living examples to point to.

I would like to ask, since I am so familiar with the Illinois nominees and I have talked to them about this, I really would like to ask, for the record, about a case which I think would go to some of the questions asked by the chairman. Probably the most notorious, outstanding, noteworthy, you pick the adjective, law case of our generation was the O.J. Simpson trial. Driving around the city of Chicago, every cabbie had it on the radio, following it every day, and people have gone back and forth in their opinions about what it meant and what it said.

I would like to ask each of you, as aspiring judges or as sitting judges, what lessons did America learn from the O.J. Simpson trial? Mr. Dyk.

Mr. DYK. Well, I think that, contrary to the views of many people, that having the O.J. Simpson trial on television did teach the public some important lessons, and I think one of the lessons that it taught the American public is the importance of a judge controlling the judicial proceedings, and that did not happen to the extent that it should have in the O.J. Simpson trial.

I think it taught the American public about the importance of having fairness in proceedings, fairness on the part of the prosecutor, fairness on the part of the defendant, and that they saw that the jury could reach a verdict which many people disagreed with. I think it brought into the public arena debates about the jury system, about how prosecution should be conducted, how defense lawyers should conduct themselves, and I think that was very, very important.

Senator DURBIN. Thank you. Judge Herndon.

Judge HERNDON. Senator, I did not have the opportunity to watch any of that proceedings, but I know that it seemed like everywhere that I went, whether I was in my courthouse or on the street or no matter where I went, people wanted to talk about that case. I think that it makes the case certainly for openness in the



court system and I applaud anyone's efforts to make our court system as available and as open to everyone as they can.

But it also, I think, demonstrated the worst side of that, when there was not, apparently, as much control as perhaps there could have been, and the most common characterization I can recall hearing about that case was the circus atmosphere that surrounded it, and I think it taught us that if you are going to approach the openness from that standpoint, a great deal of control, because of the interest of the parties in that litigation, are just as important as the public's right to know.

Senator DURBIN. Judge Pallmeyer.

Judge PALLMEYER. I think the trial communicated, at least to many Americans, the difficulties and complications in conducting a trial in which so many individuals were involved and had so many interests. I think it may have perhaps suggested or conveyed an image of what goes on in the courtroom that is probably not consistent with what goes on in most courtrooms, whether they are State or Federal. Rare, indeed, is a trial, even a difficult and violent murder trial, so long, and rare, indeed, does the jury need to wait so long in order to hear evidence and ultimately deliberate. Those are delays that we like to avoid wherever it is possible.

Senator DURBIN. Judge Scott.

Judge SCOTT. Like Judge Herndon, I did not get to see much of the testimony or television of it, but I, too, think that it brought home some of the deficiencies of the system and the need for a judge to keep control of the trial itself and to help move the case from beginning to end. In some respects, I regret that if there was going to be one case televised and all of America watch it, that it was that case rather than some that are so exceptionally well-tryed from everybody's perspective.

Senator DURBIN. Thank you for your answers on that.

There is one other element that I always like to reflect on, as a former practicing attorney before a lot of judges, and that is the fact that when you are confirmed, and I hope that you all are soon, you will have a lifetime appointment, and that sometimes leads to a great feeling of independence, as it should. That is the nature of the judiciary. And it sometimes leads to a change in temperament, because folks are not really going to be held accountable as elected officials might be.

If you could each address briefly this issue of judicial temperament and give me your idea of what is required of you if you attain this position, I would appreciate it. Judge Scott, if you would start.

Judge SCOTT. Well, I do think judicial temperament is a very important feature for a judge and to keep in mind the importance of treating the lawyers, the litigants, the jurors, the court personnel with courtesy and respect. I would hope that after 19 years' experience on the State court and, I hope, a good reputation for those qualities, that I would not undergo a transformation and become Attila the Hun.

I think something that is helpful, frankly, to me, is to have some people in your life who call me "Jeanne" and not "Judge" and to keep me down to earth, and I do have a base in Springfield of people who have known me for years who will not be the least bit impressed no matter what office I hold. [Laughter.]

Senator DEWINE. We all need people like that.

Senator DURBIN. That is right. Judge Pallmeyer.

Judge PALLMEYER. All judges need to be fair and all judges need to be hard working, and I think another characteristic that really is appealing for judges is humility. I am confident that I will retain humility because I think it is an awesome responsibility and I believe strongly that courtesy to the litigants and absence of arrogance are absolutely critical qualifications.

Senator DURBIN. Judge Herndon.

Judge HERNDON. Senator, I certainly do not disagree with the comments of my colleagues. I had the opportunity over the nearly 15 years I practiced law to practice in a variety of courthouses around the country. I had the opportunity to see any number of judges and learn what was good about some and what was bad about some others.

Since the time I have been on the bench, I have made every effort to be the kind of judge I would have wanted to appear before as a trial lawyer. I understand that, or, at least, it is my endeavor that if I gain respect while on the bench, and this has been my philosophy on the State bench, that it is not because of an arbitrary rule requiring a certain demeanor or requiring a certain action in the courtroom in the name of decorum. If I attain respect, it will be because I have accorded people respect. It will be because of the decisions I have made and the way I have handled my business.

As a very minor point, I was favorably impressed to a great extent when you called me the other day to tell me about this hearing and you said, "Judge Herndon, this is Dick Durbin." You did not say, "This is Senator Durbin," you said, "This is Dick Durbin." When I call law offices to schedule cases, I say, "This is Dave Herndon calling," and I am oftentimes criticized by lawyers, "Why did you not tell my secretary you are a judge?" I say, "Because I am Dave Herndon."

Senator DURBIN. Thank you. Mr. Dyk, you kind of started at the top here, according to your résumé, your first assignment as a clerk in the U.S. Supreme Court to three Justices, including the Chief Justice, so you have seen judicial temperament at many different levels. What are your thoughts about it when you are confirmed?

Mr. DYK. Well, that first experience helped humble me, Senator Durbin, and I completely agree with you. I think it is very, very important for a judge to remember that he or she is a civil servant. That is exactly what judges are. They have a job, just like the postman. The postman delivers the mail. Judges decide cases that come before them. I think if you lose sight of that, you really do not belong on the bench. I think it is absolutely essential to be as courteous as possible to everyone, to remember that you have a job to do, to be a jobist, in Justice Holmes' words, and to do the best you possibly can at all times and to have people who will keep you humble. I am sure my little league team will help with that.

Senator DURBIN. Mr. Chairman, we can now say to the attorneys of America, we have them all on the record. Thank you very much.

Senator DEWINE. Senator Durbin, thank you very much.

Mr. Dyk, you have been nominated to be a circuit judge for the Federal circuit. Can you tell me why you want that job? For some of us, looking at the jurisdiction, we might think it might not be



the most interesting job. What prepares you for it, but also, why do you want it?

Mr. DYK. Senator, I have always wanted to be a judge and I think the Federal circuit is a wonderful court. I have had the honor to practice before that court a considerable amount in the last few years. I think I have argued five times before it. I have briefed other cases. I guess I have always been in my practice someone who has found a patent case to be as interesting as a first amendment case. In each instance, there is a challenge——

Senator DEWINE. It sounds like you are in the right court. [Laughter.]

Mr. DYK. I think there is a challenge to understand the case, and I think the Federal circuit presents particular challenges because I think the cases are difficult, they require a great deal of time and attention, and I would enjoy it and I would particularly enjoy being part of a process and trying to make that process work in the best possible way.

Senator DEWINE. Objectively—trying to stand back from your experience practicing in that court—what are the qualities that, as a litigant or as a practicing attorney in that court, you would look for in a judge of that court?

Mr. DYK. I think a commitment to work through the difficulties of the cases, to understand them, I think to try to create a situation where the reversal rate of district courts is less than it is now. I have heard percentages like a 53-percent reversal rate, which——

Senator DEWINE. Really?

Mr. DYK [continuing]. Which would be extraordinary by other circuit standards and there is something lacking there in communication, I think, when that happens.

One of the things that I think that court should strive for is perhaps more emphasis on settlement. It does not have a mediation program now, unlike many of the other circuits. I had experience with the eighth circuit mediation program recently and it was excellent and resulted in a settlement.

Senator DEWINE. Thank you very much.

Judge Herndon, just a matter of curiosity. I had to check with my Illinois expert here for my recollection of history, but your last name is Herndon. As I recall, President Lincoln's law partner was Herndon. Is there any relationship here?

Judge HERNDON. I should probably defer to my brother, who is the genealogical expert in our family, but it is not a close relationship, Chairman. As I understand it, William Henry Herndon, who was Lincoln's law partner, was my great-great-great-great-grandfather's cousin, or something along those lines. [Laughter.]

Senator DEWINE. That counts. That counts.

Judge HERNDON. I am proud to stand before you as a Herndon, Mr. Chairman. Thank you very much.

Senator DEWINE. Thank you. In the lengthy questionnaire that you fill out, one of the questions asked (of those who are sitting judges) is how many times have you been reversed or affirmed with criticism? You have listed the number 26 here. What significance should that have to anyone looking at your career?

Judge HERNDON. Of course, I think what is important is the nature of the particular cases. In my situation, I had far more affir-

mations than I had reversals. I had a docket with well over 1,200 cases during that period of time. A good number of those cases were, I have to add, administrative law review cases and work comp cases.

And after being reversed on several occasions in those, and I think I had about nine reversals in work comp cases alone, I finally asked one of the appellate court justices what I was doing wrong and he said, "The thing you are doing wrong is you are not rubber stamping the Industrial Commission. If you affirm the Industrial Commission, you will be affirmed. If you reverse them, you will be reversed. That panel does not look at the record. They do not care what the result was. They simply affirm the Industrial Commission, and if you will look at your records and others, you will find that to be the case."

Despite that advice, I felt confident that my job was to look at the record, was to determine what happened below and did what I thought was the right thing to do.

Senator DEWINE. Thank you very much.

Judge Pallmeyer, you were appointed by Chief Justice Rehnquist in 1994 to a 3-year term on the judicial Resources Committee of the U.S. Judicial Conference. It is my understanding this committee studied the impact of imposing the Congressional Accountability Act of 1995 on the judiciary. Can you tell me a little bit about that experience and what you learned?

Judge PALLMEYER. The study was conducted in, as Congress directed, and I believe it was in 1996. What I learned was a great deal about the way the courts right now resolve employment-related disputes and what things we ought to be doing better and what things we might be doing to enhance the sense that employees are, in fact, free to come forward with concerns and get them voiced and have a resolution.

Senator DEWINE. Can you elaborate a little bit on that? Just give me one example.

Judge PALLMEYER. I think it is difficult in a court setting for an individual to come forward and make a complaint, particularly where that individual might be making a complaint about a judge, and that is something that we have to be sensitive to, just as Congress has directed, that we make a dispute resolution form available, and, in fact, we proposed and have adopted in almost every circuit a new dispute resolution program that identifies persons to whom complaints can be made and sets up a procedure in which those complaints can be made and heard.

Senator DEWINE. Thank you very much.

Judge Scott, let me ask you the same question that I asked Judge Herndon. You had to fill out the same questionnaire and you were asked how many times you have been reversed or affirmed with criticism. I think you listed 26 times there since 1980. What, if any, significance should that have for anybody looking at your record?

Judge SCOTT. I think anyone who looks at our record and wants to draw significance from the number of reversals needs first to know what type of cases are we hearing and what is the scope of the magnitude of the issues and complexity of them.



Some judges can serve in assignments with relatively less complex issues and never be reversed and still, perhaps, not be among the more respected members of the local bench. So I think you really need to know what type of work the judge is doing in order to draw significance. The raw number may seem a little high, but, hopefully, the percentage is not out of line.

Senator DEWINE. Let me ask you and Judge Herndon both a question. Do you think that the questionnaire that you fill out gives you an adequate opportunity to explain that?

Judge SCOTT. Well, it would be helpful to at least note the number of times when it has been affirmed or the percentage. I have been on the bench 19 years and I believe I have been affirmed over 80 percent of the time, but you only ask for the reversals.

Senator DEWINE. We can take that up with the committee. That is a pretty good point. That is a good point.

Senator Durbin.

Senator DURBIN. I have no further questions of the panel at this point.

Senator DEWINE. I, unfortunately for the panel, have a couple more questions that I would like to ask. Judge Herndon, can you describe your role in the Southern Poverty Law Center and what the purpose of that organization is?

Judge HERNDON. Sure. As I understand the organization, I do not know a lot about it, it is an organization that strives for civil rights. I received a solicitation in the mail one day that talked about teaching tolerance in schools, teaching people to get along regardless of their race. I felt it was a good program. I sent them a contribution and I got in the mail a membership card. So when the questionnaire asked me if I was a member of something, I had a membership card in hand and I thought, well, I guess I am a member of this. I have not attended any meetings. I have never been involved in the organization, other than simply sending them a contribution for their teaching and tolerance program.

Senator DEWINE. Judge Scott, would you please explain your role and purpose in revising the Illinois Supreme Court rules on judicial conduct during the time you served as chair of the Illinois Supreme Court's Committee on Judicial Conduct?

Judge SCOTT. Yes, Senator. Actually, when I was chair of the committee, we did not revise the rules, but I was a member of the committee when we did. The committee was set up specially by the Illinois Supreme Court and given a mandate to look at, I believe, three of the canons of ethics in Illinois plus consider adding a preamble to the code of ethics, and that was done at the supreme court's request following some changes in the model code nationally.

So we met a number of times. We had representation from throughout the State. The diversity of Illinois is very interesting on these kinds of things, and we struggled through and made recommendations to the Court. The Court accepted in total sum and modified some of our recommendations. But we had a mandate to look at, I believe, three canons plus consider adding a preamble and defining terms, which we did.

Senator DEWINE. Thank you very much.

Mr. Dyk, Chairman Hatch has asked me to ask you a series of questions, which I am now about to read to you. These are questions that Senator Hatch would like for you to answer.

In *Phillips v. Washington Legal Foundation*, the Supreme Court recently ruled that so-called IOLATA interest funds which pool small client trust accounts to earn interest must follow the principal deposited in those accounts. While it is hardly a novel ruling that interest follows principal, there has been considerable debate over whether the use of these accounts constitutes a taking. Do you have any comments with respect to this case or the takings issue the fifth circuit will soon need to address?

Mr. DYK. My firm has been involved in that case, though I have not been personally. It is a very important case. It presents a very difficult issue, and I think the whole takings area is becoming more and more important and it remains quite complex, as I think the takings issue in that particular case will be on the remand. There is an argument as to whether the *Penn Central* factors should be followed or whether those can be dispensed with, and I think there is a certain lack of clarity in the law and that we would all benefit from further Supreme Court decisions on that subject.

Senator DEWINE. As you know, many modern takings clause cases involve so-called regulatory takings. When confronted with a regulatory takings case, what basic principles would you apply in determining whether a taking has occurred?

Mr. DYK. I think the job of a junior Federal judge on the Federal circuit, first of all, is to follow the Supreme Court, and in the *Lucas* case and in the *Dolan* case, the Supreme Court has given us considerable guidance as to how to approach that. But the regulatory takings issue is a very important question and it seems clear that if the entire economic use has been destroyed as a result of the regulation, that there in many circumstances is going to be a claim.

What is not so clear and needs to be clarified is what is the situation if the regulatory action does not deprive the owner of the entire economic use. Of course, Justice Scalia has suggested there may be differences between land and personal and a wide variety of factors that need to be considered.

Senator DEWINE. In your opinion, should the normal presumption of constitutionality that is given to statutes and regulations apply to such regulations that give rise to potentially compensable takings?

Mr. DYK. Well, if I understand the Supreme Court correctly and the Chief Justice's remark in the *Dolan* case, that there is under these circumstances not a presumption of constitutionality but that it has to be approached on a de novo basis.

Senator DEWINE. Finally, the Bill of Rights in large part protects citizens from government excesses or abuse. The first amendment, for example, prohibits government from regulating our speech or forcing us to worship in any particular fashion. Similarly, the fifth amendment prohibits the government from, among other things, forcing us to testify against ourselves. That amendment, of course, also prevents the government from taking our property without just compensation.

You have engaged in considerable first amendment litigation in your practice. Could you identify for us the similarities you see, if



you think any exist, between the first amendment's protection of speech and the fifth amendment's protection of private property?

Mr. DYK. Well, the Chief Justice has himself addressed that question, suggesting that both provisions are in the Bill of Rights and that both provisions deserve special attention as a result of that.

Senator DEWINE. I have two additional questions from Senator Thurmond. So even though there are only two of us up here—[Laughter.]

Mr. Dyk, I understand that you have been a member of the board of directors of People for the American Way for many years. Please explain why you joined the board of directors and, generally, your interest in this organization.

Mr. DYK. I was invited to join the board of directors in the aftermath of a litigation that I became involved in through People for the American Way. I thought that People for the American Way did some interesting and important things. I did not agree with everything that People for the American Way did. In fact, one of my early experiences with the organization was to have a very heated debate within the organization about whether the People for the American Way should continue to endorse the fairness doctrine. My own view was then and continues to be that the fairness doctrine is unconstitutional and People for the American Way endorsed it. I think it is a valuable organization. I think it was a valuable organization. I did not agree with everything it did.

Senator DEWINE. Let me follow up. Senator Thurmond's next question covers this to some extent, or you have already covered it a little bit, but I want to get more particular. Senator Thurmond asks, are you aware of any cases taken or amicus briefs filed by the People for the American Way while you were on the board of directors that you did not agree with?

Mr. DYK. Well, certainly the position in the fairness doctrine cases where they were on the other side from me in litigation was a primary example of that. The board was generally not asked to pass on whether particular cases should be filed. It was a board of about 50 people. Those decisions were made by the president of the organization and sometimes in consultation with the executive committee.

Senator DEWINE. It was actually just made by the president?

Mr. DYK. Most of them were just made by the president, and if he had something particularly difficult, he would consult with the executive committee. I was not a member of the executive committee.

Senator DEWINE. It was not an amicus committee, or—I mean, it was just basically the president?

Mr. DYK. Well, the president in consultation with his staff, including the litigation director, but there was no amicus committee or anything like that.

Senator DEWINE. Senator Durbin.

Mr. DYK. Senator, could I clarify just one answer I gave to you?

Senator DEWINE. Absolutely.

Mr. DYK. I would not want to leave my colleagues in the Federal Circuit with the impression that the reversal rate was 53-percent

overall for the entire court. I was referring to intellectual property cases. I do not think I made that clear.

Senator DEWINE. Thank you very much. I appreciate that. Do any of the members of the panel want to add anything else? Judge.

Judge SCOTT. No, Senator, I do not.

Senator DEWINE. The record will remain open. The procedure of the committee is that you may receive additional written questions from members of the committee, so you can be prepared for that possibly occurring. The record will remain open for additional questions until the close of business tomorrow, July 17. We thank the second panel very much.

Mr. DYK. Thank you.

Judge HERNDON. Thank you, Mr. Chairman and Senator Durbin.

Judge PALLMEYER. Thank you very much.

Judge SCOTT. Thank you.

Senator DEWINE. Let me invite our second panel to start coming up. First will be Carl Barbier, of Louisiana, to be U.S. District Judge for the Eastern District of Louisiana. Our second member of the panel will be Judge Gerald Bruce Lee, of Virginia, to be U.S. District Judge for the Eastern District of Virginia. Our third witness will be Nora Manella, of California, to be U.S. District Judge for the Central District of California. And our fourth member of the panel will be Patricia A. Seitz, of Florida, to be U.S. District Judge for the Southern District of Florida.

I would ask the third panel to remain standing and to raise your right hand, please. Do you swear the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BARBIER. I do.

Judge LEE. I do.

Ms. MANELLA. I do.

Ms. SEITZ. I do.

Senator DEWINE. Please be seated. Thank you very much.

We will follow basically the same procedure. Mr. Barbier, of Louisiana, you can start off. I will just go from my left to the right and ask any of you to make any opening statement that you would like to make. If you have anybody in the audience who has not been introduced that you would like to introduce, you certainly are welcome to do that and we encourage you to do that. Thank you for joining us. Thank you for your patience.

#### **TESTIMONY OF CARL J. BARBIER, OF LOUISIANA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA**

Mr. BARBIER. Thank you, Mr. Chairman, members of the committee. I want to first thank the committee for conducting this hearing. I would like to especially thank Senator Breaux and Landrieu, who were here earlier to help introduce me and, of course, for recommending me for this position, and also Congressman Jefferson, who was here.

I might mention that it is my understanding that Congressmen Livingston, Tauzin, and John, although they could not be here, either have or will send letters of support on my behalf.

Senator DEWINE. And those certainly will be made a part of the record.



Mr. BARBIER. I appreciate that, Mr. Chairman.

I think the committee has already met my wife of 31 years, Peggy. She is here. I would like to introduce several dear friends who are here and have come a long way with me and they have not been introduced, Hank and Celie Linden from Baton Rouge, Leah Grierry, also from Baton Rouge, and Ken Carter from New Orleans.

Unfortunately, my three children, all of whom are now grown and very much engaged in their own work activities, could not be here. My 6-year-old granddaughter, Haley, also could not be here, to her great regret because her dream already is to see the White House and the Capitol, and she made me promise to bring her photos back, and I will.

Senator DEWINE. It sounds like another trip.

Mr. BARBIER. Another trip, right. My mother and father, Mary and Walter Barbier, could not be here, but I know they are here with me in spirit, and thank you, Mr. Chairman.

Senator DEWINE. Thank you very much.

Judge Lee.

#### **TESTIMONY OF GERALD BRUCE LEE, OF VIRGINIA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA**

Judge LEE. Thank you, Mr. Chairman and Senator Durbin. I would, first of all, like to thank the committee for convening the hearing. I would like to thank Senators Robb and Warner for their remarks and for their confidence with respect to this nomination.

I would like to introduce just briefly, with a little indulgence, the love of my life, Ms. Edna Ruth Vincent, my wife. My brother, Mert, and my sister, Karen, are over here, my Aunt Louise, my brother-in-law, Tyrone. I have a cousin, June Cooper, who is the Personnel Director of the U.S. Sentencing Commission and she was here earlier, my sister-in-law, Dorothy Rodgers, and my best friends, Tyrone and Pamela Harris.

I have my court support staff here, Nancy Christiansen—if they would all stand when their names are called—Nancy Christiansen, James Haynes, my court security officer, Ornetta Campbell, my probation officer, and all my law clerks, Heather Garrow, Savalle Sims, O'Kelly McWilliams, Martin Conway, Robert Garnier, and—

Senator DEWINE. Senator Durbin says, no court today, right? [Laughter.]

Judge LEE. No court today. They are here with me today.

And as Senator Robb acknowledged, the day I received the call from the committee was the day that we laid to rest my father, James Lee, and I would like to, for his memory, mention his name and my mother's name, Carrie Bernice Green. Because of them, I am here today, and I thank you so much for your time.

Senator DEWINE. Thank you very much.

Ms. Manella.

**TESTIMONY OF NORA M. MANELLA, OF CALIFORNIA, TO BE  
U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALI-  
FORNIA**

Ms. MANELLA. Thank you, Senator. I, too, of course would like to thank the committee for inviting me here today and would like to thank Senator Feinstein for her recommendation.

As a spinster, I feel at something of a competitive disadvantage to these candidates. [Laughter.]

I would love to be introducing my adoring and supportive spouse and my talented and accomplished children, but since I am unable to do that, I would simply like to pay tribute to my parents, my extraordinary mother, Nancy Manella, who is in Los Angeles, and my late father, Arthur Manella, the co-founder of the law firm of Irell and Manella, who passed away before this nomination but who, again, is with me in spirit.

Senator DEWINE. Thank you very much.

Judge LEE. Senator DeWine, I forgot to mention that my son, Max, and my daughter-in-law, Barbara, could not be here.

Senator DEWINE. I am glad you remembered that. [Laughter.]

Ms. Seitz.

**TESTIMONY OF PATRICIA A. SEITZ, OF FLORIDA, TO BE U.S.  
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA**

Ms. SEITZ. Mr. Chairman, I, too, am very grateful to this committee for the opportunity to appear here today. I have no prepared remarks. I am very honored by the kind words of Senator Graham and Senator Mack and Congressman Ramstad. I feel incredibly honored to be Senator Graham's choice and I am just pleased to be here.

If I may have your indulgence, there were two people that were not mentioned. One is my close colleague and friend from ONDCP, the chief of staff, Janet Crist, if she will stand, and I would like to mention my father, Gen. Richard Seitz, who is, unfortunately, not able to be here. He really wanted to be here, and following Ms. Manella's comments, I, too, would like to respect the memory of my mother, who died 20 years ago, Betty Merrill Seitz.

Senator DEWINE. Thank you all very much.

**QUESTIONING BY SENATOR DEWINE**

Let me ask you all just a general question, and that has to do with what we call judicial temperament. I am never sure exactly what that means, so I am going to let you define it for me. What does that mean, and what should we look for on the bench from a judge in regard to judicial temperament? We will just start, I guess, from my right this time. Ms. Seitz.

Ms. SEITZ. Mr. Chairman, three things stand out for me as far as a judge. The first is patience, the next is objectivity, and the third is diligence, and you demonstrate those by doing your homework, when people come before you, actually listening to what they have to say, treating everyone that is within your sphere with respect, so that as they leave, having had a contact with the judicial system, they felt that they got a full and fair hearing, and if a judge does that, I think that they demonstrate judicial temperament.



Senator DEWINE. Ms. Manella.

Ms. MANELLA. Senator, I have been told that the shortest period of time that scientists have learned to measure is the period of time it takes a sitting judge to forget what it was like to be a practicing lawyer. That, no doubt, reflects——

Senator DEWINE. Those of us who have practiced have seen that, yes. [Laughter.]

I am sure it is rare, but we have seen it.

Ms. MANELLA. I have had the benefit of being on both sides of the well and of actually flip-flopping. That is, I was a practicing lawyer and a practicing prosecutor for a number of years, then a State court judge for 4 years, and then back on the other side of the well. I would like to believe that during the 4 years I spent on the State court, I developed some techniques for overcoming the kinds of frustrations that I think lead to a lack of judicial temperament. And in my current position with 240 of my lawyers appearing daily in the Federal courts, I have a bird's eye view of the experiences that they face before the various judges.

I agree with Ms. Seitz that civility, preparation, and courtesy are essential. They make everyone's life go more smoothly and I think judges simply have to develop the skills to allow them to overcome any tendencies they have to be short, to be uncivil, to be unprofessional.

Senator DEWINE. Judge Lee.

Judge LEE. Mr. Chairman, I think that judicial temperament is the idea that a judge should be patient, dignified, and courteous to all litigants who appear and witnesses who appear in their courtroom, to be prepared with the law, to be patient as the witnesses present their cases, to listen, and to be concerned with fairness with respect to how your decision is announced and remember that your decision impacts people, impacts businesses, and what I would always like when anyone appeared before me is that for the person who lost, the loser to believe that they had a fair trial, that I listened, and even though they may disagree with my decision, they would think they were treated fairly. I believe that is the essence of judicial temperament.

Senator DEWINE. Mr. Barbier.

Mr. BARBIER. Thank you, Mr. Chairman. I think I was fortunate, because my first real job out of law school was as a law clerk for a Federal district judge in New Orleans by the name of Fred J. Cassibry, and all persons from Louisiana who knew the late Judge Cassibry knew what a wonderful human being he was and how he was able to maintain firm control of his courtroom yet treat all persons, lawyers, litigants, and witnesses who came before him with the greatest dignity and respect and courteousness. So he would be and he is my role model.

I also recently was in the courtroom of a State court judge in the New Orleans area who is a friend of mine and he took me behind the bench during a recess to show me a little sign that he keeps in front of him at all times that he said his wife gave him after he took the bench and it said, "Three rules to follow: No. 1, be prepared; No. 2, think before you speak; and No. 3, never take yourself too seriously." I think that is probably good advice for all of us and I would hope to abide by that, also.

Senator DEWINE. Thank you very much.

Judge Lee, let me ask the question that I asked our two other sitting judges in the previous panel. As you know, you were required to, in the questionnaire that you filled out, to list the cases where you have been reversed or cases where you have been criticized. I wonder if you could tell me what significance that should have for anyone judging your record.

Judge LEE. Well, I think that it certainly is important to consider my judicial performance. Like Judge Scott, I would say that I acknowledge that I am not always right and that I do not know everything, and that is what the Supreme Court and the Court of Appeals are supposed to do. They are supposed to review my decisions, and if I have erred, to correct them, and I learn from them and move forward.

As a trial judge in a large urban area, it is important for the committee to note that I am responsible for 1,500 cases per year and I have done that for 6 years. So in weighing the percentage of affirmances, it is important to note that I have also been affirmed a number of times in very complex cases by the Supreme Court of Virginia and Court of Appeals.

But, as I said, I think it is sometimes right, sometimes wrong, but never indecisive. [Laughter.]

Senator DEWINE. Good answer. And the unspoken thing is, and we cannot say this to the Court of Appeals or the Supreme Court, but sometimes they are just wrong. I will not ask you to comment on that, but I can. [Laughter.]

Senator Durbin.

Senator DURBIN. Thank you very much.

#### QUESTIONING BY SENATOR DURBIN

You are at an unfair advantage because you heard questions asked to the previous panel, but I have been fascinated, of all the people we have interviewed for the Federal bench, I have asked them all that same question that I am going to ask you because I think if most Americans were asked to identify one trial that they could remember, it would be the O.J. Simpson trial, and I would like to ask you first, Ms. Seitz, if you would tell us, what did America learn from the O.J. Simpson trial?

Ms. SEITZ. I cannot speak for all of America, Senator. I can give you my reaction. I chose not to watch the trial because I was very embarrassed on behalf of the legal profession. I felt that it did not demonstrate what we should be doing in the way of promoting fast, efficient administration of justice.

Having said that, out of every negative situation, we can always find a positive, and I think the earlier panels mentioned that. We may have seen the way not to do it, and in that, had an opportunity to see the complexity that is involved in the judicial system and in weighing the questions of guilt and innocence and that it is not easy to make those decisions. Hopefully, everyone gained greater respect for the role that the jury plays in our judicial system and how tough it is to be a juror.

Senator DURBIN. Ms. Manella.

Ms. MANELLA. Well, a few disclaimers, Senator. Of course, I used to sit on the court where that case was tried. The judge is a former



colleague of mine. Mr. Cochran had argued motions before me, not successfully, I might add. I was friends with some of the people from one of the networks who covered it, and I, too, did not watch a second of it on television. I did not fear that, living where I lived and being across the street from camp O.J., where the cameras were set up, that there would be anything about that case that would not be brought to my attention.

I think that one should be chary in attempting to discern any universal lessons from that trial. I believe it was an aberration in many, many ways. I can say as something of an authority on criminal cases in Los Angeles Superior Court, it was not typical in any way, shape, or form, and that to take an extraordinary case like that, which was extraordinary for a variety of reasons, and I think we all understand, and to try to derive too many universal lessons from it, I think would be a mistake.

Senator DURBIN. Judge Lee.

Judge LEE. Senator Durbin, I think that the *Simpson* case, and again, we are here now reflecting upon it from our own perspective, I think that for a Virginia jurist looking at the way the case was managed, that they are second-guessing that we might have done with respect to some of the decisions made about the management of the case.

I think what the public has learned from the system is the importance of the criminal justice system, the importance of jury service, the hardships of jury service, and I think, as a judge, what I learned was that there are lessons to be learned with respect to managing a high-profile case and ways to manage it efficiently that preserve the rights of the defendant on trial and the commonwealth to present their case. It is not something we would ever do in Virginia. It is rare. We sequestered maybe one jury in 22 years in my county, and we have had complex, high-profile cases. We just do not do it that way.

Senator DURBIN. Mr. Barbier, first, let me say that I have some difficulty with your name because my brother-in-law has the same name and pronounces it Barbier, but Mr. Barbier—Louisiana—

Mr. BARBIER. Thank you, but anything would do today. [Laughter.]

Senator DEWINE. You know the venue.

Mr. BARBIER. Senator, in Louisiana, we do not have TV cameras in the courtroom, with very rare exceptions of some limited coverage on a case-by-case basis in the appellate courts. But in trial courts, there is no coverage, TV cameras in the courts, either State or Federal. So I have no personal experience.

With regard to the *O.J.* case, not having watched the trial but, obviously, watching news reports and hearing the commentators on it on the nightly news reports, I think the lesson to be learned there is it shows the need for a trial judge to take control of the case, control of the courtroom, and manage the case, and I am not trying to be critical of that particular judge, but perhaps there was some—and I am not familiar with the procedural rules in California enough to know whether there are some procedural rules that mandated certain of the rulings that he made.

But my lesson from it is that it does not and should not have to take that long to try a murder case. I see in Federal courts, one

judge in New Orleans that I know, a Federal judge, said that case would have been over in 2 or 3 weeks. In a State court, the criminal court judge in New Orleans said it would have been over in 3 days. Now, that may be a little bit of exaggeration, but I think the point is that it teaches us about the need for management and active management in the courtroom.

Senator DURBIN. Thank you. One of the enduring symbols of justice in America is a statue involving the woman holding the scales with the blindfold, hoping to say to all that our system of justice is blind to those elements which may separate us, that we come to the courtroom in equal status, and I think those of us on this panel feel personally a responsibility to address that from time to time and to ask those who would be in the role of judge whether they feel that, in fact, our system of justice is attaining that goal in terms of treating all in the courtroom equally. Of course, that goes beyond the obvious questions of gender and race and ethnic background and religion to the question of whether the poor have as much chance in the U.S. judicial system as those who are very wealthy.

I would just like to know your thoughts on where we are today and whether you think we are meeting that goal or still have a way to go. Ms. Seitz.

Ms. SEITZ. Senator Durbin, I think that that is an unending quest, justice for all. I think that each day that we make a commitment to that quest, we are better. Each day that we follow through with that commitment, we are better. As long as we do not have equal access to the courts, we erode that basic principle upon which this country was established.

I am pleased, particularly in the State of Florida, some of the creative ways that we have developed to take lawyers back to our roots of being intimately involved in our community, providing donated legal services to ensure access to the courts, and when I was president of the Florida Bar, our supreme court came down with a very innovative way to provide a reminder to our, at that time, 53,000 lawyers of our responsibility and, in fact, our commitment when we took our oath as lawyers to ensure that there was access to the justice system.

Senator DURBIN. Thank you. Ms. Manella.

Ms. MANELLA. Well, there are two parts of that, I guess. In the civil context, obviously, it is a question of, as Ms. Seitz said, access, and it remains the case that those who have money can afford all sorts of things that those who do not cannot, and I agree with Ms. Seitz that the legal community in general has a continuing obligation to see that people with meritorious legal claims are able to have those claims litigated in a court of law.

On the criminal side, I think we have made tremendous progress, certainly in the Federal system, in providing extraordinarily competent representation to indigent defendants. Speaking for the Central District of California, we have a superlative public defenders office which provides the highest quality of representation to their clients, and I think that represents a tremendous amount of progress over several decades ago.

Senator DURBIN. Judge Lee.



Judge LEE. Senator Durbin, I would echo the comments of Ms. Seitz and Ms. Manella and I would just add that I think that while we are making considerable progress, there are areas where we could do better. For example, in my community in northern Virginia, we have an increasingly diverse community where we have over 100 different languages spoken. Our bar association and the Virginia State Bar have looked into whether or not legal services are available on an equal basis to those who are recent immigrants to America.

That statue was about welcoming all to become a part of the Nation of America, to be part of its fabric, and I think that we are doing what we can with respect to lawyers donating their time to translate documents, to bring in bilingual individuals to assist the court, and to save taxpayers money by doing it in ways that involve volunteer efforts and ways to ensure that the courthouse is open to everyone and that they know that when they come to America, that America's courts are fair. Unlike wherever they come from, where we are is we are fair and everyone should have access.

Senator DURBIN. Thank you. Mr. Barbier.

Mr. BARBIER. Thank you, Senator. I agree that I think a lot of progress has been made, primarily on the criminal side. When I was a young lawyer out of law school, I spent a number of years volunteering to represent indigent defendants, both in Federal and State court. At some point, there was a formal Federal public defender program, and in our area, a State public defender program. So it is less common now for members of the private bar to be called upon, although it still does happen occasionally, to have to represent indigent defendants in criminal cases.

In civil cases, I think there is a lot of progress that still needs to be made, frankly. I have been involved through our local bar association and the State bar association, through the Louisiana Bar Foundation, and particularly through what is called the New Orleans Pro Bono Project, which does just that. It provides legal services, or its goal is to make legal services affordable and available to those who are most in need. So I would strongly support that.

Senator DURBIN. Thank you.

Mr. Chairman, thank you. I am sorry that I will have to leave in just a few moments, but I may have a few questions to send to the panel.

Senator DEWINE. Those could be and will be submitted for the record. Thank you very much.

Each one of you will have the opportunity to choose over your career a number of law clerks. Judge Lee, I assume you have already had that experience. How will you do that? What do you look for? Ms. Seitz.

Ms. SEITZ. That is one of the things, Senator, that attracts me to this job. I started my legal career clerking for Hon. Charles R. Richey, U.S. District Court for the District of Columbia. He was my father in the law and I learned from him very important things.

You look for people that are hard working, that are respectful, that recognize that they are there to be a public servant, not little judges, and to learn how to do it right so that we actually contribute to the enhancement of the administration of justice.

If I am confirmed by the Senate, it would be my fondest dream come true to follow in the steps of Judge Richey. My only regret is that he died in the spring of last year and he will not be here to see me sworn in.

Senator DEWINE. How do you balance the obvious necessity of finding someone who can write, someone who is very bright, someone who is very studious, someone who has done well in law school, with—what I would hope would be of some interest—someone who has had some (even at that very young age) some real-life experiences?

Ms. SEITZ. Judge Richey always chose, or at least I was his third law clerk and my predecessors had all worked between college and law school. I had worked before deciding to go to law school, and I think that that helps you bring the real world to the job.

Senator DEWINE. Ms. Manella.

Ms. MANELLA. Like Ms. Seitz, I, too, was a law clerk for a legendary judge, Judge John Minor Wisdom, also in New Orleans, who, I am happy to say, at 93 is still alive and sitting and, in fact, wrote the IOLATA decision for the fifth circuit.

I do not know that when I clerked, frankly, I brought much life experience to it, but fortunately, Judge Wisdom had more than enough of his own to compensate for any lack on my part. [Laughter.]

Senator DEWINE. Well, that is maybe how you deal with it.

Ms. MANELLA. Yes. Well, I do think that on the district court, one of the most important things that a clerk must bring is, obviously, the prerequisites of intellectual candlepower and a good mind, but also the ability to work quickly, because on the district court, you do not have the luxury of writing a lengthy law review article on every TRO application that comes in the door.

Given the number of clerks that you are likely to have, as well, I think that clerks must be compatible with each other. Nobody wants a chambers in which the clerks are squabbling or cannot get along. And finally, I think that the ability that people have to bounce ideas off one another is an integral part of the process and can only lead to better results, so we certainly want people who can get along, who are bright, and can work quickly.

Senator DEWINE. Judge Lee.

Judge LEE. Mr. Chairman, I look for in a law clerk several qualities, intellect, ability with respect to research and writing, and my access to law students is considerable. I am very active with the Washington area law schools, with core competition in a variety of other programs.

I have with my law clerks what I will call a mentor-protege relationship. I have a young woman who is here in the room, Kwamina Thomas, who is a first-year student at Cornell Law School who is doing an internship for me this summer, and I insist that all of my interns and law clerks do real-world things, like visit the jail, do a ride-along with the police department, spend some time in the public defenders office and watch them try a case, spend a day with the commonwealth attorney to try a case, and then I work with them throughout.

My goal is to have a counsel in a law clerk who can assist me in carrying out my responsibilities from the standpoint of the work,



but they know that I am the judge and they are the law clerk. Sometimes we disagree about the way things ought to be done, but they are young proteges to me.

Senator DEWINE. Mr. Barbier.

Mr. BARBIER. Thank you, Senator. When I became a law clerk in the Federal Court in New Orleans, I had a lot of real-life experience. I had been a school teacher. I had been an accountant. I was married, had one child, and a second child on the way. So I can relate to that quality, and I think it did serve me well.

I believe that, beyond that, the basic qualities of a law clerk have been stated by the other nominees. Certainly, the only thing I would add beyond the obvious is that I would want to get someone who would challenge me and not just be a "yes" person, not just agree with the ideas or thoughts that I had but would challenge me to think about other options and whether what I am thinking is really correct or not. Then, obviously, in the final analysis, as the judge, I would have to make the decision.

Senator DEWINE. Judge Lee, you served as appointed counsel in indigent criminal cases in State courts for, I believe, about 10 years, and in Federal courts for 15 years. What did that experience do to help you prepare for your current position, and how do you think it would impact your ability to serve on the Federal bench?

Judge LEE. Mr. Chairman, I think my experience representing the indigent in State and Federal court gave me the practical insight about the law and the way cases are presented and the impact that the law has on individuals' lives. I have walked people through a criminal case, in a murder case in State court, or defendant individuals in multidefendant drug cases where I have had to master the evidence and advocate their case with very meager resources.

It required me to reach inside and to try to excel as an advocate on their behalf. That insight will keep me centered with respect to being a judge, and humble with respect to remembering what it is like to represent someone in a criminal case. On my bench in my courtroom, I have a little plaque that says, "Reminder: you are a lawyer," and that is to remind me what it is like to prepare a case and to know it very well and to get to court and one witness make a statement and the whole case plan is out the window and you have got to start all over. I never want to forget that and I keep that in mind as I see lawyers try cases and I see that expression of surprise. I know what that is like. I never want to forget that.

Senator DEWINE. I understand. Thank you very much.

Ms. Manella, you serve, of course, as U.S. Attorney for the Central District of California. Tell me where those lines run, what area.

Ms. MANELLA. The Central District of California encompasses seven counties of approximately 40,000 square miles, running from the northern tip of San Diego—it doesn't include San Diego County—up to San Luis Obispo. The seven counties are Los Angeles, Orange County, Riverside, San Bernadino, Ventura, Santa Barbara, and San Luis Obispo. We have a population of 16 million people.

Senator DEWINE. 16 million?

Ms. MANELLA. That is correct.

Senator DEWINE. You have served in that position since 1994, is that correct?

Ms. MANELLA. Yes.

Senator DEWINE. I will ask you a similar question to the question I asked Judge Lee. How has that experience helped you prepare for this position? And maybe a variation of that question—what do you know now you didn't know in 1994?

Ms. MANELLA. Well, Senator, I returned to an office in which I had been an assistant U.S. attorney for 8 years.

Senator DEWINE. Let me back it up, then. Let's go to the time before you had any prosecutorial experience. What has the prosecutorial experience cumulatively taught you—which is a broader question?

Ms. MANELLA. Well, as a practicing lawyer, there is no question that having been in court hundreds of times, having tried cases, I certainly hope it has given me a passing familiarity with the Federal Rules of Evidence and some notion of how a case is tried and should be tried. I have had the opportunity to appear before a sufficient number of judges to have been able to pick and choose my role models, those whom I wish to emulate and those whom I vowed never to emulate. That has been the principal advantage, I think, of being a practicing lawyer who goes to court frequently.

As U.S. attorney, I have obviously had the benefit of hearing secondhand the experiences of my own assistant U.S. attorneys, but I would have to say that in many respects the administrative responsibilities that I have had as U.S. attorney for a district of that size have probably been the greatest difference between what I knew in 1994 and what I know now, and that obviously the opportunity to serve as a State court judge for 4 years, I think, I certainly hope, was invaluable in my overall background and training.

Senator DEWINE. Your experience as a U.S. attorney, I assume, also has given you a unique insight into the community in which you live and to those 16 million people in that area.

Ms. MANELLA. I would hope so, sir.

Senator DEWINE. Do you want to comment on that?

Ms. MANELLA. I was born in Los Angeles. I went to public school in Los Angeles, but I have lived on the East Coast, I have lived in the South, I have lived abroad. Los Angeles has been my home for the last 20 years, and no matter what anybody else says, I love it. [Laughter.]

Senator DEWINE. Well, I was not questioning that. I guess I was reflecting on my own experience (in a much, much smaller area) as a local county prosecutor for a few years. It seemed that virtually every problem in the community came across your desk, and I guess that is the only thing I was alluding to. I know as a U.S. attorney, it is a little different, but you have to get an insight into the community that you did not possibly have before, at least in more depth.

Ms. MANELLA. Certainly, that is correct. I think on the State side, I saw the kinds of prosecutions brought Statewide, and federally saw those as well. And I can say that in many of the major crime enforcement areas, we lead the Nation and so we see virtually every kind of crime or civil kind of litigation that is brought.

Senator DEWINE. Thank you very much.



Mr. Barbier, would you explain your role in serving on the Board of Governors and as president of the Louisiana Trial Lawyers Association?

Mr. BARBIER. Sure, Mr. Chairman. I have been—since I have been in private practice, handled a variety, a wide variety of civil and criminal cases, but the primary emphasis in my practice has been in litigation and primarily on the plaintiff side, although I have done defense work, also. I have defended, for example, the State bar association in numerous cases over a period of about 15 years in Federal court.

I became involved in that organization in the mid-1980s, although I had been a member earlier, and had the honor of being elected president in 1989-1990. And I am on the board now because once you are elected president, you are a lifetime board member, so I still serve on the board today.

I am not sure if I have fully answered your question.

Senator DEWINE. Yes. That is fine.

Mr. BARBIER. Yes.

Senator DEWINE. That is fine. Thank you very much.

Judge Lee, would you please describe your duties as the former chairman of the Virginia State Bar's Judiciary Committee?

Judge LEE. Mr. Chairman, as chair of the judiciary committee of the Virginia State Bar, our responsibility was to assist the Virginia judiciary and the judicial conference in any matters of cross-cooperation between the State bar and the courts. Obviously, there are limitations on the things that the court can do with respect to our legislature, but there were things that we could do as lawyers and bar leaders to assist the court with respect to professionalism and other matters. And one of them led to the professional course and other things that Virginia has now that assist our lawyers in learning more about how to be ethical practicing lawyers.

Senator DEWINE. Ms. Seitz, would you describe your duties as the former Director of the Office of Legal Counsel at the Office of National Drug Control Policy? You served in that position how long?

Ms. SEITZ. For 18 months. Senator, when Gen. McCaffrey called and asked me if I would take a leave of absence from my firm to help him as he, said, "jump-start the office," he packaged it in a manner of saying "just do it for a year." And I got to Washington and the year kept getting extended until my husband finally said, "wait a minute, this wasn't part of the bargain." So I found a wonderful successor.

But the essence of the responsibilities that first 18 months was to create a legal department. There was one lawyer when I arrived. There were no files. Quite frankly, the computer system predated Wang. I don't know how the White House managed. And having come from a large law firm where everything was provided so that you could render legal services, quite frankly, I felt like I was basic nation-building to recreate the office.

But I came because of General McCaffrey and the opportunity to work with him on this issue. We handled a wide variety of legal issues. It took me back to my days of clerking with a variety of issues from the prevention side to the international side. It again infused my desire to do public service.

Senator DEWINE. Thank you very much.

Ms. Manella, as a former counsel for the Senate Judiciary Subcommittee on the Constitution, would you please further describe your work on the Civil Rights of Institutionalized Persons Act?

Ms. MANELLA. Senator, that goes back more than 20 years. To the extent I can reconstruct it, I actually worked with Senator Hatch's staff, a fellow named Mike Hunter, as I recall, to put together a set of hearings on that bill. I was on the Hill for about 18 months, I think, before I went with O'Melveny and Meyers. And maybe my memory has made things rosier than they were, but it was a very collegial relationship.

Senator DEWINE. You are talking about Senator Hatch? [Laughter.]

Ms. MANELLA. Well, for all the partisan bickering we hear about today, I don't recall any of that. Now, again, maybe my memory has dulled some of those sharper moments, but I worked closely with his staff and that of several other Senators in putting together a set of hearings on the bill. I left the position at about the time, I think, that the bill was voted out of subcommittee, and it subsequently passed into law with what amendments or modifications I really don't know.

Senator DEWINE. Was that your major work during that period of time?

Ms. MANELLA. Yes.

Senator DEWINE. As U.S. attorney for the Central District of California, you, of course, work with the appellate unit of the Department of Justice's Criminal Division and the Solicitor General's office in determining whether or not to seek Supreme Court review of cases from the ninth circuit.

Will you please, if you could, cite and describe cases, if you can recall any, in which you recommended Supreme Court review, and then what, if you can recall again, the outcome was?

Ms. MANELLA. Well, the most notable case was certainly the case of *United States v. Armstrong*, in which an en banc panel of the ninth circuit issued a ruling we felt was violative of Supreme Court precedent and would have had a disastrous impact in diverting prosecutorial resources from investigating and prosecuting criminals to keeping statistics on the race of people we prosecuted, something that we do not do.

I personally lobbied the then Solicitor General, Drew Days, to take this case to the Supreme Court, which he did, and I am pleased to report that in an 8-1 decision the Supreme Court reaffirmed what I think was the law before then that in order to state a claim of selective prosecution sufficient to warrant an order of discovery, a defendant must make a prime facie showing that others similarly situated of different races have not been prosecuted. That was probably the case in which I took the greatest interest.

We also worked with the Department of Justice in seeking cert for the case of *United States v. \$405,089.23* which, along with the *Ursery* case, ultimately led again to a reversal of the ninth circuit and a holding that a civil *in rem* forfeiture action followed by a criminal prosecution does not violate the double jeopardy clause.

Senator DEWINE. I appreciate that very much. Would it be possible for you to submit to us a list of ninth circuit cases, since you have taken this position in 1994, that you did actually have appealed?

Ms. MANELLA. Ninth circuit?

Senator DEWINE. Yes.

Ms. MANELLA. Sure.

Senator DEWINE. You don't need to do it off the top of your head, if you just want to send it to us and if you could just maybe include a brief synopsis as far as what your position was. And, I would invite you, if you wish, to also include any that you might have wanted to appeal that were not appealed.

Ms. MANELLA. OK.

Senator DEWINE. I don't know if that violates the Department of Justice's rules or not. I guess we will find out, but I would invite you to do that, if you wish. The ones I particularly want, however, are the ones that actually were appealed. And we, of course, can look up the outcome.

Ms. MANELLA. I think we can provide that for you as well.

Senator DEWINE. I am sure you can.

Do any members of the panel wish to add anything to anything that you have said?

[No response.]

Senator DEWINE. As I announced before, the record will for a brief period of time remain open for possible questions. You may be getting some additional questions in writing. It has been a rather extended hearing. We appreciate your patience. The second panel always has to sit around and wait for a while, so we appreciate you bearing with us. Let me also say we appreciate the members of the families hanging in there, particularly the young children as well. So, again, thank you all very much.

Ms. SEITZ. Thank you very much, Mr. Chairman.

Mr. BARBIER. Thank you, Senator.

[Whereupon, at 4:15 p.m., the committee was adjourned.]



## SUBMISSIONS FOR THE RECORD

April 3, 1998

Timothy Belcher Dyk

Questionnaire for Judicial Nominees

UNITED STATES SENATE  
 COMMITTEE ON THE JUDICIARY  
QUESTIONNAIRE FOR JUDICIAL NOMINEES

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Timothy Belcher Dyk

2. Address: List current place of residence and office address(es).

home: Washington, D.C. 20008

office: Jones Day Reavis & Pogue  
 1450 G Street, N.W.  
 Suite 600  
 Washington, D.C. 20005

3. Date and place of birth

February 14, 1937, Boston, Massachusetts

- 4.
- Marital Status
- (include maiden name of wife, or husband's name) List spouse's occupation, employer's name and business address(es)

Married, Sally Katzen, Deputy Assistant to President for Economic Policy, Deputy  
 Director, National Economic Council, The White House, OEOB, Room 231,  
 Washington, D.C. 20502

- 5.
- Education
- List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted

Harvard College - September 1954 - June 1958 - AB - 1958, cum laude  
 Harvard Law School - September 1958 - June 1961 - LLB - 1961, magna cum  
 laude



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6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
- February 1990 - Present - Jones Day Reavis & Pogue, 1450 G Street, N.W., Washington, DC 20005 - Partner, Chair, Issues and Appeals Section
- September 1964 - February 1990 - Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037 - Partner and Associate;
- April-October 1968 - McCarthy for President - Responsible for position papers and aspects of fundraising (Office Closed)
- July 1963 - July 1964 - U.S. Department of Justice, 10th and Pennsylvania Ave., N.W., Washington, D.C. 20530 - Special Assistant to the Assistant Attorney General, Tax Division - (one-year appointment)
- July 1962 - July 1963 - U.S. Supreme Court, Washington, D.C. - Law Clerk to Chief Justice Warren - (one-year appointment)
- August 1961 - July 1962 - U.S. Supreme Court, Administrative Office of U.S. Courts, Washington, D.C. - Law Clerk to Justices Reed and Burton - (part-time for Chief Justice Warren) (one-year appointment)
- July-August 1960 - Winthrop, Stimson, Putnam & Roberts, One Battery Place, New York, NY 10004 - Summer Associate
- June-August 1959 - Jacobs, Persinger & Parker, 77 Winter Street, New York, N.Y. 10005 - Summer Associate
- June-September 1958 - Doubleday Book Stores, Penn Station, New York, NY - Sales Clerk
- June 1993 - December 1996 - TAS Corporation (family corporation) - President and Director (Dissolved)
- 1977 - Service as Arbitrator for American Arbitration Association
- December 1990 to Present - Mass. Bay Brewing Co. (part owner - not active in management)

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### Teaching

1983-1991 - Adjunct Professor - Georgetown University Law Center, 600 New Jersey Avenue, NW, Washington, DC 20001. (202) 662-9010 - Fall Term - August-December 1983; Spring Term - January-May 1985; Spring Term - January-May 1986; Fall Term - August-December 1989; Spring Term - January-May 1991

1984-1988 - Visiting Professor/Lecturer - University of Virginia School of Law, 580 Massie Road, Charlottesville, VA 22903-1789. (804) 924-4676 - Lecturer: Spring 1984; Spring 1985; Spring 1987; Spring 1988; Visiting Professor: September 1985-December 1985

1986-1989 - Visiting Lecturer- Yale Law School, 127 Wall Street, New Haven, CT 06511; P.O. Box 208329, New Haven, CT 06520-8239. (203) 432-4995 - Fall 1986 (September - January) ; Fall 1988 (September - January); Spring 1989 (January-May)

### Boards of Directors (Non-Profits)

Migrant Legal Action Program, Board of Directors, 1971 to 1992,

Farmworker Litigation Support Fund, Member, Board of Directors, 1981 to present;

Farmworker Justice Fund, Board of Directors, 1981 to 1985;

People for the American Way, Board of Directors, 1989 to 1996,

Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received

No

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8. Honors and Awards: List any scholarships or financial aid, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Harvard College and Harvard Law School partial scholarships; member of Harvard Law Review; honors upon graduation from college and law school.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Academy of Appellate Lawyers

Chair — D.C. Circuit Membership Evaluation Committee - 1995, 1996, 1997, 1998

American Bar Association

Member, Editorial Board of the State and Local Tax Lawyer - 1996 to present

Member, Governing Board of Forum on Communications Law, 1990 to 1992

District of Columbia Bar

Federal Bar Association (no longer a member of association)

Assisted in organizing "Salute to Law Enforcement" - Washington, D.C. - October 13, 1991

Steering Committee, "Salute to Law Enforcement" - Washington, D.C. - May 4, 1990

Co-chair, "Salute to Law Enforcement" Washington, D.C. - May 5, 1989

Federal Circuit Bar Association

Federal Communications Bar Association

Judicial Conferences - Invited to participate as panelist at Judicial Conferences of District of Columbia (June 6, 1991), Sixth (June 13, 1991), Seventh Circuits (May 14, 1984), invited to Judicial Conference of Fifth Circuit (1993), District of Columbia Circuit (various years)

New York Bar Association

State Income Tax Alert: Member, Editorial Board, August, 1992 to Present

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National Chamber Litigation Center, Constitutional & Administrative Law Advisory Committee,  
 1992 to Present

10. Other Memberships. List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

**Organizations Engaged in Lobbying:**

National Chamber Litigation Center, Constitutional & Administrative Law Advisory Committee,  
 1992 to Present (U.S. Chamber of Commerce engaged in lobbying),

**Other Organizations**

American Arbitration Association  
 (Member, Commercial Arbitration Panel)

Cleveland Club of Washington

Farmworker Litigation Support Fund

Forest Hills Citizens Assn

Harvard Club of Washington  
 (National Press Club)  
 (Tab 1 of Attachment Volume A)

Harvard Club of New York  
 (Tab 2 of Attachment Volume A)

Pamet Harbor Yacht and Tennis Club  
 (Shareholder, not a current member)  
 (Tab 3 of Attachment Volume A)

Provincetown Tennis Club  
 Provincetown, MA  
 (Tab 4 of Attachment Volume A)

Copies of by-laws of clubs are contained in Attachment Volume A, except that the  
 Cleveland Club of Washington has no by-laws



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11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such membership lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

<u>Court, Agency, etc.</u>	<u>Date</u>
U.S. District Court for the District of Columbia	July 14, 1964
D.C. Bar (State Courts)	July 14, 1964
New York Bar (State Courts)	June 21, 1962
U.S. Supreme Court	January 24, 1966
D.C. Court of Appeals	July 14, 1964
U.S. Court of Appeals for the D.C. Circuit	September 17, 1964
Federal Circuit	June 18, 1993
Second Circuit	July 12, 1971
Third Circuit	March 28, 1981
Fourth Circuit	January 15, 1964
Fifth Circuit	May 30, 1972
Sixth Circuit	November 3, 1986
Eight Circuit	May 21, 1992
Ninth Circuit	March 8, 1982
Tenth Circuit	November 29, 1990

Does not include admission *pro hac vice*

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12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

My published writings are in Attachment Volume B, indexed to the numbers below. (Student course materials, consisting almost entirely of cases and court pleadings, are not included.) Notes, drafts, transcripts and press reports of speeches, television or radio interviews, and law school classes (to the extent available) are in Attachment Volume C, which contains an index. Videotapes and audiotapes of television and radio interviews and of speeches (to the extent available) are supplied separately.

**LIST OF PUBLISHED WRITINGS**

- 1 Dyk & Bilich, Allied-Signal and the Unitary Business Principle: Little Guidance, Many Questions, The Journal of Multistate Taxation, September/October, 1992
- 2 Dyk & Bilich, Allied-Signal: Supreme Court Rejects States' Bid To Eliminate Unitary Business Principle, State & Local Taxes Weekly, June 23, 1992
- 3 Dyk, Appealability of Interlocutory Orders Enjoining or Refusing to Enjoin Commercial Arbitration, 69 Ky. L.J. 827 (1981)
- 4 Dyk, Book Review: Seven Dirty Words and Six Other Stories by Matthew L. Spitzer, 40 Fed. Comm. L.J. 134 (1988)
- 5 Dyk, Cameras in the Supreme Court, ABA Journal, (Mar. 1989), p. 34
- 6 Dyk, Campaign '84: Advertising and Programming Obligations of the Electronic Media (portions), Practising Law Institute (1983)
- 7 Dyk & Castanias, Certiorari in Business Cases: Improving Your Chances, ABA The Practical Litigator, November 1996 (Seeking Certiorari in the U.S. Supreme Court)
- 8 Dyk & Katsas, Certiorari in Business Cases: Opposing the Application, ABA The Practical Litigator, November 1996 (Opposing Certiorari in the U.S. Supreme Court)
- 9 Dyk, Commentary: Prosecutorial Leaks, ABA Journal, September 1996 (First Amendment implications of improperly leaked information)

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10. Dyk & Wanner, Controlling Television Culture: You May Know Indecency When You See It, But You May Not Be Permitted to See It, The Recorder, May 26, 1993.
11. Dyk & Fisher, Courtside, Communications Lawyer (ABA) - Fall 1997; Winter 1998 (update on First Amendment and Communication cases before Supreme Court).
12. Dyk & McDowell, Courtside, Communications Lawyer (ABA), Spring 1991, Summer 1991, Fall 1991, Winter 1991, Spring 1992, Summer 1992, Fall 1992, Spring 1993, Summer 1993, Fall 1993, Winter 1993, Spring 1994, Summer 1994, Fall 1994, Winter 1994, Spring 1995, Summer 1995, Fall 1995, Winter 1995, Winter 1996, Spring 1996; Spring 1997, Summer 1997(update on First Amendment and communications cases before Supreme Court).
13. Dyk & Doss, Courtside, Communications Lawyer (ABA) - Fall 1990 (update on First Amendment and Communication cases before Supreme Court).
14. Dyk & Castanias, Daubert Doesn't End Debate On Experts, The National Law Journal, Aug. 2, 1993 (Discussion of admissibility of expert testimony).
15. Dyk, Don't Ban It; That's Censorship, USA Today, Dec. 28, 1988
16. Dyk & Schenck, Exceptions to Chevron, 18 Admin L. News, No. 2 (1993).
17. Dyk, FCC's New Indecency Standard Tunes in to a Host of Problems, N.Y. Law J. (Aug 7, 1987)
18. Dyk, Full First Amendment Freedom for Broadcasters, 5 Yale Journal on Reg. 299 (1988)
19. Dyk, General Motors v. Tracy: A Defeat for the Commerce Clause, Journal of Multistate Taxation, May/June 1997 (Discussion of U.S. Supreme Court decision in state tax case).
20. Dyk, Interview in West Trust Your Children (Neal-Schman 1988), p 165
21. Gall, Dyk, Kulwicki & Bilich, Is the Writing on the Wall for Use Tax Collection by Out-of-State Companies?, State Tax Review, Mar. 3, 1992
22. Dyk, Johnson Controls' Decision Creates Tort Issues, Indoor Pollution Law Report (April 1991)

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- 23 Nagel, Dyk, Castanias & Richards, Leading United States Supreme Court State Tax Cases: Official Syllabi, Notes and Indices, Bureau of National Affairs, December 1994. (A copy is being supplied.)
- 24 Nagel, Dyk, Castanias & Richards, Leading United States Supreme Court State Tax Cases: Official Syllabi, Notes and Indices, Bureau of National Affairs, December 1997 - Supplement. (A copy is being supplied.)
- 25 Dyk, Letter to the Editor, The Washington Times, Nov. 23, 1994 (commenting on possible judicial nominee).
- 26 Dyk, LBO Bankruptcies Increase Fraudulent Conveyance Risks, Natl. Law J. (Sept. 25, 1989).
- 27 Dyk, as participant at Fifty-second Judicial Conference of the D.C. Circuit, Media Coverage of the Courts, Judicial Decisions and the Judiciary (June 6, 1991).
- 28 Dyk, Newsgathering, Press Access and the First Amendment, 44 Stan. L. Rev. 927 (1992).
- 29 Dyk, Newsgathering, Press Access and the First Amendment, 10 Comm. Lawyer No. 2, p. 1 (1992).
- 30 Dyk, Recent Cases, 73 Harv. L. Rev. 1410 (1960) (Student case comment. Author not named)
- 31 Dyk & Wilkins, Regulation and Ownership: Washington's Influence on Who Owns the Media, Gannett Center Journal, Winter 1989
- 32 Dyk, Ruling May Induce Employer Liability, Leader's Product Liability Law and Strategy (April 1991)
- 33 Dyk, '7 Dirty Words' Not Enough: The FCC Goes a Step Further, N.Y. Law J. (July 31, 1987)
- 34 Dyk, State Taxes and the U.S. Supreme Court: The 1996-1997 Term, Multistate Tax Report, July 25, 1997
- 35 Dyk, Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality", 19 Stan. L. Rev. 907 (1967)



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36. Dyk, as panel participant at the Federalist Society, Symposium: Do We Have a Conservative Supreme Court?, The Pub. Interest L. Rev. (1994).
37. Dyk & Kulwicki, Taxing the Media: An Examination of Leathers v. Medlock, State Tax Notes, Sept. 9, 1991.
38. Dyk & McDowell, Televise Federal Courts: The Judicial Conference Should Lift The Ban, The Los Angeles Daily Journal, Oct. 5, 1994.
39. Dyk & McDowell, The Congressional Assault on Television Violence, Communications Lawyer (ABA), Fall 1993.
40. Rosenbloom & Dyk, The FCC and Broadcast Regulations: The Rules Relaxed, N.Y. L. Journal (1988).
41. Dyk & Schiffer, The FCC, the Congress and Indecency on the Air, Communications Lawyer (Winter 1990).
42. Dyk & Wanner, The FCC's Indecency Proposals Under Fire, Legal Times, May 5, 1993.
43. Dyk & Goldberg, The First Amendment and Congressional Investigations of Broadcast Programming, 3 Va. Journal of Law and Politics 625 (1987).
44. Dyk, The Supreme Court, 1959 Term, 74 Harv. L. Rev. 81, 126-132 (1960) (portions of student note. Author not named).
45. Dyk, The Supreme Court's Role in Shaping Administrative Law, Admin. L. News (Fall 1991).
46. Dyk, The Supreme Court's Role in Not Shaping Administrative Law, 44 Admin. L. Rev. (1992).
47. Dyk, Heifetz, Bilich & Gall, U.S. Supreme Court Hears Reargument in Allied-Signal -- World Without Unitary Business Principle Explored, State Tax Review, May 5, 1992.
48. Dyk & Bilich, U.S. Supreme Court Orders Reargument in Allied Signal Case: Unitary Business Precedents Questioned, State & Local Taxes Weekly, Mar. 31, 1992.
49. Dyk & Nagel, U.S. Supreme Court State Tax Decisions - The 1992-93 Term, State Tax Notes, Sept. 13, 1993.

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50. Dyk, Validity of 'New Value' Exception Remains an Open Legal Question, Natl. Law J. (Feb. 5, 1990).
51. Dyk, Why Broadcasters Should Continue the Fight for First Amendment Rights, Broadcasting, Aug. 1, 1988.

**LIST OF SPEECHES**

**1997:**

- February 10, 1997      The American Trucking Associations re Food Lion v. Capital Cities/ABC (FL)  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 1 of Attachment Volume C)
- March 5, 1997      Catholic University Conference on the First Amendment --  
    Discussion of Media Institute Report on First Amendment  
    (Washington, D.C.)  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 2 of Attachment Volume C)
- April 14, 1997      The Brennan Center for Justice - Benchmark 1997 - Should  
    *Buckley v. Valeo* Be Overruled? (moot court) (member of panel of  
    judges) (Washington, D.C.)  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 3 of Attachment Volume C)
- July 15, 1997      Junior Statesmen Foundation - Guest Speaker - Rayburn House  
    Office Building (Washington, D.C.) (Role of U.S. Supreme Court)  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 4 of Attachment Volume C)
- August 3, 1997      American Bar Association Annual Meeting - An Afternoon of  
    Special Programs at the Ninth Circuit Court of Appeals -  
    Affirmative Action: Taking the Argument to Another Level - Moot  
    Court (represented position of state re constitutionality of Prop  
    209-like provision) (San Francisco, CA)  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 5 of Attachment Volume C)

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October 24, 1997	National Practice Institute -- Objections At Trial And How To Win An Appeal (Cleveland, OH) (Notes, draft or transcript of speech, or press reports) (Tab 6 of Attachment Volume C)
<b><u>1996:</u></b>	
January 9, 1996	Federal Communications Bar Association Young Lawyers Committee: CLE Seminar on Communications Law in the Courts (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 7 of Attachment Volume C)
February 27, 1996	Federal Communications Bar Association, Conference, Indecency Regulation (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 8 of Attachment Volume C)
April 10, 1996	Breakfast Meeting - Law Firm of Leventhal, Senter and Lerman (appellate advocacy) (Washington, D.C.)
April 17, 1996	Introduction of Richard Pogue at Cleveland Club (Washington, D.C.)
May 10, 1996	ABA State and Local Tax Committee, State Tax Institute - State Tax Issues (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 9 of Attachment Volume C)
May 17-18, 1996	ABA - Appellate Institute re Appellate Advocacy (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 10 of Attachment Volume C)
May 10, 1996	ABA, State and Local Tax Committee - State Tax Institute - State Taxation Issues (Washington, D.C.)
July 11, 1996	1996 Jones Day Reavis & Pogue Patent Litigation Seminar (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 11 of Attachment Volume C)

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September 27, 1996

ABA Forum on Communications - Content Regulation and Liability  
for New Media (New York, NY)

## 1995:

March 23, 1995

American University's Criminal Law Society - Second Annual  
Conference on Crime: The Death Penalty in the 21st Century:  
Where Is It Going? The Media Debate and Public Executions  
(Washington, D.C.)

(Notes, draft or transcript of speech, or press reports)  
(Tab 12 of Attachment Volume C)

April 25, 1995

Associated General Contractors of America, Labor and  
Employment Law Council - Annual Symposium - Challenge to E.O.  
12954 (Washington, D.C.)

November 1995

State and Local Center for the Academy for State and Local  
Government - State Tax Issues (Washington, D.C.)

November 4, 1995

National Center for State Courts: 1995 National Conference of  
Court Public Information Officers (Cameras in the Courts)  
(Cambridge, MA)

## 1994:

June 8, 1994

Federal Communications Bar Association - CLE Seminar -  
Forfeiture Provisions of the Communications Act and the  
Commission's Rules (Indecency Forfeitures) (Washington, D.C.)  
(Notes, draft or transcript of speech, or press reports)  
(Tab 13 of Attachment Volume C)

July 21 1994

Jones Day Reavis & Pogue - State Tax and the 1993 Supreme Court Term (Washington, D C )

September 27, 1994

Institute of Property Taxation - Sales and Use Tax Symposium -  
Federal Constitutional Issues Affecting State and Local Taxation  
(Washington, D C )

October 5, 1904

Georgetown University Law Center - Appellate Advocacy Before  
the D.C. Circuit (Washington, D.C.)



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1993:

- January 27, 1993 Jones Day Reavis & Pogue: The Clinton Administration: Legislative, Regulatory and Enforcement Issues Confronting American Business and Finance (London)
- January 29, 1993 Jones Day Reavis & Pogue: The Clinton Administration: Legislative, Regulatory and Enforcement Issues Confronting American Business and Finance (Paris)
- May 6-8, 1993 National Public Radio Conference: Indecency: It's Not Just Seven Dirty Words (Washington, D.C.)  
 (Notes, draft or transcript of speech, or press reports)  
 (Tab 14 of Attachment Volume C)
- August 6, 1993 ABA Annual Meeting - State and Local Tax Committee - Luncheon Panel re Harper v. Virginia (New York, NY)  
 (Notes, draft or transcript of speech, or press reports)  
 (Tab 15 of Attachment Volume C)
- October 7, 1993 Jones Day Reavis & Pogue - Business Law and the Supreme Court: A Review of the 1992 and 1993 Terms (Washington, D.C.)
- October 12, 1993 Federalist Society, "Do We Have A Conservative Supreme Court?" (panel discussion) (Washington, D.C.)  
 (Published version of appearance is item 36 in Attachment Volume B.)

1992:

- February 14, 1992 ABA - Annual Meeting - State and Local Tax Committee (San Antonio, Texas)  
 (Notes, draft or transcript of speech, or press reports)  
 (Tab 16 of Attachment Volume C)
- March 4, 1992 ABA Committee on State Taxation, Media/State Tax Seminar - Bellas Hess Panel - Leathers v. Medlock - Aftermath (Tampa, Florida)  
 (Notes, draft or transcript of speech, or press reports)  
 (Tab 17 of Attachment Volume C)

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- June 25, 1992      D.C. Bar Convention - Who Decides? The Current Status and Proper Role of Judicial Review in Shaping the Future of Administrative Law? (Washington, D.C.)
- June 30, 1992      Jones Day Reavis & Pogue - State Tax and the 1991 Supreme Court Term (Washington, D.C.)
- August 10, 1992      ABA Annual Meeting - The Federal Courts' Experience/The William Kennedy Smith Trial - Cameras in the Courts Presidential Showcase Program (San Francisco, CA)  
                               (Notes, draft or transcript of speech, or press reports)  
                               (Tab 18 of Attachment Volume C)  
                               (A videotape is being provided separately. See Tape 1)
- September 24, 1992      Jones Day Reavis & Pogue - Environmental Insurance Program: Cleaning Up the Environmental Insurance Mess (Washington, D.C.)
- October 20, 1992      Thomas Jefferson Center for the Protection of Free Expression - Conference on Textbook Censorship: What Johnny Shouldn't Read (Washington, D.C.)
- December 17, 1992      Jones Day Reavis & Pogue: The Clinton Administration Legislative, Regulatory and Enforcement Issues Confronting American Business and Finance (New York, NY)
- 1991:**
- March 18, 1991      FCBA, et al.: First Amendment Seminar: The Battle is Raging Press Restrictions During Military Conflict (Washington, D.C.)  
                               (Notes, draft or transcript of speech, or press reports)  
                               (Tab 19 of Attachment Volume C)
- May 2, 1991      ABA/FCBA: Celebrating 200 Years of The First Amendment (Washington, D.C.)  
                               (Notes, draft or transcript of speech, or press reports)  
                               (Tab 20 of Attachment Volume C)  
                               (Videotapes are being provided separately. See Tapes 2-4)

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May 18, 1991	American Women in Radio and Television National Convention: First Amendment: Media Coverage of the Courts, The Indecency Issue (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 21 of Attachment Volume C)
June 6, 1991	52nd Judicial Conference of the District of Columbia Circuit - Media Coverage of the Courts, Judicial Decisions and the Judiciary - (Williamsburg, VA)- (Published version of appearance is item 27 in Attachment Volume B.)
June 13, 1991	52nd Judicial Conference of the Sixth Circuit - Bill of Rights - Civil Rights (Panel on Affirmative Action) (Grand Traverse, MI) (Notes, draft or transcript of speech, or press reports) (Tab 22 of Attachment Volume C)
June 27, 1991	District of Columbia Bar Association - 1991 Annual Convention: Cameras in the Courtroom: Has the Time Come? - D.C. Bar Convention (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 23 of Attachment Volume C)
August 10, 1991	ABA Annual Meeting - The Supreme Court and Administrative Law (Published version of appearance is item 45 in Attachment Volume B)
September 24, 1991	Jones, Day, Reavis & Pogue Environmental Insurance Program, "Cleaning Up the Environmental Insurance Mess," (Washington, D.C.)
September 24, 1991	National Chamber Litigation Center - Fourth Annual Supreme Court Press Briefing (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 24 of Attachment Volume C)
September 25, 1991	ABA Forum Committee - Taxation of the Media and Mail Order Sales (Washington, D.C.)

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October 4-5, 1991	Georgetown University Law Center: Sponsorship: The Revolutionary Trial Strategy - A Seminar on Bold New Trial & Appellate Tactics (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 25 of Attachment Volume C)
October 13, 1991	Federal Bar Association - Salute to Law Enforcement
<u>1990:</u>	
March 30, 1990	ABA Forum Committee: Representing Your Local Broadcaster, Current Content Problems in Broadcasting, Atlanta, Ga.
April 18, 1990	FCBA - What is Indecency: Who Decides? (Washington, D.C.) (Videotapes are being provided separately. See Tapes 5-6)
May 3-4, 1990	United States Court of Military Appeals 15th Annual Homer Ferguson Conference (Cameras in the Courts) (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 26 of Attachment Volume C) (A videotape is being provided separately. See Tape 7)
May 4, 1990	Federal Bar Association - Salute to Law Enforcement
May 8, 1990	Fairfax Bar Association, The Law Related Education Committee - Commentary on CNN - Noriega Tapes Case (Fairfax, VA) (Notes, draft or transcript of speech, or press reports) (Tab 27 of Attachment Volume C) (A videotape is being provided separately. See Tape 8)
May 18, 1990	American Women in Radio and Television National Convention - First Amendment Power, The Indecency Issue (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 28 of Attachment Volume C) (A videotape is being provided separately. See Tape 8)
June 11, 1990	Broadcasting and FCBA - Broadcast Cable Influence IV - Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 29 of Attachment Volume C)



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June 13, 1990	The Euro-Club - Commercial Speech, Broadcasting and the First Amendment in the United States (Helsinki, Finland) (Notes, draft or transcript of speech, or press reports) (Tab 30 of Attachment Volume C)
June 27, 1990	FCBA/D.C. Bar Annual Convention - Panel on Offensive Programming (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 31 of Attachment Volume C)
August 5, 1990	ABA Annual Meeting - Presidential Showcase: The News Media and the Judiciary: Cameras in the Courts at Here and Abroad
September 25, 1990	National Chamber Litigation Center Third Annual Supreme Court Briefing (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 32 of Attachment Volume C)
October 11-12, 1990	Jones Day Reavis & Pogue - Current & Evolving Regulatory Issues in Labor and Employment Law
 <u>1989:</u>	
February 23, 1989	FCBA Seminar - Key Communications Issues in the 101st Congress (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 33 of Attachment Volume C)
May 5, 1989	Federal Bar Association - Salute to Law Enforcement (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 34 of Attachment Volume C)
 <u>1988:</u>	
March 5, 1988	First Amendment Congress, Workshop Debate on Obscenity & Pornography (Denver, CO)

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April 10, 1988	NAB Convention - Indecency and Other On-Air Perils (Las Vegas, NV) (Notes, draft or transcript of speech, or press reports) (Tab 35 of Attachment Volume C)
May 14, 1988	FCBA- 1988 Annual Seminar Media Coverage of the Bork Nomination (Hershey, PA) (Notes, draft or transcript of speech, or press reports) (Tab 36 of Attachment Volume C)
June 10-11, 1988	Wilson Center - Constitutional Protections of the Freedom of Speech; Tocqueville and the Press; and Roles and Responsibilities of the News Media in a Democracy
<u><b>1987:</b></u>	
January 12, 1987	Washington Center - The Legal System and Legal Careers - Freedom of Religion, Competitive Interests and the First Amendment
April 24-26, 1987	FCBA Annual Seminar Everything You Always Wanted to Know About FCC But Were Afraid to Ask, Media Coverage of the Supreme Court and Legal Issues in Washington (Wintergreen, VA)
June 18, 1987	FCBA and Broadcasting Magazine: Broadcasting/Cable Interface Programming Content Regulation - Washington, D.C. (Notes, draft or transcript of speech, or press reports) (Tab 37 of Attachment Volume C)
June 24, 1987	Washington Council of Lawyers Public Interest and Pro Bono Forum
June 25, 1987	State Bar of Wisconsin Convention: We the People (Notes, draft or transcript of speech, or press reports) (Tab 38 of Attachment Volume C)
September, 1987	Telecommunications Policy Research Conference Airline House

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September 22, 1987	Northwestern University Seminar: The Fairness Doctrine: Adequate and Balanced Coverage vs. The Big Chill, Annenberg Washington Program (Washington, D.C.) (Notes, draft or transcript of speech, or press reports) (Tab 39 of Attachment Volume C)
October 17, 1987	Philadelphia Bar Association: Indecency (Atlantic City, NJ)
October 2, 1987	Moot Court, Yale University re <u>Mozert v. Hawkins County</u>
October 29, 1987	William and Mary University, Address to Faculty and Students (Williamsburg, VA) (Notes, draft or transcript of speech, or press reports) (Tab 40 of Attachment Volume C)
December 10, 1987	FCBA/PLI Common Carrier Conference
<b><u>1986:</u></b>	
November 1986	International Association of Gaming Attorneys Annual Conference (commercial speech) (San Juan, PR)
November 6, 1986	American Civil Liberties Union of Massachusetts, Massachusetts Bar Association, and Massachusetts Department of Education: Censorship and the Classroom (Boston, MA) (Notes, draft or transcript of speech, or press reports) (Tab 41 of Attachment Volume C)
<b><u>1985:</u></b>	
April 15, 1985	National Association of Broadcasters- 63rd Annual Convention & International Exposition Speak Out On First Amendment (Las Vegas, NV) (Notes, draft or transcript of speech, or press reports) (Tab 42 of Attachment Volume C)
<b><u>1984:</u></b>	
February 23, 1984	NAB Political Broadcast Video Teleconference: The Fairness Doctrine and Noncandidate Advertising (Notes, draft or transcript of speech, or press reports) (Tab 43 of Attachment Volume C)

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May 14, 1984                      Seventh Circuit Judicial Conference: Moderator of Panel on  
    Cameras in the Courts  
    (Notes, draft or transcript of speech, or press reports)  
    (Tab 44 of Attachment Volume C)

1969:

March 17-18, 1969              Federal Bar Association: Supreme Court Briefing Conference  
    (Washington, D.C.)

LIST OF TELEVISION AND RADIO INTERVIEWS

1997:

December 4, 1997              CNN Burden of Proof: Tawana Brawley Case.  
    (Transcript appears at Tab 45 of Attachment Volume C)

June 16, 1997                  CNN Burden of Proof: Fashion Trend Known as Heroin Chic  
    (Transcript appears at Tab 46 of Attachment Volume C)  
    (A videotape is being provided separately. See Tape 11)

May 20, 1997                  CNN Burden of Proof: The Globe's Role in Frank Gifford's Affair  
    (Transcript appears at Tab 47 of Attachment Volume C)

April 22, 1997                  CNN Burden of Proof: Securing a Jury  
    (Transcript appears at Tab 48 of Attachment Volume C)  
    (A videotape is being provided separately. See Tape 9)

March 3, 1997                  CNN Burden of Proof: Oklahoma City Bombing.  
    (Transcript appears at Tab 49 of Attachment Volume C)

February 3, 1997              CNN Burden of Proof: Ghost of Simpson's Past  
    (Transcript appears at Tab 50 of Attachment Volume C)

1996:

July 17, 1996                  CNN Burden of Proof:



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**1995:**

- October 11, 1995                    **CNBC Appearance: BMW Punitive Damages Case.**  
   (A videotape is being provided separately. See Tape 10)
- October 17, 1995                    **CNN Burden of Proof: Open Judicial Proceedings.**  
   (Transcript appears at Tab 51 of Attachment Volume C)  
   (A videotape is being provided separately. See Tape 11)
- October 30, 1995                    **CNN Interview: Attractive Social Factors Form III Values.**  
   (Transcript appears at Tab 52 of Attachment Volume C)
- November 13, 1995                  **CNN Burden of Proof: Simpson Civil Case.**  
   (Transcript appears at Tab 53 of Attachment Volume C)

**1994:**

- May 16, 1994                        **Nightly Business Report: Judge (now Justice) Breyer and Business.**  
   (Transcript appears at Tab 54 of Attachment Volume C)
- October 7, 1994                    **CNN Talk Back Live: Cameras in the Courts.**  
   (Transcript appears at Tab 55 of Attachment Volume C)
- November 7, 1994                  **CNN Talk Back Live: Cameras in the Courts.**  
   (Transcript appears at Tab 56 of Attachment Volume C)

**1993:**

- June 14, 1993                        **Nightly Business Report: Interview Concerning Justice Ginsburg**  
   (Transcript appears at Tab 57 of Attachment Volume C)  
   (A videotape is being provided separately. See Tape 12)
- June 17, 1993                        **C-SPAN: Timothy Dyk on Supreme Court Nominee Ginsburg**  
   (A videotape is being provided separately. See Tape 9)

**1991:**

- July 1, 1991                         **C-SPAN: Cameras in the Federal Courts**  
   (A videotape is being provided separately. See Tape 13)

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1989:

January 2, 1989 USA Today Television Show: Interview re Indecency  
 (A videotape is being provided separately. See Tape 14)

1988:

May 20, 1988 CNN/Crossfire: Religion in the Schools

December 1988 WABC Radio Station Interview Indecency

1986:

Mel Young Show: Scopes II (*Mozert v. Hawkins County*)  
 (An audiotape is being provided separately. (See  
 Audiotape)

William Buckley, Jr. Television Program (*Mozert v. Hawkins  
 County*) (1985 or 1986)

1982:

December 24, 1982 CNN "Take Two"  
 (A videotape is being provided separately See Tape 15)

UNDATED

1 CNN/FNN News - Business Cases in the Supreme Court  
 (A videotape is being provided separately See Tape 9)

2 CNN - "Early Prime" Timothy B. Dyk, Sen. Lieberman on  
 Indecency  
 (A videotape is being provided separately See Tape 9)

3 FX Network "Under Scrutiny" - Timothy B. Dyk - Panel Guest  
 (A videotape is being provided separately See Tape 9)

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4. CNBC "Business Insider" - Timothy B. Dyk on the BMW Case  
 (A videotape is being provided separately. See Tape 9)
5. Fox Morning News: Decency Regulation.  
 (A videotape is being provided separately. See Tape 16)
6. Timothy B. Dyk - McNeil/Lehrer  
 (A videotape is being provided separately. See Tape 17)

### LECTURE NOTES

Lecture Notes from Yale Law School Class  
 (Tab 58 of Attachment Volume C)

Lecture Notes from Georgetown University Leveraged  
 Buyouts Class  
 (Tab 59 of Attachment Volume C)

Lecture Notes from University of Virginia Law School  
 (Tab 60 of Attachment Volume C)

N B There may have been other speeches, and were other television and radio interviews, that I cannot now identify

- 13 Health What is the present state of your health? List the date of your last physical examination.

Very good. Only condition is high pressure in eyes controlled with Occupress.  
 Date of last physical exam: February 10, 1998

- 14 Judicial Office State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court

None

- 15 Citations If you are or have been a judge, provide (1) citations for the ten most significant opinions you have written, (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with

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significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

July 1963 - July 1964 - U.S. Department of Justice, 10th and Pennsylvania Ave., N.W., Washington, D.C. 20530 - Special Assistant to the Assistant Attorney General, Tax Division (one-year appointment)

1962 - 1963 - U.S. Supreme Court, Washington, D.C. - Law Clerk to Chief Justice Warren (one-year appointment)

1961 - 1962 - U.S. Supreme Court, Administrative Office of U.S. Courts, Washington, D.C. - Law Clerk to Justices Reed and Burton (part-time for Chief Justice Warren) (one-year appointment)

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:

1962 - 1963 - U.S. Supreme Court, Washington, D.C. - Law Clerk to Chief Justice Warren (one-year appointment)

1961 - 1962 - U.S. Supreme Court, Administrative Office of U.S. Courts, Washington, D.C. - Law Clerk to Justices Reed and Burton (part-time for Chief Justice Warren) (one-year appointment)

2. whether you practiced alone, and if so, the addresses and dates.

No, I did not practice alone.



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3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

February 1990 - Present - Jones Day Reavis & Pogue, 1450 G Street, N.W., Washington, DC 20005 - Partner and Chair, Issues and Appeals Section;

September 1964 - February 1990 - Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037 - Partner and Associate;

July 1963 - July 1964 - U.S. Department of Justice, 10th and Pennsylvania Ave., N.W., Washington, D.C. 20530 - Special Assistant to the Assistant Attorney General, Tax Division - (one-year appointment)

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My practice has been almost entirely in litigation, and has covered a wide variety of matters. I have appeared in proceedings involving intellectual property, unfair competition, antitrust, injunctions, civil and criminal contempt, motions for access to judicial records, review of federal administrative agencies, adjudications and rulemakings before federal administrative agencies, arbitrations pursuant to court order, breach of contract actions (including government contract issues), customs duties, labor, state and federal taxation, bankruptcy, communications law, and constitutional law. I estimate that I have taken or defended over two hundred depositions in federal court and administrative litigation and have tried both civil and criminal cases. I have participated in hundreds of hours of trial before federal and state courts or administrative agencies. I have argued approximately 70 appeals in various courts, including the United States Supreme Court, ten of the Federal Circuits and in state appellate courts.

During the period 1964 to 1990, my practice consisted primarily of Federal Communications Commission issues, First Amendment issues, and general litigation before the federal courts. My practice included substantial amounts of appellate litigation. In February 1990, I moved from Wilmer, Cutler & Pickering to Jones, Day, Reavis & Pogue to chair the Issues and Appeals Section of the Litigation Group. During the period 1990 to the present, I have continued to do substantial amounts of appellate litigation and district court litigation, but have done less FCC work. My practice has expanded to include additional areas such as intellectual property, labor law, state taxation, Lanham Act and unfair competition.

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and a wide variety of other appellate matters. I have appeared in state as well as federal court

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I have specialized in appellate litigation and general trial court litigation. My areas of substantive specialization have included intellectual property, state taxation, communications law, bankruptcy, First Amendment law, labor law, and constitutional law. Typical former clients have included: (1) broadcasters, and broadcast organizations; and (2) other corporations and associations. On occasion, I have represented government entities and individuals

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates

Frequently

2. What percentage of these appearances was in

- (a) federal courts,  
70%-75%
- (b) state courts of record,  
5%-10%
- (c) other courts  
administrative agencies - 15%-20%  
(Estimated)

3. What percentage of your litigation was

- (a) civil,  
98%
- (b) criminal  
2%  
(Estimated)

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Timothy Belcher Dyk

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4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

At least seven - Chief counsel in all but one (co-counsel in one); (includes administrative and arbitration proceedings; excludes cases decided without evidentiary hearing.)

5. What percentage of these trials was:

- (a) jury;  
0%.
- (b) non-jury.  
100%

- 18 Litigation. Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Cable News Network, Inc. v. United States, 824 F.2d 1046 (D.C. Cir.), cert. denied 484 U.S. 914 (1987).

This case involved the First Amendment right of the public to access to jury voir dire in the Deaver trial. The District Court (Judge Thomas Penfield Jackson), on July 14, 1987, held that there was no right of access. The District of Columbia Circuit reversed. I was lead counsel for the news media. I argued and supervised briefing. The case confirmed the public's access to jury voir dire proceedings.

Parties represented: Cable News Network, Inc., Capital Cities ABC, Inc., CBS, Inc., National Broadcasting Co., Inc.

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U.S. Court of Appeals for the D.C. Circuit. Before Judges Starr and Silberman and Senior Circuit Judge McGowan

Co-counsel: Kevin T. Baine, Williams & Connolly, 725 12th St., N.W., Washington, D.C. 20005. (202) 434-5000.

David E. Kendall, Williams & Connolly, 725 12th St., N.W., Washington, D.C. 20005. (202) 434-5000.

Opposing counsel: Whitney North Seymour, Jr., Landy & Seymour, 25 West 43rd Street, New York, NY 10036. (212) 869-2212.

2. **Chamber of Commerce of the United States v. Reich**, 886 F. Supp. 66 (D.D. C. 1995), **rev'd**, 57 F.3d 1099 (D.C. Cir. 1995), **on remand**, 897 F. Supp. 570 (D.D.C. 1995), **rev'd**, 74 F.3d 1322 (D.C. Cir. 1996), **rehearing denied**, 83 F.3d 439 (D.C. Cir. 1996), **rehearing en banc denied**, 83 F.3d 442 (D.C. Cir. 1996)

This case involved a suit by a number of business organizations including the Chamber of Commerce, the National Association of Manufacturers, the American Trucking Associations, the Labor Policy Association, Bridgestone Firestone and Mosler challenging President Clinton's executive order barring government contractors from hiring permanent replacement workers during economic strikes. I was lead counsel for the business groups, both at the district court and courts of appeals levels, from the filing of the case through the conclusion. I argued and supervised briefing at all levels. The executive order was ultimately held invalid by the District of Columbia Circuit on the ground that it conflicted with the National Labor Relations Act, the first time in decades that an executive order had been invalidated. The first District of Columbia Circuit opinion is also significant on ripeness issues since it held that the executive order's impact on labor/management bargaining made it ripe for review.

886 F. Supp. 66

Parties represented: Chamber of Commerce of the United States, American Trucking Associations, Inc., Labor Policy Association, National Association of Manufacturers, Bridgestone/Firestone, Inc. and Mosler, Inc.

U.S. District Court for the District of Columbia. Before Judge Kessler

Co-counsel: Daniel R. Barney, ATA Litigation Center, 2200 Mill Road, Alexandria, VA 22314. (703) 838-1865



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Timothy Belcher Dyk

## Questionnaire for Judicial Nominees

Daniel V. Yaeger, Labor Policy Association, 1015 15th Street, N.W., Suite 1200, Washington, D.C. 20005. (202) 789-8670.

Douglas S. McDowell, McGuiness & Williams, Washington, D.C. (Deceased).

Jan S. Amundson, National Association of Manufacturers, 1331 Pennsylvania, N.W., North Tower - Suite 1500, Washington, D.C. 20004. (202) 637-3058.

Opposing Counsel: Thomas S. Williamson, Jr., Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044 (202) 662-6000.

Margaret S. Hewing, U.S. Dep't of Justice, 901 E St., N.W., Room 969, Washington, D.C. 20530. (202) 514-3481.

57 F.3d 1099:

Parties represented: Chamber of Commerce of the United States, American Trucking Associations, Inc., Labor Policy Association, National Association of Manufacturers, Bridgestone/Firestone, Inc. and Mosler, Inc.

U.S. Court of Appeals for the D.C. Circuit. Before Judges Wald, Buckley and Rogers.

Co-counsel: Daniel R. Barney, ATA Litigation Center, 2200 Mill Road, Alexandria, VA 22314. (703) 838-1865.

Daniel V. Yaeger, Labor Policy Association, 1015 15th Street, N.W., Suite 1200, Washington, D.C. 20005. (202) 789-8670.

Douglas S. McDowell, McGuiness & Williams, Washington, D.C. (Deceased).

Jan S. Amundson, National Association of Manufacturers, 1331 Pennsylvania, N.W., North Tower - Suite 1500, Washington, D.C. 20004. (202) 637-3058.

Opposing counsel: John A. Rogovin, O'Melveny & Myers, L.L.P., 555 13th St., N.W., Washington, D.C. 20004. (202) 383-5414.

Margaret S. Hewing, U.S. Dep't of Justice, 901 E St., N.W., Room 969, Washington, D.C. 20530. (202) 514-3481.

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897 F. Supp. 570:

**Parties represented:** Chamber of Commerce of the United States, American Trucking Associations, Inc., Labor Policy Association, National Association of Manufacturers, Bridgestone/Firestone, Inc. and Mosler, Inc.

U.S. District Court for the District of Columbia. Before Judge Kessler.

**Co-counsel:** Daniel R. Barney, ATA Litigation Center, 2200 Mill Road, Alexandria, VA 22314. (703) 838-1865.

Daniel V. Yaeger, Labor Policy Association, 1015 15th Street, N.W., Suite 1200, Washington, D.C. 20005. (202) 789-8670.

Douglas S. McDowell, McGuiness & Williams, Washington, D.C.  
 (Deceased).

Jan S. Amundson, National Association of Manufacturers, 1331 Pennsylvania, N.W., North Tower - Suite 1500, Washington, D.C. 20004  
 (202) 637-3058.

**Opposing counsel** Margaret S. Hewing, U.S. Dep't of Justice, 901 E St., N.W., Room 964, Washington, D.C. 20530. (202) 514-3481

74 F.3d 1322

**Parties represented:** Chamber of Commerce of the United States, American Trucking Associations, Inc., Labor Policy Association, National Association of Manufacturers, Bridgestone/Firestone, Inc. and Mosler, Inc.

U.S. Court of Appeals for the D.C. Circuit. Before Judges Silberman, Sentelle and Randolph

**Co-counsel** Daniel R. Barney, ATA Litigation Center, 2200 Mill Road, Alexandria, VA 22314. (703) 838-1865

Daniel V. Yaeger, Labor Policy Association, 1015 15th Street, N.W., Suite 1200, Washington, D.C. 20005. (202) 789-8670

Douglas S. McDowell, McGuiness & Williams, Washington, D.C.  
 (Deceased)

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Jan S. Amundson, National Association of Manufacturers, 1331  
 Pennsylvania, N.W., North Tower - Suite 1500, Washington, D.C. 20004.  
 (202) 637-3058.

Opposing counsel: Stephen W. Preston, U.S. Dep't of Justice, 950 Pennsylvania Avenue,  
 N.W., Washington, D.C. 20530. (202) 514-4015.

3. **Exxon Chemical Patents, Inc. v. Lubrizol Corporation**, No. 93-1275 and **Exxon Chemical Patents, Inc. v. Lubrizol Corporation**, No. 94-1309, 64 F.3d 1553 (Fed. Cir. 1995), rehearing and rehearing en banc denied, 77 F.3d 450 (Fed. Cir. 1996), cert. denied, 116 S. Ct. 2554 (1996)

These cases (one on liability, one on damages) involved a judgment for patent infringement against Lubrizol in excess of \$100 million. The two appeals, in which I participated actively in briefing and presented argument before the Federal Circuit (together with co-counsel), presented a variety of significant patent law issues. The court resolved the case on the basis of claim construction (i.e., court's construction of the claims appearing in the patents), and Lubrizol prevailed on the ground that it had not infringed under the appellate court's claim construction. A divided court of appeals denied en banc review, and the Supreme Court denied certiorari. The case is significant on the issue of construction of patent claims. (The Federal Circuit (Plager, Clevinger, Bryson) held recently in Exxon Chemicals Patents, Inc. v. Lubrizol Corp., 45 USPQ2d 1865 (Fed. Cir. 1998), that the district court was required to entertain a motion for new trial on a doctrine of equivalents theory (an alternative theory for infringement))

No. 93-1275

Parties represented: The Lubrizol Corporation

U.S. Court of Appeals for the Federal Circuit Before Judges Nies, Plager and Clevenger.

Co-counsel S. Leslie Misrock, Pennie & Edmunds, 1155 Avenue of the Americas, New York, NY 10036. (212) 790-9090

Opposing counsel William C. Slusser, Baker & Botts, L.L.P., One Shell Plaza, 910 Louisiana, Houston, TX 77002 (713) 229-1234

No. 94-1309

Parties represented: The Lubrizol Corporation

U.S. Court of Appeals for the Federal Circuit Before Judges Nies, Plager, and Clevenger

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Co-counsel: S. Leslie Misrock, Pennie & Edmunds, 1155 Avenue of the Americas, New York, NY 10036. (212) 790-9090.

Opposing counsel: Donald R. Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., 1300 Eye Street, N.W., Suite 700, Washington, D.C. 20005. (202) 408-4000.

4. FCC Fairness litigation. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989); cert. denied 493 U.S. 1019 (1990).

This case was one of a series of related cases involving the question whether the FCC's fairness doctrine (requiring the presentation of opposing views on controversial issues) was required by statute, whether it served the public interest, and whether it was constitutional under the First Amendment. In these cases I was counsel for certain broadcasters challenging the doctrine. The representation included the period from 1987 to 1993. I argued and supervised briefing. At first the FCC declined to decide whether the doctrine was constitutional. On review the District of Columbia Circuit ordered the Commission to consider the constitutional question. Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987); Radio-Television News Directors Association v. FCC, 809 F.2d 860 (D.C. Cir. 1987). On remand the FCC held that the doctrine was unconstitutional and that it did not serve the public interest. The decision to eliminate the doctrine was sustained by the District of Columbia Circuit in Syracuse Peace Council, without reaching the constitutional question. In later litigation in the Eight Circuit, petitioners claimed that the doctrine could not be eliminated by the FCC because it was required by statute. Ultimately the Eight Circuit agreed with our position that the doctrine was not statutorily required. Arkansas AFL-CIO v. FCC, 980 F.2d 1190 (8th Cir. 1992), vacated on grant of petition for rehearing en banc, affirmed, Arkansas AFL-CIO v. FCC, 11 F.3d 1430 (8th Cir. 1993) (en banc). This decision is an important precedent concerning the FCC's authority to repeal the fairness doctrine.

Parties represented: CBS, Inc., Radio-Television News Directors Association, American Newspaper Publishers Association, National Association of Broadcasters, National Broadcasting Co., Inc., Freedom of Expression Foundation, Reporters Committee for Freedom of the Press

U.S. Court of Appeals for the District of Columbia Circuit. Before Chief Judge Wald and Judges Starr and Williams

Co-counsel: Floyd Abrams, Cahill, Gordon & Reindel, 50 Pine Street, New York, NY 10005. (212) 701-3000



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Opposing counsel: Henry Geller, 3001 Veazy Terrace, N.W., #702, Washington, D.C. 20008. (202) 293-4380.

Diane S. Killory, Intelsat, 3400 International Drive, N.W., Washington, D.C. 20008 (202) 944-8252.

5. FCC Indecency Litigation. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992).

In these related litigations I was lead counsel representing broadcasters, program suppliers, and representatives of listeners and viewers in challenging FCC indecency regulation on constitutional grounds. I supervised briefing and presented oral argument. The representation included the period from 1987 to 1996. The District of Columbia Circuit ruled in 1988 that the FCC was constitutionally required to establish a safe harbor -- certain hours of the day during which broadcasters could present, and listeners and viewers could receive, non-obscene indecent matter. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). Congress then enacted a statute imposing a twenty-four-hour ban on broadcast indecency. In 1991, in this case, the District of Columbia Circuit held the statute unconstitutional. Congress enacted another statute limiting broadcast indecency to the hours of midnight to 6:00 a.m. on commercial stations. The same group challenged that statute in the District of Columbia Circuit which held the statute unconstitutional for the period from 10:00 p.m. to midnight. Action for Children's Television, Inc. v. FCC, 58 F.3d 654 (D.C. Cir. 1995), (en banc) cert. denied, 116 S.Ct. 701 (1996).

Parties represented: Action for Children's Television, Capital Cities/ABC, Inc., CBS Inc., American Civil Liberties Union, Association of Independent Television Stations, Inc., Infinity Broadcasting Corp., Motion Picture Association of America, National Association of Broadcasters, National Broadcasting Co., Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists

U.S. Court of Appeals for the District of Columbia Circuit Before Chief Judge Mikva and Judges Edwards and Thomas

Opposing counsel Robert L. Pettit, Wiley, Rein & Fielding, 1770 K Street, N.W., Washington, D.C. 20006 (202) 429-7000

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6. In re Prudential Lines, Inc., 114 B.R. 27 (Bankr. S.D.N.Y. 1989) (subsequent history omitted).

This case involved an important question under the Bankruptcy Code -- whether the debtor was entitled to the net operating loss carryforwards. After extensive discovery the matter was tried to the court in 1989. I was counsel at the trial level (together with my then-partner, William Perlstein), representing creditors in a successful effort to claim the NOLS. I participated in the trial and supervised briefing. The bankruptcy court decision was affirmed on appeal. (I was not responsible for the appeals.) The case decided a significant unresolved bankruptcy issue

Parties represented: Cold Spring Shipping, L.P. and Official Committee of Unsecured Creditors

Trial Period: One day bench trial - December 1989

U.S. Bankruptcy Court in the Southern District of New York. Before Judge Howard C. Bushman, III

Co-counsel William J. Perlstein, Wilmer, Cutler & Pickering, 2445 M Street, N W , Washington, D.C. 20037-1420. (202) 663-6000

Allan L. Gropper, White & Case, 1155 Avenue of the Americas, New York, NY 10036. (212) 819-8200

Opposing counsel W Bruce Johnson, 75 E. 55th St , New York, NY (212) 856-7050

7. Mozert v. Hawkins County School Board, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988)

This case involved a First Amendment freedom of religion claim brought by fundamentalist parents against a local school board and school officials. The parents claimed that their children had a right to be excused from any class which taught objectionable material. The parents' objections included large parts of the reading curriculum and possibly the social studies program as well. I was lead counsel for the school board and school officials. In addition to playing the lead role at the bench trial, I supervised briefing and presented argument on appeal. After extensive discovery, this case was tried before the court. The court ruled in favor of the plaintiffs. On appeal the judgment was reversed. The Sixth Circuit held that the plaintiffs had not established a violation of the Free Exercise clause and that the schools did not have to accommodate the plaintiffs' religious beliefs to the extent requested. The case is viewed as a major free exercise case and received extensive publicity.

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647 F. Supp. 1194:

Parties represented: Hawkins County Public Schools, Doug Cloud, Conley E. Bailey, Larry Elkins, Harold E. Silvers, Jr., Jean Price, Quentin Dykes, James Salley.

Trial Period: July 14, 1986 - July 21, 1986.

U.S. District Court for the Eastern District of Tennessee. Before Chief Judge Hull.

Co-counsel: John Payton, Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037-1420. (202) 663-6000

Judith Wish, Associate Counsel, Office of Professional Responsibility, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4304, Washington, D.C. 20530. (202) 514-3365

N.R. Coleman, Jr., Milligan & Coleman, NationsBank Bldg., Suite 301, P.O. Box 1060, Greeneville, TN 37744. (423) 639-6811.

Phillip L. Boyd, 108 South Church Street, P.O. Box 298, Rogersville, TN 38757. (423) 272-3619.

Charles Hampton White, Cornelius & Collins, Suite 2700, Nashville City Center, P.O. Box 190695, Nashville, TN 37219. (615) 244-1440.

William H. Farmer, Waller Lansden Dortch & Davis, Nashville City Center, Suite 2100, 511 Union St., Nashville, TN 37219. (615) 244-6380.

Opposing counsel: Michael P. Farris, Home School Legal Defense Assn., P.O. Box 159, Paeonian Springs, VA 22129. (540) 882-3838.

27 F.2d 1058

Parties represented: Hawkins County Public Schools, Doug Cloud, Conley E. Bailey, Larry Elkins, Harold E. Silvers, Jr., Jean Price, Quentin Dykes, James Salley

U.S. Court of Appeals for the Sixth Circuit. Before Chief Judge Lively, Judges Kennedy and Boggs

Co-counsel: John Payton, Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037-1420. (202) 663-6000

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Questionnaire for Judicial Nominees

Judith B. Wish, Associate Counsel, Office of Professional Responsibility,  
U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4304,  
Washington, D.C. 20530. (202) 514-3365

N.R. Coleman, Jr., Milligan & Coleman, NationsBank Bldg. 301, P.O. Box  
1060, Greeneville, TN 37744. (423) 639-6811.

Charles Hampton White, Cornelius & Collins, Suite 2700, Nashville City  
Center, P.O. Box 190695, Nashville, TN 37219. (615) 244-1440

William H. Farmer, Waller Lansden Dortch & Davis, Nashville City  
Center, Suite 2100, 511 Union St., Nashville, TN 37219. (615) 244-6380

W.J. Michael Cody, Burch, Porter & Johnson, 130 North Court Ave.,  
Memphis, TN 38103. (901) 524-5000.

Opposing counsel: Michael P. Farris, Home School Legal Defense Assn., P.O. Box 159,  
Paconian Springs, VA 22129. (540) 882-3838.

8. Peden v. State of Kansas, 930 P.2d 1 (Kan. 1996), cert. denied, 117 S. Ct. 1821  
(1997)

This case involved an equal protection challenge brought by a single Kansas taxpayer who claimed that the Kansas income tax rate structure was unconstitutional. His claim was that the tax rate structure unconstitutionally favored married taxpayers over single taxpayers by taxing married taxpayers at a lower rate. I represented the State of Kansas from 1995-1997. I supervised briefing and argued the case for the State of Kansas. We successfully argued to the Kansas Supreme Court that the state had a legitimate interest in promoting the institution of marriage and subsidizing marriage through its lower tax rate structure and that the statute did not violate the equal protection clause. The case is important in the area of tax and equal protection.

Parties represented: State of Kansas, Kansas Department of Revenue, Secretary of Revenue for the State of Kansas, Director of Taxation of the State of Kansas

Supreme Court of Kansas: Before Justices Abbott, Allegretti, Six, Larson, and Lockett, and Judges Lewis and Wahl

Counsel: Richard Oxendale, General Counsel, Kansas Dept. of Revenue, 915 S.W.  
Harrison St., Topeka, Kansas 66612. (913) 296-2331



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Opposing counsel: Michael E. Waldeck, Niewald, Waldeck & Brown, P.C.,  
12 Wyandotte Plaza, 120 West 12th St., Kansas City, MO 64105.  
(816) 471-7000

9. **Textron Lycoming Reciprocating Engine Division. AVCO Corp. v. United Automobile, Aerospace and Agricultural Implement Workers, No. 97-463 (U.S.)**  
(decision pending)

This case is presently pending before the United States Supreme Court. It was argued on February 23, 1998. The issue is whether Section 301 of the Labor Management Relations Act of 1947, giving district courts' jurisdiction over suits "for violation" of collective bargaining agreements, allows a union to sue to invalidate an agreement on grounds of alleged fraud in the negotiating process when there has been no violation of the agreement, or whether such claims must be brought before the NLRB as unfair labor practices. Our client is Textron Lycoming; I am lead counsel in the case. I supervised the briefing and presented oral argument in the Supreme Court. Textron Lycoming urges that section 301 only allows suits in federal court where there has been a violation of the agreement and that jurisdictional grants should be narrowly construed.

Parties represented Textron Lycoming Reciprocating Engine Division, AVCO Corp.

U.S. Supreme Court. The Justices of the Supreme Court

Co-counsel: Andrew M. Kramer, Jones, Day, Reavis & Pogue, 1450 G Street, N.W.,  
Washington, D.C. 20005. (202) 879-3939

Opposing counsel: Stephen A. Yokich, UAW, 1757 "N" Street, N.W., Washington, D.C.  
20036. (202) 828-8500

10. **United States v. George Gordon Liddy, 354 F. Supp. 208 (D.D.C.), stay denied, 478 F.2d 586 (D.C. Cir. 1972)**

This case involved the right of a news organization to withhold unpublished materials on grounds of First Amendment privilege. The materials (unpublished tape recordings of a potential witness) were subpoenaed by the defense in the Watergate criminal case. John Lawrence, the Bureau Chief of the L.A. Times, became the first person to go to jail in the Watergate case for refusing to produce the materials. I represented Mr. Lawrence and the Los Angeles Times, and supervised briefing and argued the case in the district court. The district court, in 1972, ordered the materials produced and overruled the claim of privilege. The case was settled while on appeal.

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**Parties represented:** Times Mirror Co., and John Lawrence

**U.S. District Court for the District of Columbia.** Before Chief Judge Sirica.

**Co-counsel:** J. Roger Wollenberg, Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037-1420. (202) 663-6000

Herbert J. Miller, Miller, Cassidy, Larroca & Lewin, L.L.P., 2555 M Street, N.W., Washington, D.C. 20037. (202) 293-6400.

**Opposing counsel:** Earl J. Silbert, Schwalb, Donnenfeld & Silbert, 1025 Thomas Jefferson St., N.W., Suite 300 East, Washington, D.C. 20007. (202) 965-7910.

Seymour Glanzer, Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street, N.W., Washington, D.C. 20037. (202) 785-9700.

Peter L. Maroulis, 104 Hooker Ave., Poughkeepsie, NY 12601. (914) 471-6050.

William O. Bittman, Reed Smith Shaw & McClay, 1301 K St., N.W., Suite 1100 East Tower, Washington, D.C. 20005. (202) 414-9200

Gerald Alch: No listing available

Henry B. Rothblatt, Esq., Barnett, Barclay & Springmann, P.A., 501 Mainposa Street, P.O. Box 1667, Orlando, FL 32802. (404) 425-4245.

**N.B.:** Only principal co-counsel are listed.

- 19 **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In addition to the 19 cases listed in the answer to Question 18, I have participated in a number of other significant matters. For example:

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1. I have argued eight cases in the U.S. Supreme Court and more than 60 others in the U.S. Courts of Appeals and the state appellate courts. I have argued five cases in the Federal Circuit on behalf of Lubrizol and other clients (four of these were patent cases, and one involved customs duties). I was scheduled to argue a sixth case involving a drug delivery patent. I have participated in other Federal Circuit patent cases that I did not argue.

2. Recently, I have been involved in large district court cases involving intellectual property and unfair competition issues on behalf of the Lubrizol Corporation. These cases have involved significant discovery. I have also been lead counsel or associate counsel in a large number of other cases at the trial court level, including most recently a labor case in Michigan federal court, a First Amendment case in District of Columbia federal court, etc.

3. Earlier in my practice, I was active in helping to secure court approval of deregulation of broadcasting. In addition to the litigation concerning the fairness doctrine (see Question 18), I argued the radio format case in the United States Supreme Court on behalf of the industry. (The Court ultimately approved the FCC's decision not to regulate radio format changes, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)). I also argued broadcast deregulation cases, (Office of Communications v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Office of Communications v. FCC, 779 F.2d 702 (D.C. Cir. 1985)), in the District of Columbia Circuit. I participated, as lead counsel, in two lengthy license renewal cases before the FCC involving CBS Inc. and RKO General.

4. I have been active in a number of other high profile cases involving the news media and the courts representing broadcasters. I was involved in the Agnew and Reagan tapes cases, as well as others involving newsgathering privilege and press access.

5. While it is not a litigated case, I have also represented the news media in their efforts to secure camera access to the federal courts. A three-year experiment, approved by the U.S. Judicial Conference, was concluded. The Conference did not continue the experiment or make it permanent.

6. I have taught at three law schools -- Yale, the University of Virginia, and Georgetown -- teaching a variety of subjects ranging from constitutional law (the introductory course and First Amendment seminars), Communications Law, and leveraged buyout law.

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## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I am entitled to receive monthly payments from Wilmer, Cutler & Pickering as part of its retirement plan. The last payment date is March 1, 2001. If I left the firm of Jones Day, I would also be entitled to receive payments as follows (as of March 15, 1998): (a) payment of capital contribution over a three-year period; (b) payment of deferred compensation in the year following withdrawal. There is also a retirement plan, but I have not yet vested under the plan. While there is no right to convert any of these plans to a lump sum payment, Jones Day would be willing to make a lump sum payment.

I have 401(k) plans with both firms (and my wife has a 401(k) plan with Wilmer Cutler). These 401(k) plans can be converted into IRAs.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

There are no personal matters of which I am aware that are likely to result in litigation before the Federal Circuit. My representation of clients would result in a conflict of interest if matters in which I was involved were pending before the court at the time I became a judge. An actual conflict or an appearance of conflict of interest could arise if former clients, former law firms, or companies or other entities in which I hold or held a pecuniary interest or sat on the board of directors were to become parties before the court.

If I became a federal judge, I would comply with the Code of Judicial Conduct and other ethical obligations. I would disqualify myself in matters involving my former law firms or former significant clients for a substantial period of time after I had severed all financial relationships. I would also disqualify myself for a substantial period of time in all matters involving non-profits on which I served on their board of directors. I would consult, when appropriate, with the Administrative Office of U.S. Courts or other judicial bodies to secure necessary guidance.



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3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

It is possible that I would teach a course at a law school or elsewhere, but I have no commitment or agreement to do so.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

The response is supplied in my Financial Disclosure Report which follows:

40-10  
Rev. 1/91

# FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 1997

Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
DYN, Timotny Belcher	U.S. Court of Appeals for the Federal Circuit	4/3/98
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date _____ ____ Initial ____ Annual ____ Final	6. Reporting Period 1/1/97 to 3/15/98
U.S. Circuit Judge -Nominee		
7. Chambers or Office Address Jones Day Reavis & Pogue 1450 G Street, N.W. Washington, D.C. 20005	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
	Reviewing Officer _____	Date _____

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts,  
checking the NONE box for each part where you have no reportable information. Sign on last page.

## I. POSITIONS. (Reporting individual only; see pp 9-13 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
NONE (No reportable positions.)	
1 Partner	Jones Day Reavis & Pogue
2 Director	Farmworker Litigation Support Fund, Inc.
3 Director	People for the American Way

## II. AGREEMENTS. (Reporting individual only; see pp 14-16 of Instructions.)

DATE	PARTIES AND TERMS
NONE (No reportable agreements)	
1990	Jones Day Reavis & Pogue - Agreement for return of capital contribution and deferred compensation; 401(k) plan
1990	Wilmer, Cutler & Pickering - Agreement for individual payments on account of previous partnership interest; 401(k) plan

## III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp 17-24 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
NONE (No reportable non-investment income)		
1996	Jones Day Reavis & Pogue - partnership compensation	\$54,161.90
1997	Jones Day Reavis & Pogue - partnership compensation	\$660,500.00
1998	Jones Day Reavis & Pogue - partnership compensation	\$117,700.00
1996	Wilmer, Cutler & Pickering - former partner withdrawal payments	\$47,136.00
1997	Wilmer, Cutler & Pickering - former partner withdrawal payments	\$47,136.00
1998	Wilmer, Cutler & Pickering - former partner withdrawal payments	\$9,820.00

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### III. NON-INVESTMENT INCOME: Continuation Sheet

<u>Date</u>	<u>Source and Type</u>	<u>Gross Income</u>
1997	Frameworks - services in lieu of past rent (J)	c. 700.00
1997	Aetna - Insurance reimbursement re TAS property (J)	643.00
1/1/98 - 3/15/98	Frameworks - services in lieu of past rent (J)	c. 500.00
1/1/98 - 3/15/98	Settlement in class action re Equimark Securities (J)	269.73

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

DYK, Timothy Belcher

Date of Report

4/3/98

## IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 33-38 of Instructions.)

SOURCE

DESCRIPTION

☐ NONE (No such reportable reimbursements.)

☐ Exempt

## V. GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

SOURCE

DESCRIPTION

VALUE

☐ NONE (No such reportable gifts.)

☐ Exempt

\$

\$

\$

\$

## VI. LIABILITIES. (Includes those of spouse and dependent children; indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(D)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

CREDITOR

DESCRIPTION

VALUE CODE\*

☒ NONE (No reportable liabilities.)



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

DYK, Timothy Belcher

Date of Report

4/3/98

## VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (includes those of

spouse and dependent children. See pp. 33-34 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date Month- Day	(3) Value Code3 (I-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)

Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership of spouse, "(DC)" for ownership by dependent child.

Place "(N)" after each asset exempt from prior disclosure

--- NONE (No reportable income, assets, or transactions.)

See also Continuation Sheet appended hereto.

Mass Bay Brewing Co. Common Stock	None	None	M	W					
Mass Bay Brewing Co. Common Stock	None	None	L	W					
Lot - Truro, MA (J) Parcel 1	None	None	L	W					
Lot - Truro, MA (J) Parcel 2	None	None	L	W					
First National Bank of Boston, Boston, MA (blind trust)		unknown	P1	T					
Hamstead Village Hous- ing Assn. (Inc. par. 1)(J)	C	Div	unknown						EXEMPT
Hamstead Village Assoc. (Inc. par. 1)	A	Div	unknown						
Hamstead Village Assoc. (Inc. par. 1)	A	Div	unknown						
Lot - Truro, MA (J)	None	None	M	W					

Income Tax Code	A=\$1,000 or less	B=\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000	E=\$15,001-\$50,000
Asset Code	F=\$50,001-\$100,000	G=\$100,001-\$1,000,000	H=\$1,000,001-\$5,000,000	I=\$5,000,001-\$10,000,000	J=\$10,000,001-\$25,000,000
Asset Code	K=\$25,000,001-\$50,000,000	L=\$50,000,001-\$100,000,000	M=\$100,000,001-\$500,000,000	N=\$500,000,001-\$1,000,000,000	O=\$1,000,000,001-\$5,000,000,000
Asset Code	P=\$5,000,001-\$10,000,000	Q=\$10,000,001-\$25,000,000	R=\$25,000,001-\$50,000,000	S=\$50,000,001-\$100,000,000	T=\$100,000,001-\$250,000,000
Asset Code	U=\$250,000,001-\$500,000,000	V=\$500,000,001-\$1,000,000,000	W=\$1,000,000,001-\$5,000,000,000	X=\$5,000,000,001-\$10,000,000,000	Y=\$10,000,000,001-\$25,000,000,000
Asset Code	Z=\$25,000,001-\$50,000,000	AA=\$50,000,001-\$100,000,000	AB=\$100,000,001-\$250,000,000	AC=\$250,000,001-\$500,000,000	AD=\$500,000,001-\$1,000,000,000

VII. INVESTMENTS AND TRUSTS – Income, value, transactions  
Continuation Sheet, Page one

Description of Assets	Income	Type	Value	Value Method
<b>ZERO COUPON BONDS</b>				
FICO Strips due 6/6/05	C	Int	K	T
FICO Strips due 12/06/99	B	Int	---	---
US Treas Strips due 7/30/97	C	Int	---	---
US Treas Strips due 8/15/16	C	Int	---	---
US Treas CUBES due 5/15/01	A	Int	J	T
GATORS due 5/15/03	B	Int	K	T
Cert Accrual Treas Sec, 5/15/04	B	Int	K	T
Coupon Treas Recpts, 5/15/04	A	Int	J	T
US Treas CUBES, 11/15/01	C	Int	K	T
US Treas CUBES, 5/15/02	D	Int	M	T
US Treas Strips due 5/15/99	C	Int	---	---
US Treas Strips due 11/15/99	C	Int	---	---
US Treas Strips due 11/15/03	D	Int	M	T
Cert Accrual Treas Sec, 8/15/04	D	Int	M	T
US Treas Strips due 11/15/04	E	Int	N	T
US Treas CUBES due 11/15/04	C	Int	L	T
US Treas CUBES due 11/15/05	C	Int	K	T
US Treas CUBES due 11/15/06	D	Int	M	T
FICO Strips due 8/3/04	B	Int	K	T
FICO Strips, due 5/2/06	C	Int	K	T

**VII. INVESTMENTS AND TRUSTS -- Income, value, transactions**  
**Continuation Sheet, Page two**

Description of Assets	Income	Type	Value	Value Method
<b>ZERO COUPON BONDS (Cont.)</b>				
US Treas Strips, due 5/15/21	D	Int	---	---
CPN Treas H Bond, due 8/15/01 (S)	A	Int	J	T
Cert Accrual Treas Sec, 5/15/04 (S)	B	Int	K	T
Cert Accrual Treas Sec, 11/15/01 (S)	A	Int	J	T
US Treas CUBEs, due 11/15/02 (S)	D	Int	L	T
US Treas Bond, due 5/15/21 (S)	E	Int	---	---
FICO Strips, due 12/6/99 (S)	D	Int	---	---
FICO Strips, due 4/6/99 (S)	D	Int	---	---
Treas Invt Growth Recpts, due 11/15/98 (DC)	B	Int	K	T
US Treas Strips, due 2/15/00 (DC)	A	Int	J	T
US Treas CUBEs, due 5/15/01 (DC)	A	Int	J	T
US Treas Strips, due 8/15/16 (DC)	C	Int	---	---
US Treas Strips, due 5/15/21 (DC)	C	Int	---	---
FICO Strips, due 12/06/99 (DC)	E	Int	---	---
FICO Strips, due 3/07/99 (DC)	D	Int	---	---
FICO Strips, due 5/18/99 (DC)	F	Int	---	---
<b>COMMON STOCK</b>				
Lubrizol Corp.	A	Div	---	---

VII. INVESTMENTS AND TRUSTS -- Income, value, transactions  
 Continuation Sheet, Page three

Description of Assets	Income	Type	Value	Value Method
<b>TREASURY BILLS</b>				
US Treas Bills due 7/23/98	None	Int	M	T
US Treas Bills due 6/25/98	None	Int	L	T
US Treas Bills due 7/23/98	None	Int	N	T
US Treas Bills due 7/23/98	None	Int	N	T
US Treas Bills due 12/10/98	None	Int	L	T
US Treas Bills due 7/23/98	None	Int	L	T
US Treas Bills due 7/23/98 (S)	None	Int	P1	T
US Treas Bills due 7/23/98 (DC)	None	Int	M	T
<b>MUTUAL FUNDS</b>				
Crabbe Huson Special Fund	E	Int	M	T
Tweedy Browne American Value Fund, Inc.	C	Int	M	T
Crabbe Huson Special Fund (S)	C	Int	J	T
<b>BANK ACCOUNTS (Money Market, Checking, Savings and NOW accounts)</b>				
Armada Money Market Fund	B	Int	L	T
Wheat First Money Market (CRM)	A	Int	L	T
Wheat First Money Market (CRG)	A	Int	J	T
Wheat First Money Market (CRT) (DC)	A	Int	J	T
UMB Money Market-1	A	Int	K	T



VII. INVESTMENTS AND TRUSTS – Income, value, transactions  
 Continuation Sheet, Page four

Description of Assets	Income	Type	Value	Value Method
<b>BANK ACCOUNTS (Money Market, Checking, Savings and NOW Accounts) cont.</b>				
UMB Money Market (S)	A	Int	K	T
Cape Cod Bank & Trust Savings	A	Int	J	T
Riggs Bank, N.A. Checking	A	Int	J	T
Riggs Bank Money Mkt	A	Int	J	T
Riggs Bank Checking (J)	A	Int	J	T
Riggs Bank Money Mkt (J)	A	Int	J	T
Riggs Bank Checking (S)	A	Int	J	T
Riggs Bank Money Mkt (S)	A	Int	J	T
PNCBank Money Mkt (S)	A	Int	K	T
Riggs Bank Money Mkt (DC)	A	Int	J	T
<b>CERTIFICATES OF DEPOSIT</b>				
CD, Crestar Bank, maturity 4/15/98 (DC)	A	Int	J	T
CD, Crestar Bank, maturity 11/13/98 (DC)	A	Int	J	T
<b>MISCELLANEOUS GOVERNMENT SECURITIES</b>				
White House Federal Credit Union, S-00 Prime Share (S)	A	Div	J	T
US Treas Notes due 1/31/98 (DC)	A	Int	J	T
<b>MISCELLANEOUS ASSETS</b>				
Mass Mutual Life Ins Policy	B	Int	K	T
Security Conn Life Ins (S)	C	Int	K	T
Security Conn Life Ins (S)	A	Int	J	T
Security Conn Life Ins (S)	B	Int	K	T

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting DYK, Timothy Belcher	Date of Report 4/3/98
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## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Note: Investment income from Zero Coupon bonds is reported at 6% yearly on market value of bond. Capital gains from transactions are not reported. Income and underlying assets from First National Bank of Boston blind trust (established because of my wife's federal employment) is unknown, and we are not allowed to know details of the trust. Values of limited partnerships are not known. House in Truro, MA is under contract of sale; settlement scheduled for today.

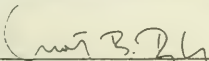
## IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Date April 3, 1998

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App. 4, § 104.)

Mail Signature

April 3, 1998  
Timothy Belcher Dyk  
Questionnaire for Judicial Nominees

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

## FINANCIAL STATEMENT

TIMOTHY BELCHER DYK

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

As of 12/31/97, unless otherwise noted.

ASSETS				LIABILITIES			
Cash on hand and in banks	Sched. I	196	816	.92	Notes payable to banks—secured		
U.S. Government securities—add schedule	Sched. II	c. 4,081	146	.59	Notes payable to banks—unsecured		
Liquid securities—add schedule	Sched. III	1,705	146	.37	Notes payable to relatives		
Unlisted securities—add schedule	Sched. IV	c. 185	800	.00	Notes payable to others		
Accounts and notes receivable: None					Accounts and bills due		
Due from relatives and friends					Unpaid income tax		
Due from others					Other unpaid tax and interest	\$ 831	.82
Doubtful					Real estate mortgages payable—add schedule	191	925 .35
Real estate owned—add schedule	Sched. V	1,461	000	.00	Chattel mortgages and other liens payable		
Real estate mortgages receivable					Other debts—itemize:		
Automobile and other personal property	Sched. VI	131	000	.00	Home Equity Loan	12	500 .00
Cash value—life insurance	Sched. VII	88	558	.66	Miscellaneous bills	10	000 .00
Other assets—itemize:							
- See Sched. VIII		624	458	.00			
- Right to receive framing services from Frameworks			500	.00			
					Total Liabilities	289	057 .17
					Net Worth	8185	369 .37
Total Assets		8,474	426	.54	Total Liabilities and net worth	8474	426 .54
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor					Are any assets pledged? (Add sched. Only personal etc.) residence as shown above		
None							
On leases or contracts					Are you defendant in any suits or legal actions?	NO	
Legal Claims					Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax		70	000	.00			
Other special debt							



**TIMOTHY BELCHER DYK**  
**Financial Statement**

**SCHEDULE I - CASH ON HAND AND IN BANKS**

<u>Account</u>	<u>Value</u>
1. Cape Cod Bank & Trust Company, Personal Savings Account Timothy B. Dyk, Savings Account Balance	1,445.42
2. Riggs Bank, N.A., Checking Account Timothy B. Dyk, Balance as of 1/13/98	3,078.90
3. Riggs Bank, N.A., Money Market Account Timothy B. Dyk	3,141.91
4. Riggs Bank, N.A., Checking Account Timothy B. Dyk/Sally Katzen Dyk Joint Balance as of 1/10/98	1,143.18
5. Riggs Bank, N.A., Money Market Account Timothy B. Dyk/Sally Katzen Dyk Joint	3,198.71
6. Riggs Bank, N.A., Checking Account (S) Sally Katzen Dyk, Balance as of 12/23/97	1,594.94
7. Riggs Bank, N.A., Money Market (S) Sally Katzen Dyk	2,507.89
8. PNCBank, Money Market Account as of 1/27/98 (S) Sally Katzen	25,232.86
9. Riggs Bank, N.A., Money Market (DC) Abraham Benjamin Dyk Custodial	1,260.14
10. White House Federal Credit Union (S) Sally Katzen	269.54
11. Wheat First Money Market Fund (CRM)	29,352.65
12. Wheat First Money Market Fund (DC)	170.04
13. Wheat First Money Market Fund (CRG)	145.42
14. Wheat First Money Market Fund (CRG)	1,863.12

TIMOTHY BELCHER DYK  
Schedule I  
Page two

SCHEDULE I - CASH ON HAND AND IN BANKS (Cont.)

<u>Account</u>	<u>Value</u>
15. Armada Money Market Fund	64,071.68
16. UMB Short Term Money Market -401(k)	42,429.92
17. UMB Short Term Money Market -401(k) (S)	15,910.60

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**TIMOTHY BELCHER DYK**  
**Financial Statement**

**SCHEDULE II - U.S. GOVERNMENT SECURITIES**

<u>Assets</u>	<u>Market Value</u>
1. 100,000 US Treasury Bills Due 6/25/98, dated 6/26/97	97,448.00
2. 168,000 US Treasury Bills Due 7/23/98, dated 7/24/97	163,002.00
3. 67,000 FICO Strips Sr 12 06/6/05 Interest Pmt Due 6/6/05, Dated 12/14/88	42,667.61
4. 160,000 US Treasury Strips 08/16 Interest Pmt Due 8/15/16	52,361.60
5. 5,000 US Treasury CUBEs 05/01 Under B/E Safekeeping Generic Cube, CPN 0.000% Due 05/15/01	4,123.00
6. 21,375 GATORS Ser 1 05/03 Interest Pmt Bd, CPN 0.000% Due 05/15/03	15,612.08
7. 27,000 Cert Accrual Ser W Treasury Sec. Int Pmt on 11.75% 2014 CPN 0.000% Due 05/15/04	18,679.95
8. 18,675 Coupon Treas Rcpt. 05/04 Interest PMT Due 05/15/04	12,920.29
9. 269,000 US Treasury Bill 07/98 Due 07/23/98, Dated 7/24/97	260,997.25
10. 56,000 US Treasury Cpn CUBEs 11/01 Under B/E Safekeeping Generic CUBE CPN 0.000% Due 11/15/01, Date 11/15/81	44,873.92

Timothy Belcher Dyk  
Schedule II  
Page Two

<u>Assets</u>	<u>Market Value</u>
11. 126,000 US Treasury CUBEs 5/02 Under B/E Safekeeping Generic CUBE CPN 0.000% Due 05/15/02	98,074.62
12. 180,000 US Treasury Strips 11/03 Interest Pmt Due 11/15/03	128,847.60
13. 245,000 Cert Accrual Ser R 08/04 Treas Secs Principal Pmt CPN 0.000% Due 08/15/04	167,156.15
14. 375,000 US Treasury Strips 11/04 <sup>a</sup> Interest Pmt Due 11/15/04	252,890.62
15. 98,000 US Treasury CUBEs 11/04 Under B/E Safekeeping, Generic CUBE Due 11/15/04	65,780.54
16. 70,000 US Treasury CUBEs 11/05 Under B/E Safekeeping, Generic CUBE CPN 0.000%, Due 11/15/05	44,234.40
17. 238,000 US Treasury CPN 11/15/06 Under B/E Safekeeping, Generic CUBE CPN 0.000%, Due 11/15/06	141,386.28
18. 27,000 FICO Strips 0% Ser 8 Due 8/3/04 Int Pmt on 10.35%, Bond Due 2018	18,216.90
19. 76,000 FBE FICO Strips 0% Ser E Due 5/2/06 Int Pmt on 9.65%, Bond due 2018	45,926.80
20. 394,000 US Treasury Bills Due 7/23/98	382,219.40



<u>Assets</u>	<u>Market Value</u>
21. 100,000 Treasury Bills Dated 12/26/97, Due 12/10/98	95,222.22
22. 100,000 Treasury Bills Dated 7/24/97, Due 7/23/98	97,166.67
23. 13,750 CPN Treasury Recpt H 8/15/01 (S) Treas Bond H 13.75% 8/04 Underlying due 08/15/01	11,175.72
24. 27,000 Cert Accrual Ser W 5/04 (S) Treas Sec Interest Pmt on 11.75% 2014 CPN 0.000% Due 05/15/04	18,679.95
25. 13,000 Cert Accrual Treasury Securities (S) 0% Ser M Due 11/15/01, Int Pmt on 12.375%	10,416.90
26. 119,000 US Treasury Coupons, (S) 0% Generic Cube, due 11/15/02 Treas Bd due 2004	90,366.22
27. 1,467,000 US Treasury Bill (S) Due 7/23/98	1,423,136.70
28. 172,000 Treasury Bills 07/98 (DC) Due 07/23/98, dated 7/24/97	166,883.00
29. 25,500 Treas Invt Ser 2, Growth Recpts (DC) Int Pmt on 12.75% 2010, CPN 0.000% Due 11/15/98	24,290.79
30. 10,000 US Treasury Strips 02/00 (DC) Interest Pmt Due 02/15/00	8,877.00
31. 10,000 US Treasury CUBE 05/01, Under B/E Safekeeping (DC) Generic Cube, CPN 0.000% Due 05/15/01	8,246.00

Timothy Belcher Dyk  
Schedule II  
Page Four

<u>Assets</u>	<u>Market Value</u>
32. 160,000 US Treasury Strips (DC) Interest Pmt Due 08/15/16	52361.60
33. 12,000 US Treasury Notes (DC) 5%, dated 1/31/96, due 1/31/98	c. 12,000.00
34. Certificate of Deposit (DC) Issue date 10/15/97, 4.6%, Maturity 4/15/98	3,582.57
35. Certificate of Deposit (DC) Issue date 11/13/97, 5.2%, Maturity 11/13/98	1,321.72

**TIMOTHY BELCHER DYK**  
**Financial Statement**

**SCHEDULE III - LISTED SECURITIES**

<u>Assets</u>	<u>Market Value</u>
1. First National Bank of Boston Blind Trust Trustee, John W. Simpson (Assets contained in trust are unknown.)	1,352,455.00
2. 7,665.31 Shares -Crabbe Huson Special Fund (Mutual Fund)	107,161.09
3. 7,281.07 Shares -Tweedy Browne Fund, Inc. (Mutual Fund)	153,703.47
4. 13.132 Crabbe Huson Special Fund, Inc. Equity Fund	183.59
5. TSP Common Stock Index Investment Fund (C Fund) as of 10/31/97	91,643.22

TIMOTHY BELCHER DYK  
Financial Statement

SCHEDULE IV - UNLISTED SECURITIES

<u>Asset</u>	<u>Market Value</u>
1. Hempstead Village Housing Associates, a Richman Company Timothy B. Dyk & Sally Katzen Dyk, Limited Partnership	Unknown
2. Urban Village, Ltd. Partnership Timothy B. Dyk, Limited Partner,	Unknown
3. Urban Village, Ltd. Partnership Sally Katzen Dyk, Ltd. Partner	Unknown
4. Mass Bay Brewing Company Timothy B. Dyk, 1600 Shares of Common Stock	106,600.00
Sally Katzen Dyk, 1200 Shares of Common Stock (S)	79,200.00



**TIMOTHY BELCHER DYK**  
**Financial Statement**

**SCHEDULE V- REAL PROPERTY**

<u>Asset</u>	<u>Market Value</u>
1. Principal Residence Timothy B. Dyk/Sally Katzen Dyk Washington, D.C.	1,000,000.00
2. Vacation Property Timothy B. Dyk/Sally Katzen Dyk Truro, Massachusetts	175,000.00
3. Investment Properties Timothy B. Dyk/Sally Katzen Dyk	
Truro, Massachusetts (house & land)	145,000.00
Truro, Massachusetts (land only)	72,000.00
Truro, Massachusetts (land only)	69,000.00

\*There is presently a contract for sale of this property with a purchase price of \$145,000.00. //

**TIMOTHY BELCHER DYK**  
**Financial Statement****SCHEDULE VI- AUTOMOBILES AND PERSONAL PROPERTY**

	<u>Market Value</u>
1. 1990 Volvo 240D	7,000.00
2. 1979 Mercedes Benz 240	4,000.00
3. 1989 Mercedes Benz 560SEL	20,000.00
4. Household furnishings, including rugs, paintings, & other personal property	100,000.00

**TIMOTHY BELCHER DYK**  
**Financial Statement****SCHEDULE VII- LIFE INSURANCE****Cash Value**

- |   |           |
|---|-----------|
| 1. Mass Mutual Life Insurance Policy<br>as of 11/18/97<br>Insured: Timothy B. Dyk                 | 17,240.09 |
| 2. Security Connecticut Life Insurance (S)<br>as of 5/97<br>Insured: Sally Katzen Dyk             | 42,994.38 |
| 3. Security Connecticut Life Insurance Policies (S)<br>as of 3/10/97<br>Insured: Sally Katzen Dyk | 28,324.19 |

**TIMOTHY BELCHER DYK**  
**Financial Statement**

**SCHEDULE VIII - OTHER PARTNERSHIP ASSETS**

<u>Assets</u>	<u>Market Value</u>
1. Jones Day Reavis & Pogue Partnership Account Timothy B. Dyk, Capital (as of March 15, 1998)	153,375.00
2. Jones Day Reavis & Pogue Partnership Account Timothy B. Dyk, Deferred Income (as of March 15, 1998)	334,083.00
2. Wilmer, Cutler & Pickering Partnership Withdrawal Timothy B. Dyk (as of March 15, 1998)	c. 137,000.00



April 3, 1998

Timothy Belcher Dyk

## Questionnaire for Judicial Nominees

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

There are two instances that I recall. I served as a paid member of the McCarthy for President Campaign in 1968. Although I cannot recall my title, I was responsible for position papers and aspects of fundraising during the period approximately April 1968 - October 1968.

I also served as a volunteer in the Clinton for President Campaign in 1996. My duties included literature distribution, participation in rallies, etc. during the general election. The dates were October/November 1996.

In 1995 and 1996, I served as a volunteer lawyer for the Democratic National Committee in connection with campaign financing litigation, although I did not formally appear in such litigation. In 1996 and 1997, I also served as volunteer counsel for an individual in connection with FEC investigations of a political action committee which made independent expenditures in connection with an Oregon election for U.S. Senate.

I have also contributed financially to political campaigns.

April 3, 1998  
 Timothy Belcher Dyk  
 Questionnaire for Judicial Nominees

### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In addition to contributing financially to a wide variety of public service organizations, I have been a member of the boards of directors of the Farmworker Justice Fund, the Migrant Legal Action Program, Inc. (a Legal Services support center serving migrant workers), the Migrant Litigation Support Fund, Inc. (a program which supplies loans to private law firms undertaking litigation on behalf of migrant farmworkers), and People for the American Way. I have also handled a number of pro bono cases in the First Amendment, migrant worker and other areas, and I have arranged for young lawyers in my section in the firm to undertake both criminal and civil pro bono work.

For the past several years I have coached a Little League team (Capitol City Little League) - the Athletics - Kid pitch minor league: Ages 10-12.

Specifically, my pro bono activities have included:

-- I served as pro bono criminal counsel at the trial and appellate level in the District of Columbia. (I estimate several hundred hours.)

-- I represented migrant workers at the trial level and on appeal in the 5th and 11th Circuits. (I estimate more than two hundred hours.)

-- I served as conservator appointed by the Superior Court (without compensation) for Elsie P. Martin (F95-87) during the period May 18, 1987 through February 11, 1992. (I estimate several hundred hours.)

-- I served on boards of public interest organizations (listed above) over a period of two decades. (I estimate several hundred hours.)

-- I served as pro bono counsel in a number of First Amendment cases. (I estimate several hundred hours.)

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously

April 3, 1998  
 Timothy Belcher Dyk  
 Questionnaire for Judicial Nominees

discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I have never belonged to such an organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no judicial selection commission for the Federal Circuit. The nomination process began with an interview with the White House Counsel's office on June 10, 1997, in which I expressed an interest in being considered for nomination to the Federal Circuit. On January 2, 1998, I supplied written information to the White House Counsel's office in draft form. This was followed on January 6, 1998, by a further interview with representatives of the White House Counsel's office and the Justice Department concerning my qualifications and interest in the position. On January 8, 1998, I was formally notified that I would be nominated if the results of the various investigations by the FBI, the American Bar Association, and the Office of Attorney General were favorable. In connection with my consideration and in connection with these investigations, I filled out a variety of forms and supplied additional information in writing, by telephone and in person. On April 1, 1998, I was informed that I would be nominated.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The Federal Courts are courts of limited jurisdiction. Requirements for standing, ripeness, case or controversy, and separation of powers play an important role in ensuring that the courts do not exceed their assigned function. In exercising judicial discretion, the courts should be mindful of the limited judicial role and avoid unnecessarily broad pronouncements in written opinions and should avoid playing an unnecessary role in the supervision of continuing government operations.



**SENATE JUDICIARY COMMITTEE QUESTIONNAIRE****I. BIOGRAPHICAL INFORMATION**

1. Full name (include any former names used).

**DAVID RICHARD HERNDON**

2. Address: List current place of residence and office address(es).

Residence: **East Alton, IL 62024**

Office: **Madison County Courthouse  
115 N. Main St., Edwardsville, IL 62025**

3. Date and place of birth.

**August 23, 1953 Sedalia, Pettis County, MO**

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

**Divorced.**

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

**Southern Illinois University at Carbondale, IL September 1971 to February 1972 (2 quarters): freshman studies, no degree.**

**Southern Illinois University at Edwardsville, IL March 1972 to August 1974: Bachelor of Arts degree in August 1974.**

**Southern Illinois University School of Law, Carbondale, IL August 1974 to May 1977, Juris Doctorate in May 1977.**

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

**1972-1976: Haley, Frederickson, Stubbs and Abele, Attorneys at Law, East St. Louis, IL, employed as errand boy law clerk and investigator.**

- 1976-1978:** L. Thomas Lakin, Attorney at Law, East Alton, IL, employed as a law clerk initially and then a trial attorney.
- 1978-1980:** Haley, Frederickson, Walsh and Herndon, P.C., St. Louis, MO, trial attorney.
- 1980-1991:** Lakin and Herndon, P.C., Wood River, IL, shareholder/principal and trial attorney. (The firm name from June, 1981 to September 1983 was Lakin, Herndon and Peel, P.C. and from April 1986 to May 1987 was Lakin, Herndon, Becker and Gitchoff.)
- 1984-1989:** Environmental Restoration and Development Corp., East Alton, IL, director/shareholder.
- 1989-1995:** Bar-Klee Limited Partnership, East Alton, IL, limited partner.
- 1987-1991:** Metro North Development, Wood River, IL, partner.
- 1990-1991:** Metro Tourism and Entertainment, Inc., member of executive committee.
- 1991-present:** State of Illinois, Third Judicial Circuit, Madison County, Associate Judge.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

**No military service.**

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

**None.**

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

**American Bar Association**

**Illinois State Bar Association**

**Missouri State Bar Association**

**Madison County Bar Association**

**Illinois Judges Association**

**Alton-Wood River-Jerseyville Bar**

**Tri-City Bar Association**

**In addition to the above, while in practice, I was a member of the Association of Trial Lawyers of America, the Illinois Trial Lawyers Association, and the Missouri Association of Trial Attorneys**

**I did not hold any offices in any of the above organizations.**

**Illinois Judicial Conference Technology and Automation Committee, Sept. 1997 to present.**

**Third Judicial Circuit:**

**Automation and Computerization Committee, Co-Chair, May 1997 to present.**

**Building Committee, August 1997 to present.**

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

**Lobbying organizations:**

**Sierra Club   The Nature Conservancy   Southern Poverty Law Center  
NAACP**

**Other organizations:**

**Honorable Order of Kentucky Colonels**

**Loyal Order of Moose   Bethalto Masonic Lodge 406**

**Valley of Southern Illinois Scottish Rite   Shriners, East St. Louis**

**No offices were ever held in the above organizations.**

**St. Paul United Methodist Church**

**Parish Staff Relations Comm. 1998 - present**

**Southern Illinois University School of Law**

**Alumni Association Board of Directors 1994 - present**

**Board of Visitors 1997 - present**

**Alumnus of the Year 1992**

**Southern Illinois University at Edwardsville**

**Alumni Association Board of Directors 1995 - present**

**Roxana Schools Foundation Board of Directors 1997 - present**

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

**Supreme Court of Illinois, 1977**

**Supreme Court of Missouri, 1979**

**Supreme Court of United States, 1990**

**United States Courts of Appeal: Eighth Circuit, 1980   Seventh Circuit, 1987**

**United States District Courts:   Southern District of Illinois, 1979**

**Central District of Illinois, 1986**

**Eastern District of Missouri, 1979**

**Western District of Missouri, 1979**

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

**None.**

13. Health: What is the present state of your health? List the date of your last physical examination.

**Excellent. November 24, 1997**

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

**Associate Judge, State of Illinois Third Judicial Circuit, beginning August 1, 1991 through the present. The position is by appointment of the Illinois Supreme Court by virtue of a vote of the Circuit Judges. The court is one of general jurisdiction. There isn't a limitation on the authority of an associate judge, except that in order to handle felony cases, an associate judge must be certified by the Illinois Supreme Court. I have been so certified.**

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and, (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

**Part I.**

1. *Vernon Best v. Taylor Machine Works; Isbell v. Union Pacific Railroad Co.*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997).
2. *Statler v. Catalano*, 293 Ill.App.3d 483 (5<sup>th</sup> Dist. 1997).
3. *Keeven v. City of Highland*, 294 Ill.App.3d 345, (5<sup>th</sup> Dist. 1998).
4. *Friedman v. State of Illinois Department of Public Aid*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0127, Dec. 20, 1996.
5. *Marco v. Doherty*, 276 Ill.App.3d 121, 657 N.E.2d 1165 (5<sup>th</sup> Dist. 1995).



6. *Sinn v. Mid-Century Insurance Co.*, 288 Ill.App.3d, 679 N.E.2d 870 (5<sup>th</sup> Dist. 1997).
7. *Morgan v. Dickstein*, 292 Ill.App.3d 822, 686 N.E.2d 56 (5<sup>th</sup> Dist. 1997).
8. *C.D. Peters Construction Company Inc. v. Tri-City Regional Port District.*, 281 Ill.App.3d 41, 666 N.E.2d 44 (5<sup>th</sup> Dist. 1996).
9. *Evers v. Collinsville Township*, 269 Ill.App.3d 1069, 647 N.E.2d 1058 (5<sup>th</sup> Dist. 1995).
10. *People v. Womack*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0597, August 27, 1996.

## Part II.

1. *Laramie v. Dillman*, 5<sup>th</sup> Dist. No. 5-94-0104, Dec. 20, 1994). Appellate court determined that trial court construed Mechanic's Lien Act too strictly.
2. *Schuck v. Industrial Commission*, Rule 23 Order, 5<sup>th</sup> District No. 5-94-0642WC, June 7, 1995. Trial court erred in ruling that the commission's decision to reverse the arbitrator's award finding causal connection was against the manifest weight of the evidence.
3. *Oaklawn Cemetery Association v. Illinois Department of Revenue*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-94-0460, Oct. 5, 1995. Trial court erred in finding that annual Decoration Day Service did not remove cemetery parcel from its otherwise tax exempt status.
4. *Nettles v. Department of Children and Family Services*, Rule 23 Order 5<sup>th</sup> Dist. No. 5-94-0841, Nov. 30, 1995. Trial court erred in confirming Civil Service Commission which found that petitioner was discharged for delivery of a controlled substance not just for being arrested at work. The charging instrument had just set out the arrest.
5. *Gerber v. Hamilton*, 276 Ill.App.3d 1091, 659 N.E.2d 443 (5<sup>th</sup> Dist. 1995). Trial court abused its discretion in not entering injunction to prevent operation of beauty salon in home.
6. *Pratt, Bradford, Tobin, P.C. v. Norfolk & Western Ry. Co.*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0510, Jan. 19, 1996. Trial court abused its discretion in entering preliminary injunction. The appellate found plaintiff's had failed to establish a likelihood of success on the merits.

7. ***Norman v. Seebold*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0209, Feb. 29, 1996.** Trial court reversed because an unauthenticated deed was used to show plaintiff had standing as owner of property. The underlying substantive issues were not disturbed.
8. ***Magna Bank of Illinois v. Office of State Fire Marshall*, Rule 23 Order 5<sup>th</sup> Dist. No. 5-94-0859, Mar. 5, 1996.** Trial court erred in finding that the Office of State Fire Marshall's determination that bank had accepted a quit claim deed to property that had underground storage tanks was against the manifest weight of the evidence. The bank had not recorded the deed and had returned it to the property owners.
9. ***DeLisle v. Ryan*, 5<sup>th</sup> Dist. No. 5-95-0154, March 18, 1996).** Trial court erred in entering a preliminary injunction against Secretary of State since venue for actions against the secretary lies only in Sangamon or Cook counties.
10. ***Rodgers v. Lochmann*, 279 Ill.App.3d 648, 665 N.E.2d 36 (5<sup>th</sup> Dist. 1996)** Trial court erred in dismissing paternity action on the basis of the *res judicata* effect of the court's finding in dissolution proceeding. The appellate court so ruled because the unborn child did not have a guardian *ad litem* in that action. [A later jury trial resulted in a finding of no paternity.]
11. ***St. Elizabeth Medical Center v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0719WC, May 31, 1996.** Trial court erred in finding the commission's decision on a causal connection was against the manifest weight of the evidence.
12. ***City of Granite City v. The Industrial Commission*, 279 Ill.App.3d 1087, 666 N.E.2d 827 (5<sup>th</sup> Dist. 1996).** Trial court erred in finding as against the manifest weight of the evidence the commission's decision against extending police officer's TTD another 5 months.
13. ***Olin Corp. v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0861WC, July 18, 1996.** Trial court erred in finding the commission's decision on whether there were accidental injuries and medical causal connection was against the manifest weight of the evidence.
14. ***Vaughniaux v. City of Edwardsville*, 284 Ill.App.3d 407, 672N.E.2d 40 (5<sup>th</sup> Dist. 1996).** Trial court erred in granting summary judgment because a mixed question of law and fact existed regarding the length of a lease entered into by the city. The trial court's determination relative to the TIF statute and standing of the plaintiff was upheld.

15. *J. S. Alberici/Eby Construction v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0860WC, Dec. 10, 1996. Trial court erred in reversing commission and reinstating arbitrator's award on a finding that the decision on an issue of causal connection was against the manifest weight of the evidence.
16. *Pruett v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0221WC, Dec. 17, 1996. Trial court erred in reversing commission on a finding that the decision on issues of causal connection and vocational rehabilitation were against the manifest weight of the evidence.
17. *Ogden Allied Services v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0312WC, Dec. 26, 1996. Trial court erred in reversing commission decision as against the manifest weight of the evidence on the issue of causal connection.
18. *McRae v. The Industrial Commission*, 285 Ill.App.3d 448, 674 N.E.2d 512 (5<sup>th</sup> Dist. 1996). The trial court erred in reversing the commission and reinstating the arbitrator's award on a finding that the decision on an issue of causal connection was against the manifest weight of the evidence. The only medical evidence introduced was to the effect that the work condition "may well have caused her condition of ill being."
19. *Gordon v. Country Mutual Insurance Co.*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0859, January 8, 1997. The trial court erred in finding that one aspect of the underinsured policy was against public policy.
20. *Mercantile Bank of Illinois, N.A.*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0498, Feb. 4, 1997. Trial court's findings of fact on issue of whether debtor made all his mortgage payments was against the manifest weight of the evidence where the creditor's records were incomplete.
21. *Alliance General Insurance Co. v. Wicks Lounge, Inc.*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-95-0950, Feb. 13, 1997. Trial court erred in finding that assault and battery exclusion in dram shop liability policy was against public policy.
22. *Estate of Sinn v. Mid-Century Insurance Co.*, 288 Ill.App.3d 193, 679 N.E.2d 870 (5<sup>th</sup> Dist. 1997). Trial court erred in finding that certain provisions of underinsured policy did not violate public policy.

23. *Slagel v. The Industrial Commission*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0353WC, Sept. 25, 1997. Trial court erred in finding that Commission's decision against a causal relationship between claimant's work injury and his psychiatric condition of ill-being was against the manifest weight of the evidence.
24. *Jefferson-Smurfit Corp. v. National Union Fire Insurance Co.*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0832, September 30, 1997. Trial court erred in granting summary judgment of indemnification for company that hired sub-contractor as the contractual provision relied upon for indemnity was prohibited by the Construction Contract Indemnification for Negligence Act.
25. *Morgan v. Dickstein*, 292 Ill.App.3d 822, 686 N.E.2d 56 (5<sup>th</sup> Dist. 1997). Trial court abused its discretion under the venue statute in transferring, for purposes of trial, a malpractice action on a finding that plaintiff, Caucasian woman married to African-American man, may be subject to prejudice. The appellate court found that the court should have convened a jury and conducted voir dire prior to such a determination.
26. *Cox v. Cox*, Rule 23 Order, 5<sup>th</sup> Dist. No. 5-96-0569, Dec. 12, 1997. Trial court erred in terminating "alimony" on assertion of intent to retire and remanded for a determination if respondent has actually retired.

### Part III.

*Vernon Best v. Taylor Machine Works; Isbell v. Union Pacific Railroad Co.*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

**Other than my current judicial position, I have not held any public offices.**



17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

**I did not serve as a clerk.**

2. whether you practiced alone, and if so, the addresses and dates;

**I have never practiced alone.**

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

**June 1977 through October 1978:**

**law office of L. Thomas Lakin, 303 N. Shamrock, East Alton, IL; trial attorney.**

**November 1978 to May 1980:**

**Haley, Frederickson, Walsh and Herndon Suite 1240, 818 Olive St., St. Louis, MO; partner and trial attorney.**

**May 1980 through July 1991:**

**Lakin and Herndon, P.C.**

**[known as Lakin, Herndon & Peel from June 11, 1981 to September 13, 1983; and Lakin, Herndon, Becker & Gitchoff from April 30, 1986 through May 19, 1987]**

**303 N. Shamrock, East Alton, IL then, 251 Old St. Louis Rd., Wood River, IL; "managing partner" and trial attorney.**

**August 1991 through present:**

**Associate Judge, State of Illinois, Third Judicial Circuit, Madison County Courthouse, 115 N. Main St., Edwardsville, IL.**

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

**Following graduation from law school through October, 1980, my practice was general with an emphasis (approximately 80%) on personal injury. From November, 1980 until I assumed my judicial duties, my practice was almost exclusively personal injury, concentrating in representing plaintiffs with causes of action brought pursuant to the Federal Employers' Liability Act [FELA].**

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

**Typical clients were injured railroad workers, usually represented by the United Transportation Union, as I pursued my specialty under the FELA.**

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates. **Frequently**

2. What percentage of these appearances was in:  
 (a) federal courts; **approximately 10 %**  
 (b) state courts of record; **approximately 90 %**  
 (c) other courts; **0%**

3. What percentage of your litigation was:  
 (a) civil; **virtually 100 %**  
 (b) criminal; **virtually none (I tried one jury and one non-jury criminal case.)**

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**Twelve as sole counsel.  
 Three as chief counsel.  
 Three as associate counsel.**

5. What percentage of these trials was:  
 (a) jury; 94% (all except one)  
 (b) non-jury; 6%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;  
 (b) the name of the court and the name of the judge or judges before whom the case was litigated; and  
 (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Clarence R. Higley v. Missouri Pacific Railroad Co.*, 685 S.W.2d 572 (Mo. App., E. Dist. 1985).

On January 30, 1982, this railroad brakeman's left hand was coupled between two railroad cars in southern Arkansas. The jury verdict was in favor of the plaintiff in the amount of \$2,371,000.00.

I was sole trial counsel in this case which was upheld on appeal. [I did employ associate counsel for the appellate argument.]

The case was tried between July 11 and 14, 1983, in the Circuit Court, St. Louis, MO [cause no. 822-01046] before the Hon. Murray L. Randall. Defendant's counsel was Kim Roger Luther, Ste. 1150, 906 Olive St., St. Louis, MO 63101 314-231-2512.

2. *Leland Lockard v. Missouri Pacific Railroad Co.*, 894 F.2d 299 (8<sup>th</sup> Cir. 1990).

On December 15, 1984, this railroad fireman was descending the icy steps of the boarding house in Crete, Nebraska where his employer rented rooms for its crews, when he slipped and fell.

I represented the plaintiffs as chief trial counsel. The jury returned a verdict in the amount of \$480, 000.00 as against the railroad and \$150,000.00 as against the boarding house, with an additional \$37,500.00 for plaintiff wife against the boarding house. The judgment against the boarding house was vacated without prejudice. Jeanne Sathre, at that time the appellate specialist in my office, handled the appeal; her current address and phone are unknown.

The case was tried between June 28, 1988 and July 1, 1988 in the U.S. District Court for the District of Nebraska, 86-0-283, before the Honorable Richard E. Robinson. Associate counsel for plaintiffs was John J. Higgins, 551 Continental Building, Omaha, NE 68102, 402-341-9970. Counsel for defendant railroad was R. Dennis Osterman, Ste. 380, 3 Bethesda Metro Center, Bethesda, MD 20814, 301-986-1300; and for the boarding house was Robert D. Mullin, Jr., Ste. 1400, One Central Park Plaza, Omaha, NE 68102, 402-341-3020.

3. *Gary L. Rowe v. Missouri Pacific Railroad Co.*, U.S. District Court, Eastern District of Arkansas, LR-C-89-114.

On February 4, 1986, this railroad engineer was injured when the engine he was operating collided with a rail car in the switch yard in Fort Smith, Arkansas.

I was chief trial counsel. The jury returned a verdict in the amount of \$482,000.00. The judgment resulting therefrom was paid without appeal.

The case was tried between October 23 and 25, 1989, in the U.S. District Court for the Eastern District of Arkansas before the Honorable Henry Woods. Associate counsel for the plaintiff was Pamela D. Walker, 2115 Broadway, Little Rock, AR 72201, 501-376-8920. Counsel for the defendant were James M. Simpson and Hank Jackson, 2000 First Commercial Building, Little Rock, AR 72201, 501-376-2011.

4. *Stephen E. Lednicky v. Burlington Northern*, U.S. District Court for the District of Kansas, 86-1962-C

On November 20, 1984, this 29 year old farmer was paralyzed at his second thoracic vertebra and below when the truck he was driving was struck by defendant's train near his farm in Everest, Kansas.

I was chief counsel in this case. The case was settled on the first day of trial with a structured settlement with a present case value of \$560,000.00. The matter was set for trial in June of 1988 in the U.S. District Court for the District of Kansas, 86-1962-C, before the Honorable Sam A. Crow. The magistrate before whom pre-trial matters were conducted was the Honorable John B. Wooley.

Associate counsel was Gordon Maag, now Fifth District Appellate Court Justice, 1410 Niedringhaus Ave., P.O. Box 774, Granite City, IL 62040, 618-451-7638. Counsel for the defendant was Jerry D. Bogle, Ste. 923, 106 W. Douglas, Wichita, KS 67202, 316-265-7841.



5. *Thomas J. Early v. Illinois Central Gulf Railroad Co.*, St. Louis Circuit Court, 842-05684.

On October 31, 1984, this railroad switchman was burned when the Kansas City, Missouri yard office in which he was standing exploded due to a leaking gas pipe that had been improperly installed by a company other than his employer.

I was sole counsel for the plaintiff in this matter that settled in May, 1987 for \$900,000.00, paid by the railroad prior to trial.

Counsel for the defendant railroad were John W. Cowden, 2100 Commerce Tower, P.O. Box 13566, Kansas City, MO 64199, 816-421-2121; and Frank N. Gundlach, One Metropolitan Square, St. Louis, MO 63102, 314-621-5070.

6. *Cecil Hardison v. L & N Railroad Co.*, 20th Judicial Circuit, St. Clair County, Illinois, 81 L 940.

On February 8, 1981, this railroad switchman injured his back while attempting to stop a runaway rail car in Nashville, Tennessee. Following surgery to his injured back, scar tissue rendered him impotent. The case was delayed for a period of time due to the untimely forum non conveniens motion of defendant which was denied by the trial court and appealed by the defendant. Ultimately the Illinois Supreme Court, in a supervisory order, denied the defendant's motion and ordered the case to trial. 108 Ill.2d 563, 487 N.E.2d 530 (1985).

I was sole counsel for plaintiff.

This matter was filed in the 20<sup>th</sup> Judicial Circuit, St. Clair County, 81 L 940, and heard in the court of the Honorable John J. Hoban.

Counsel for the defendant was John B. Gunn, 4343 W. Main St., Belleville, IL 62223, 618-277-1000.

7. *Bobby A. Muck v. Missouri Pacific Railroad Co.*, 3rd Judicial Circuit, Madison County, Illinois, 80 L 982.

On May 8, 1980, this railroad switchman attempted by phone to get time off from work in order to go to the hospital for the purpose of undergoing certain cardiac tests recommended by his doctor. When his request was refused, he slammed the phone down in a highly agitated state and suffered a heart attack.

I was chief counsel for plaintiff.

This matter was heard in the 3<sup>rd</sup> Judicial Circuit, Madison County, Illinois, 80 L 982, and the trial initiated before the Honorable George J. Moran before being settled in August of 1983.

Associate counsel for the plaintiff was Gary Peel, 6100 Center Grove Rd., P.O. Box 309, Edwardsville, IL 62025, 618-692-6200. Counsel for the defendant was Dale Bode, 4343 W. Main St., Belleville, IL 62223, 618-277-1000.

8. *Sally Lane Kelly, Adm'x. of the Estate of Joe Kelly, Jr. v. Southern Railway Co.*, U.S. District Court for the District of South Carolina, Columbia Division, 84-2773

On December 1, 1981, the plaintiff's decedent, a railroad telephone maintainer, died of a heart attack while driving his company truck. Thirty five minutes prior to his death, the decedent made a temporary repair to a broken telephone pole by digging a hole immediately adjacent to it and inserting the broken end into it.

I was chief trial counsel for the plaintiff in this action which was filed in the U.S. District Court for the District of South Carolina, Columbia Division, before the Honorable Matthew J. Perry.

Associate counsel for plaintiff was Henry Hammer, Ste. 201, 1634 Main St., Columbia, SC 29202, 803-787-1111. Counsel for defendant was Robert J. Thomas, 1441 Main St., P.O. Box 100200, Columbia, SC 29202, 803-771-7900.

9. *Dennis McClanahan v. Missouri Pacific Railroad Co.*, St. Louis Circuit Court, 862-02168.

On May 31, 1986, this Hernando, Mississippi railroad brakeman was working in the railroad's yard in Memphis, Tennessee when he was struck by a train backing on the adjacent track, amputating his left arm and a portion of his left foot.

I served as sole counsel and settled this matter well before trial in the St. Louis Circuit Court where this cause was docketed as 862-02168.

Counsel for the defendant were Michael D. O'Keefe and Raymond L. Massey, One Mercantile Center, St. Louis, MO 63101, 314-552-6092 (O'Keefe) and 314-552-6075 (Massey).

10. *Donald E. Buis v. Norfolk & Western Railway Co.*, 3rd Judicial Circuit, Madison County, Illinois, 80 L 760.

On February 25, 1980, this railroad engineer trainee fell from a rail car on which he was riding in Tolono, Illinois, amputating both feet.

I was sole counsel for the plaintiff. While the case was filed in Madison County, 80 L 760, it was settled before any discovery was accomplished. The case was handled with Chief Claims Agent Harry L. Clatterbuck, 3107 L Honeywood, Roanoke, VA 24014, 540-774-1956.

Moreover, the following attorneys have had recent contact with this nominee in jury trials in court:

<b>James Barr</b>	<b>314-542-0990</b>
<b>Ray Bell</b>	<b>618-465-7745</b>
<b>Dale Bode</b>	<b>618-277-1000</b>
<b>Roy Carnine</b>	<b>618-242-3310</b>
<b>James DeFranco</b>	<b>618-277-0900</b>
<b>Joseph Hoefert</b>	<b>618-462-1700</b>
<b>David Jones</b>	<b>618-236-2121</b>
<b>Tom Jones</b>	<b>618-277-1000</b>
<b>Mark Levy</b>	<b>618-692-9444</b>
<b>Lance Mallon</b>	<b>618-254-0960</b>
<b>Keith Phoenix</b>	<b>314-231-3332</b>
<b>Ron Roth</b>	<b>618-451-1000</b>
<b>Jane Unsell</b>	<b>618-259-3728</b>

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Within my own circuit, I have served as the chair of the traffic committee. This was an outgrowth of what I perceived to be an unfair manner of dealing with traffic fines within the county. Depending upon whether a traffic offender was ticketed with a state statute or a village ordinance, depending upon which of the courts the defendant was called to and, therefore, what the customs were with the prosecutors or police liaison officers in that particular courthouse, and even the particular judge a defendant was to appear before, one saw a variance in traffic fines for the same offense. Ultimately, we were able to establish uniform fines for all traffic offenses and established the policy that all judges would require those fines in his or her courtroom.

The Madison County Board has commissioned an architectural study on the space needs of the court system. I am chair of the court's committee and serve as liaison to the architectural group. The committee's work is in progress.

I also serve as co-chair of the circuit's Automation Committee. This is an ongoing committee with the charge of dealing with all automation issues as we attempt to become fully automated and handle all attendant problems therewith.

Statewide, I serve by appointment of the Illinois Supreme Court as an associate member of the Automation and Technology Committee. We are dealing with a number of ongoing issues, including the establishment of a professional web page for the court system statewide. The committee is also charged with advising the Court on technology issues upon its request.



## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

**The only matter in which I have an anticipation which falls into any of the categories listed in this question is for the buy sell agreement covering the stock of my former law firm, Lakin and Herndon, P.C., now known as the Lakin Law Firm. The payments relative thereto will be on or before December 31<sup>st</sup> of each of the years 1998, 1999, and 2000, and amount to \$155,000 plus 5% interest on the unpaid balance for each payment.**

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

**I have already curtailed the ownership of individual equities and propose to curtail organization memberships as well. I will maintain, as I do now, a list of conflicts which will be continually updated for my ready reference to determine potential conflicts. Maintaining that list in the courtroom, my current practice, or clerks office (or both) will allow ease of others recognizing conflicts. I do not anticipate any categories of litigation or financial arrangements that will create conflicts of interest with the exception of that disclosed in number 1 above. I will continue, as I have done on the state bench, to recuse myself from any cases involving my old law firm during the time moneys are owed me. I will continue to adhere to the Code of Judicial Conduct.**

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

**No such plans, commitments, or agreements.**

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**Please see the Financial Disclosure Report attached hereto.**

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

**Please see the net worth form attached hereto.**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

**I served as media coordinator for Madison County in the 1990 U.S. Senate campaign for Paul Simon. My responsibilities were minimal, but included insuring the press was aware of any visits by Senator Simon and theoretically to coordinate responses to any negative information through letters to the editors of local newspapers. However, there weren't any negative matters to which to respond.**

AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Herndon, David R.		2. Court or Organization Southern District of Illinois	3. Date of Report 03/31/1998
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) United States District Judge (nom.)		5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date ____ / ____ / ____ ____ Initial ____ Annual ____ Final	6. Reporting Period 01/01/1997 to 03/31/1998
7. Chambers or Office Address United States District Court 750 Missouri Ave. East St. Louis, IL 62201		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 8-13 of instructions.)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Custodian	for Neil R. Herndon UTMA/IL at 21
2 Trustee	Herndon June 1995 Childrens Trust
3 Trustee	David R. Herndon Living Trust

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1991	David R. Herndon and Tom Lakin, real est. ptshp.
2 1991	David R. Herndon and Lakin Law Firm stock buy out
3	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1997	State of Illinois, salary	\$ 101,378.72
2 1997	L. Thomas Lakin, real est. ptshp buyout	\$ 100,000.00
3 1998	Lakin Law Firm, stock buyout, installment	\$ 155,000.00
4 1998	State of Illinois, salary as of 3/31/98	\$ 26,207.45
5		

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Herndon, David R.

Date of Report

03/31/199

## IV. REIMBURSEMENTS and GIFTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of instructions.)

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts)		
1	EXEMPT		
2			
3			
4			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	NONE		
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001 to \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Herndon, David R.Date of Report  
03/31/1998

## VII. Page 1 INVESTMENTS and TRUSTS

- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)									
1 North Harris Cnty JCD Tex mun bond		None			exempt				
2 University Ill. Revs Mun. bond		None	J	T	Exempt				
3 Connecticut State Ser A 7.15 Mun bond		None	K	T	exempt				
4 Puerto Rico Elec PWR 6.55 Mun bond		None	K	T	Exempt				
5 Illinois St Clg Svng Cap 6.8 Mun bond		None	K	T	Exempt				
6 University IL Univ Rev 6.8 Mun bond		None	J	T	Exempt				
7 Michigan State Bldg Auth 7.2 Mun bond		None	K	T	Exempt				
8 Illinois St Ser 1989 7. Mun bond		None	K	T	Exempt				
9 State Univ Rctmnt Sys Ill 7.35 Mun bond		None	J	T	Exempt				
10 Tampa FL Util Tax 6.25 Mun bond		None	J	T	Exempt				
11 Argosy Gaming Co common		None	P1	T	Exempt				
12 Barrick Gold Corp. common		None			Exempt				
13 Noram Energy Corp. common	A	Dividend			Exempt				
14 Nokia Corp ADR	A	Dividend	K	T	Exempt				
15 AIM Constellation Mut fund IRA	A	Dividend	J	T	Exempt				
16 Franklin Small Cap GRW Mut fund IRA	A	Dividend	J	T	Exempt				
17 Delaware Group Delcap Mut fund IRA	A	Dividend	J	T	Exempt				
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Herndon, David R.

Date of Report  
03/31/1998

– income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

**VII. Page 2 INVESTMENTS and TRUSTS**

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(CO)" after each asset exempt from prior disclosure.		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (no reportable income/assets, or transactions)									
18	ML Capital Fund C1 A Mut fund IRA	A	Dividend	J	T	Exempt				
19	Templeton Dev Mkt Mut fund IRA	A	Dividend	J	T	Exempt				
20	Kemper US Govt. Mut fund IRA	A	Dividend	J	T	Exempt				
21	TIGR Ser 18 Gov bond		None	J	T	Exempt				
22	Coupon Treas Rec 2013 Gov bond		None	J	T	Exempt				
23	TIGR Ser 21 Gov bond		None	J	T	Exempt				
24	US TREAS STRIPS 2001 Gov bond		None	J	T	Exempt				
25	US TREAS STRIPS 5/2002 Gov bond		None	J	T	Exempt				
26	US TREAS STRIPS 8/2002 Gov bond		None	J	T	Exempt				
27	TIGR Ser 9 Gov bond		None	J	T	Exempt				
28	Templeton Gbl Inc Mut fund	A	Dividend	J	T	Exempt				
29	ML CMA Tax Exempt	A	Interest	K	T	Exempt				
30	Merrill Lynch CMA cash account	#	Interest	P1	T	Exempt				
31	Vanguard money market IRA	B	Interest	#	T	Exempt				
32	Mercantile Bank of IRA	A	Interest	J	T	Exempt				
33	Merrill Lynch Ready Assets (DC)	A	Interest	L	T	Exempt				
34	Accustaff Inc common		None			Exempt				
1 In/Gain Codes: A=\$1,000 or less (Col. B1, D4)		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3)		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val With Codes: Q=Appraisal (Col. C2)		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Herndon, David R.Date of Report  
03/31/1998

## VII. Page 3 INVESTMENTS and TRUSTS

— Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)									
35 Adaptec Inc. common		None			Exempt				
36 ADC Telecommunications common		None			Exempt				
37 Allied West Industries common		None			Exempt				
38 Altera Corp. common		None			Exempt				
39 Amerisource Health Corp. common		None			Exempt				
40 AMN Bankers Ins. Group common	A	Dividend			Exempt				
41 AMN Power Conversion Corp. common		None			Exempt				
42 Apollo Group Inc CL A		None			Exempt				
43 Applied Magnetics Corp common		None			Exempt				
44 Ascend Communications common		None			Exempt				
45 Autodesk Inc. common		None			Exempt				
46 Bear Stearns Companies, Inc. common	A	Dividend			Exempt				
47 Bed Bath and Beyond common		None			Exempt				
48 Best Buy Co. common		None			Exempt				
49 Biogen, Inc. common		None			Exempt				
50 Blyth Inds. Inc. common		None			Exempt				
51 BMC Software Inc. common		None			Exempt				
1 Inc./Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000		L=\$50,001-\$100,000		M=\$100,001-\$250,000		N=\$250,001-\$500,000		
	P1=\$1,000,001-\$5,000,000		P2=\$5,000,001-\$25,000,000		P3=\$25,000,001-\$50,000,000		P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Amortment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Herndon, David R.Date of Report  
03/31/1998

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

## VII. Page 4 INVESTMENTS and TRUSTS

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)									
52 Callaway Golf Co. common	A	Dividend			Exempt				
53 Carlisle Companies Inc. common	A	Dividend			Exempt				
54 Cascade Comm. Corp. common		None			Exempt				
55 Centex Corp common	A	Dividend			Exempt				
56 Central Newspapers Inc. common	A	Dividend			Exempt				
57 Charter One Financial Inc. common	A	Dividend			Exempt				
58 Cheasapeake Energy Okla common		None			Exempt				
59 Cyrix Systems Inc. common		None			Exempt				
60 Claires Stores Inc. common	A	Dividend			Exempt				
61 Cognos Inc. common		None			Exempt				
62 Coltec Industries common		None			Exempt				
63 Comair Holdings Inc. common	A	Dividend			Exempt				
64 Compusa Inc. common		None			Exempt				
65 Computer Assoc. Intl. Inc. common	A	Dividend			Exempt				
66 Compuware Corp. common		None			Exempt				
67 Converse Technology common		None			Exempt				
68 Concord EFS Inc. common		None			Exempt				
1 Inco/Gain Codes: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: (Col. C1, D3)	J=\$15,000 or less O=\$300,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		
3 Val Mth Codes: (Col. C2)	Q=Appraisal U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market		



<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Herndon, David R.	Date of Report 03/31/1998
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**VII. Page 5 INVESTMENTS and TRUSTS** — Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period	If not exempt from disclosure				
				(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month/Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)				
NONE (no reportable income, assets, or transactions)								
69 Continental Airlines CL B		None		Exempt				
70 Cooper Cameron Corp common		None		Exempt				
71 Creative Technology Ltd. common		None		Exempt				
72 Cullen Frost Bankers		None		Exempt				
73 Dana Corp common		None		Exempt				
74 Danaher Corp. common	A	Dividend		Exempt				
75 Darden Restaurants Inc. common		None		Exempt				
76 Dean Foods Co. common	A	Dividend		Exempt				
77 DeKalb Genetics Corp. common	A	Dividend		Exempt				
78 Department 56 Inc. common		None		Exempt				
79 Doubletree Corp. common		None		Exempt				
80 DSP Communications Inc.		None		Exempt				
81 Dura Pharmaceuticals Inc. common		None		Exempt				
82 Electronics for Imaging common		None		Exempt				
83 Enasco Intl Inc. common	A	Dividend		Exempt				
84 Equitable Cos Inc. common		None		Exempt				
85 Everest Reinsurance Holdings common	A	Dividend		Exempt				
1 <b>Loss/Gain Codes:</b> A-\$1,000 or less (Col. B1, D4)	B-\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000	E=\$15,001-\$50,000				
2 <b>Val Codes:</b> J=\$15,000 or less (Col. C1, D3)	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000				
3 <b>Val Mth Codes:</b> Q=Appraisal (Col. C2)	R=Cost (real estate only)	S=Assessment	T=Cash/Market					
	U=Book Value	V=Other	W=Estimated					

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Herndon, David R.Date of Report  
03/31/1998

- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions)

## VII. Page 6 INVESTMENTS and TRUSTS

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "DC" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period		D. Transactions during reporting period				
				(1) Type (e.g., dividend, rent or interest)	(2) Value Code (J-P)	(3) Value Method Code (Q-W)	If not exempt from disclosure	
				(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)								
86 Family Dollar Stores common	A	Dividend		Exempt				
87 FILA Holding common		None		Exempt				
88 First American Corp. common	A	Dividend		Exempt				
89 First Plus Financial common		None		Exempt				
90 Fleetwood Enterprises common	A	Dividend		Exempt				
91 Fort Howard Corp. common		None		Exempt				
92 Fred Meyer Inc. common		None		Exempt				
93 Fremont General Corp. common	A	Dividend		Exempt				
94 Fruit of the Loom common		None		Exempt				
95 Gartner Group Inc. common		None		Exempt				
96 Gateway 2000 Inc. common		None		Exempt				
97 Global Industries Ltd. common		None		Exempt				
98 Global Marine Inc. common		None		Exempt				
99 Green Tree Financial Corp. common	A	Dividend		Exempt				
100 Guidant Corp. common	A	Dividend		Exempt				
101 HBO and Co. common	A	Dividend		Exempt				
102 Health Management Assoc. Inc. common		None		Exempt				
1 Int/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000				
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more				
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market					

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## VII. Page 7 INVESTMENTS and TRUSTS

– income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
<i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month: Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income/assets, or transactions)										
03	Herman Miller Inc. common	A	Dividend			Exempt				
04	HFS Inc. Del. common		None			Exempt				
05	Hilton Hotel Corp. common	A	Dividend			Exempt				
06	Hologic Inc. common		None			Exempt				
07	ICN Pharmaceuticals common		None			Exempt				
08	Immunex Corp. common		None			Exempt				
09	Imperial Bancorp common		None			Exempt				
10	Imeega Corp. common		None			Exempt				
11	Jabil Circuit Inc. common		None			Exempt				
12	Jones Apparel Group Inc. common		None			Exempt				
13	Keane Inc. common		None			Exempt				
14	LCI International common		None			Exempt				
15	Lear Corp. common		None			Exempt				
16	Liz Claiborne, Inc. common	A	Dividend			Exempt				
17	McAfee Associates, Inc. common		None			Exempt				
18	Medic Computer Systems Inc. common		None			Exempt				
19	Mercantile Bankshares common	A	Dividend			Exempt				
1 Into Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

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## VII. Page 8 INVESTMENTS and TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D.
<i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>	(1) Asset Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)
	(1) Type (e.g., buy, sell, merger, redemption)		
<i>Please "XX" after each asset exempt from prior disclosure.</i>	If not exempt from disclosure		
	(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)
	(5) Identity of buyer/seller (if private transaction)		
NONE (no reportable income/assets, or transactions)			
120 Meredith Corp. common	A	Dividend	Exempt
121 MGIC Investment Corp.	A	Dividend	Exempt
122 Micron Electronics common		None	Exempt
123 Nabors Industries Inc. common		None	Exempt
124 National Semiconductor common		None	Exempt
125 Network Associates Inc. common		None	Exempt
126 Newfield Expl Inc. common		None	Exempt
127 Newport Res. Inc. common		None	Exempt
128 Noble Drilling Corp. common		None	Exempt
129 Novacore Inc. common		None	Exempt
130 Owens Illinois Inc. common		None	Exempt
131 Oxford Health Plans Inc. common		None	Exempt
132 Pairgain Technology Inc. common		None	Exempt
133 Parker Hannifin Corp. common	A	Dividend	Exempt
134 Paxar Corp. common		None	Exempt
135 Peoplesoft Inc. common		None	Exempt
136 Phycor Inc. common		None	Exempt
1 Inst/Oain Codes: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more
2 Val Codes: J=\$15,000 or less (Col. C1, D3)	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000
	O=\$500,001-\$1,000,000	P4=\$50,000,001 or more	
3 Val Meth Codes: Q=Appraisal (Col. C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market



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## VII. Page 9 INVESTMENTS and TRUSTS

– Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
<p>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</p> <p>Place "(X)" after each asset exempt from prior disclosure.</p>		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/>	NONE (no reportable income/assets, or transactions)									
137	Proffitts Inc. common		None			Exempt				
138	Quantum Corp. common		None			Exempt				
139	Quintiles Transnational Corp. common		None			Exempt				
140	Rational Software common		None			Exempt				
141	Rayonier Inc. common		None			Exempt				
142	Ramedy Corp. common		None			Exempt				
143	Ross Stores, Inc. common	A	Dividend			Exempt				
144	Rowan Companies Inc. common		None			Exempt				
145	S C I Systems Inc. common		None			Exempt				
146	Safeskin Corp. common		None			Exempt				
147	Safeway Inc. common		None			Exempt				
148	Salomon Inn common	A	Dividend			Exempt				
149	Seacor Holdings Inc. common		None			Exempt				
150	SLM Holding Corp. common	A	Dividend			Exempt				
151	Smith Intl Inc. common		None			Exempt				
152	Southdown Inc. common	A	Dividend			Exempt				
153	Standard FDL BNCPTN common	A	Dividend			Exempt				
1 In/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				



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03/31/1998

## VII. Page 11 INVESTMENTS and TRUSTS

- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)									
171 UAL Corp common		None			Exempt				
172 UNIFI Inc. common	A	Dividend			Exempt				
173 Unisys Corp. common		None			Exempt				
174 USF&G Corp common	A	Dividend			Exempt				
175 USG Corp common		None			Exempt				
176 Vitesse Semiconductor Corp. common		None			Exempt				
177 VLSI Technology Inc. common		None			Exempt				
178 West Point Stevens common		Dividend			Exempt				
179 Westin Digital Corp. common		None			Exempt				
180 Witco Corp. common	A	Dividend			Exempt				
181 Woolworth common		None			Exempt				
182 Community Educ Fed CU savings	J	Interest	J	T	Exempt				
183 Community Educ Fed CU savings (DC)	A	Interest	J	T	Exempt				
184 Magna Bank checking	A	Interest	J	T	Exempt				
185 Bank of Edwardsville checking	A	Interest	K	T	Exempt				
186 Argosy Gaming Co common (DC)		None	L	T	Exempt				
1 Int/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	G=\$100,001-\$1,000,000		H1=\$1,000,001-\$5,000,000		H2=\$5,000,001 or more		N=\$250,001-\$500,000		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
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## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☒ NONE (No additional information or explanations.)



## FINANCIAL DISCLOSURE REPORT

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## SECTION HEADING. (Indicate part of report.)

## SECTION 1. POSITIONS (cont'd.)

Li. Position	Name of Organization/Entity
4 Director	So. Ill. Univ. School of Law Alumni Ass'n
5 Director	So. Ill. Univ. Edw. Alumni Ass'n.

**FINANCIAL DISCLOSURE REPORT**

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03/31/1998

**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

David R. Herndon

Date

4/20/98

**Note:** Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

**Mail original and three additional copies to:**

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	52,300.	Notes payable to banks - secured	0.
U.S Government securities - add schedule	18,612.	Notes payable to banks - unsecured	0.
Listed securities - add schedule	1,754,445.	Notes payable to relatives	0.
Unlisted securities - add schedule	0.	Notes payable to others	0.
Accounts and notes receivable:	0.	Accounts and bills due	0.
Due from relatives and friends		Unpaid income tax	
Due from others		unliquidated but see contingent liability	0.
Doubtful		Other unpaid tax and interest	0.
Real Estate owned - add schedule	495,000.	Real estate mortgages payable - add	
Real Estate mortgage receivable	0.	schedule	0.
Autos and other personal property	100,000.	Chattel mortgages and other liens	
		payable	0.
Cash value - life insurance	0.	Other debts - itemize	0.
Other assets - itemize:			
Merrill Lynch money market	1,366,773.		
Vanguard money market	165,114.		
Mercantile IRA CD	2,848.		
municipal bonds	171,490.		
Merrill Lynch Ready Assets	71,183.		
Merrill Lynch IRA mutual funds	38,254.		
Merrill Lynch mutual funds	1,840.		
<b>Total Assets</b>	<b>4,237,859.</b>	<b>Total liabilities</b>	<b>575,409.</b>
		<b>Net Worth</b>	<b>3,662,450.</b>
		<b>Total liabilities and net worth</b>	<b>4,237,859.</b>
<b>CONTINGENT LIABILITIES</b>		<b>GENERAL INFORMATION</b>	
As endorser, comaker or guarantor	0.	Are any assets pledged? (Add	
On leases or contracts	14,301.	schedule.)	No.
Legal Claims	0.	Are you defendant in any suits	
Provision for Federal Income Tax	561,108.	or legal actions?	No.
[265,000. is in reserve for tax protest and 296,108			
is in reserve for 1998 tax liability not yet due.]			
Other special debt	0.	Have you ever taken bankruptcy?	No.

## FINANCIAL STATEMENT SCHEDULES

**U. S. GOVERNMENT SECURITIES**

3,000 TIGR SERIES 18 ZERO% FEB 15 1999  
4,080 COUPON TREASURY RECEIPT INT PYMT ON 12% 2013  
ZERO% FEB 15 2000  
2,000 TIGR SERIES 21 ZERO% MAY 15 2000  
3,000 U.S. TREASURY STRIPS ZERO% AUG 15 2001  
3,000 U.S. TREASURY STRIPS ZERO% MAY 15 2002  
5,000 U.S. TREASURY STRIPS ZERO% AUG 15 2002  
2,000 TIGR PRINCIPAL SERIES 9 ZERO% NOV 15 2003

**LISTED SECURITIES**

462,092 Argosy Gaming Co. @3.75 \$1,732,845.  
200 Nokia @108. \$ 21,600.

**REAL ESTATE OWNED**

Residence \$432,500.  
Two unimproved lake lots \$62,500.



### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

**I made an agreement with legal aid services for our firm to handle cases without compensation. I referred the cases within our office to attorneys whose particular areas of concern included the referred matter. Lawyers within the office who became aware of a client, not otherwise a referral from legal services, who was in need of consideration on their fee were to refer the client to me and if the need was genuine the fee would be waived. In the course of my work in the railroad industry, I often assisted with legal advice without compensation. For example, I would make myself available to the widows of fatally injured workers. If the case was clear cut and did not require the use of the discovery process and the widow was intimidated by the legal process, I would assist on her behalf with the railroad but allow the railroad to settle directly with the widow, not taking any compensation. I felt called upon to assist railroad families without an eye toward my own remuneration.**

**Moreover, I was always available to respond to inquiries and provide whatever legal assistance I could to my church and the local school district without compensation. I never felt constrained to always charge for my time and enjoyed helping others without regard to financial considerations.**

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

**No such memberships.**

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

**Yes, there is such a commission and I was recommended twice.**

**At the point in time when there were two vacancies for the Southern District of Illinois, applications were called for with the commission to recommend six persons. The application process centered around background information, as well as information regarding the identity of attorneys who had appeared before me in court. Each member of the commission was assigned certain of the applicants for the purpose of contacting persons who could comment on the work and integrity of the applicant. Once the background checks were completed, interviews were offered to those applicants the commission deemed qualified. The interview with the commission centered around my experience and what I could bring to the federal judgeship. Once the six nominees were established, a screening committee of the Illinois State Bar Association conducted interviews of each person. I received a "well qualified" recommendation and, I understand, there weren't any higher recommendations, although two others equaled it. Following those interviews, the Senators met with each of the six nominees individually. The Senators recommended two persons for the two vacancies, this nominee not being one. Ultimately, one of those persons withdrew from consideration.**

**The Senators then reopened the application process and all prior applicants were only required to submit a letter of interest as opposed to filing a new application. This time, all applicants were offered the opportunity to interview, although prior interviewees could opt to stand on the previous interview. I chose to interview and again the discussion centered around what I brought to the position. Two other applicants and I were recommended for the remaining vacancy. One of the other applicants had also been a previous candidate. He and I were not offered another interview with the bar screening committee and we retained the same rating. All three candidates were then offered interviews with both Senators, an offer which I accepted.**

**Following the interview with the Senators Moseley-Braun and Durbin, I was recommended jointly by the Senators to the President for the vacancy. Following that recommendation, I have undergone background examinations by the ABA, FBI and the Department of Justice.**

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

**No one has discussed any such specifics with me.**

5. Please discuss your views on the following criticism involving "judicial activism." The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**In Senate Document No. 170 of the 82<sup>nd</sup> Congress, Second Session, Editor Edward S. Cohen, commented at page XVI of the Introduction: "The second great structural principle of American Constitutional Law is supplied by the doctrine of Separation of Powers. . . . It was Montesquieu's fundamental contention that 'men entrusted with power tend to abuse it'. Hence it was desirable to divide the powers of government, first, in order to keep to a minimum the powers lodged in any single organ of government; secondly, in order to be able to oppose organ to organ." In crafting the Constitution, and in an effort to minimize abuses, the framers sought to restrain government by enumerating the powers of the legislative, executive and**

judicial branches thereof. No where is that any more evident than in Article III. Judicial power was vested in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish. The jurisdiction of the federal courts is quite limited in constitutional terms. Congress was given the power to enact laws and is not to delegate that authority.

My own observation, since I've been on the state bench, is that the best use of the judiciary system is to allow juries, and judges in matters strictly legal, to examine specific disputes between persons or entities on the basis of precise evidence and facts. It is neither a proper function nor a practical one for the courts to legislate.

In looking to have their disputes resolved judicially, people should enjoy consistency in court rulings. *Stare decisis* is extremely important in providing the comfort of fundamental fairness in solving specific disputes. Just as *stare decisis* is crucial in matters of common law, the plain meaning of constitutionally sound statutes should enjoy strict adherence to that meaning. Likewise, legally sound agreements between person should be honored by the courts. Faithful adherence to these concepts will allow a consistency in relationships between people and dispute resolutions. As such, potential litigants will better know what to expect.



UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
WASHINGTON, D.C. 20510-6275  
July 31, 1997

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Rebecca Ruth Pallmeyer

2. Address: List current place of residence and office address(es).

U.S. District Court  
219 S. Dearborn St.  
Suite 2578  
Chicago, Illinois 60604

Home: Wilmette, Illinois

3. Date and place of birth.

September 13, 1954  
Tokyo, Japan

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Dan Philip McAdams  
The Charles Deering McCormick Professor of Teaching  
Excellence and Professor of Human Development and  
Psychology  
Northwestern University  
2115 North Campus Drive  
Evanston, IL 60208

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

I attended Valparaiso University in Valparaiso, Indiana, from August 1972 through May 1976, earning a B.A. in May 1976. I attended the University of Chicago Law School in Chicago, Illinois in 1976-77. I transferred to Boston University College of Law for my second year in 1977-78 to accompany my husband, who was then a graduate student at Harvard, but

returned to the University of Chicago for my third year, earning my J.D. in June 1979.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

**Employment**

<b>1991-present:</b>	<b>United States Magistrate Judge U.S. District Court Northern District of Illinois Chicago, Illinois</b>
<b>1985-1991:</b>	<b>Administrative Law Judge Illinois Human Rights Commission Chicago, Illinois</b>
<b>1980-85</b>	<b>Associate Hopkins &amp; Sutter Chicago, Illinois</b>
<b>September 1979- August, 1980:</b>	<b>Clerk to Justice Rosalie E. Wahl Minnesota Supreme Court St. Paul, Minnesota</b>
<b>Summer 1979</b>	<b>Summer associate Choate, Hall &amp; Stewart Boston, Massachusetts</b>
<b>January 1979- June 1979</b>	<b>Law clerk Reuben &amp; Proctor Law firm, now dissolved Chicago, Illinois</b>
<b>Summer 1978</b>	<b>Summer associate Dorsey &amp; Whitney Minneapolis, Minnesota</b>

Summer 1977

Clerk-typist  
Gelco Corporation n/k/a GE Capital Fleet  
Corp.  
Eden Prairie, Minnesota

Service on non-profit boards:

(1990-1991)	Board of Governors, Augustana Center
(1991-1994)	Board of Directors, Valparaiso University Alumni Association
(1994-1997)	Board of Directors, Federal Magistrate Judges Association
(1995-present)	Board of Directors, Federal Bar Association
(1996-present)	Board of Directors, Womens' Bar Association of Illinois

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- University of Chicago, Joseph Henry Beale Prize for Excellence in Legal Research and Writing, 1977
- Boston University, Class rank approximately 2/350; staff member, the *American Journal of Law and Medicine*, 1978
- Chicago Bar Association, David C. Hilliard award from Young Lawyers' Section for Outstanding Service to the Legal Profession and Community
- Women's Bar Association of Illinois, Award in Recognition and Appreciation for Her Contributions to the Advancement of Women in the Federal Judiciary, April 1996

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

**Chicago Bar Association**

- Member, 1985-present
- Young Lawyers' Section Labor and Employment Law Committee, Co-Chair, 1989-90 and 1990-91
- Development of the Law Committee, Vice-Chair, 1991-92; Chair, 1992-93
- Alliance for Women, Member 1992 to present

**Federal Bar Association, Chicago Chapter**

- Member, 1992-present
- Board of Directors, 1995-96; 1996-97

**Federal Magistrate Judges Association**

- Member, 1991-present
- Seventh Circuit Director, 1994-96

**National Association of Women Judges**

- Member, 1992, 1994-present

**Women's Bar Association of Illinois**

- Member, 1980, 1993 to present
- Board of Managers, 1996-1997
- Recording Secretary, 1997-98

In 1994, I was appointed by Chief Justice Rehnquist to a three-year term on the Judicial Resources Committee of the United States Judicial Conference. I am the first Magistrate Judge in the country to be appointed to serve as a circuit representative on such a committee. The Judicial Resources Committee makes recommendations to the Judicial Conference on all aspects of the human resource needs of the federal courts. Beginning in 1996, I served on a task force of five judges charged with studying the impact of imposing on the judiciary the obligations adopted by Congress in the Congressional Accountability Act of 1995. Our task force report was approved by the U.S. Judicial Conference and submitted to Congress in December 1996. A copy of that report is attached as part of Exhibit D.



10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

**I belong to no organizations that engage in lobbying. I am a member of a book club of approximately one dozen members and an active church member.**

**I have an honorary membership in the Union League Club of Chicago. My use of the Club's facilities is minimal. See attached Exhibit C for a copy of the Club's By-Laws. I have no other non-professional affiliations.**

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

**Illinois Supreme Court, 10/29/80  
U.S. District Court, Northern District of Illinois, 12/18/80  
U.S. Court of Appeals, Fifth Circuit, 6/30/81  
U.S. Court of Appeals, Eleventh Circuit, 10/1/81**

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

**Publications and articles are attached as Exhibit D:**

***Recent Human Rights Commission Cases* (October 10, 1990)  
*Employment Law: Seventh Circuit Update* (1994) (February 28, 1995)  
*Employment Law: Seventh Circuit Update* (1995) (January 5, 1996)  
*Employment Law: Seventh Circuit Update* (1996) (February 24, 1997)  
*Study of Judicial Branch Coverage pursuant to the Congressional Accountability Act of 1995* (submitted by Judicial Resources Committee to the U.S. Judicial Conference) (December 1996)**

Copies of speeches or notes and outlines are attached as Exhibit E:

- Chicago Bar Association speech for "Litigating Sexual Misconduct Evidentiary Issues" seminar (September 24, 1992)
- DuPage County Bar Association seminar on Labor and Employment Law Issues. Outline for speech on "Expert Testimony in Sexual Harassment Cases" (March 6, 1993)
- Chicago-Kent College of Law Employment Discrimination Class: Notes for lecture on Statutory Awards of Attorney's Fees lecture (April 14, 1993)
- Chicago Bar Association notes for speech on *St. Mary's Honor Center v. Hicks* (September 10, 1993)
- National Employment Lawyers Association outline for "New Federal Rules of Civil Procedure" seminar (January 20, 1994)
- Chicago-Kent College of Law outline for trial practice class on discovery disputes (October 13, 1994)
- Chicago Bar Association speech for "Employment Law: Seventh Circuit Update" seminar (February 28, 1995)
- Chicago Bar Association outline for "The Latest and the Greatest: Past, Present & Future of Employment Law" seminar (February 29, 1996)
- Chicago Bar Association outline for "Disability Discrimination in Employment" seminar (May 15, 1996)
- National Employment Lawyers' Association speech on recent Seventh Circuit employment decisions seminar (January 21, 1997)
- Continuing Legal Education Speech on Practice before U.S. Magistrate Judges for "What Every Lawyer Should Know About the Local Rules and Procedures of the Northern District of Illinois" seminar sponsored by U.S. District Court (April 9, 1997)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. My last physical examination was in May 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Since October 1991, I have been a U.S. Magistrate Judge for the Northern District of Illinois, appointed for an eight-year term by the judges of this District on February 25, 1991. In May 1996, I was appointed Executive Magistrate Judge by the judges of this District. The duties of

this position include the conduct of most preliminary proceedings in federal criminal cases, trial and disposition of federal misdemeanor charges upon consent of the litigants, the conduct of various pretrial matters and evidentiary proceedings on referral from the judges of the District Court and the trial and disposition of federal civil cases upon the parties' consent.

From February 1985 until 1991, I was an Administrative Law Judge with the Illinois Human Rights Commission, a quasi-judicial state agency. In that capacity, I conducted bench trials of several days' length in hearing rooms in the Commission's offices, and in other locations throughout the State of Illinois. All cases involved alleged civil rights violations; most were claims of discrimination in employment or housing. Trials were conducted on the record and governed by the Illinois Rules of Evidence, with both parties represented by counsel.

I was also responsible for conducting the Commission's motions call. In that role, I heard contested motions on procedural and substantive issues in all of the Commission's cases not yet scheduled for trial. At the time I became the Commission's first permanent "motions judge," the Human Rights Commission's pretrial call numbered some 1000 cases.

From September 1990 through January 1991, I served as Acting Chief Administrative Law Judge during the extended absence of my supervisor, who died in February 1992.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) *Zumbro, Inc. v. Merck & Co., Inc.*, 819 F. Supp. 1387 (N.D. Ill. 1993)

*Scholes v. Moore*, No. 90 C 6615, 1993 WL 84428, FED. SEC. L. REP. (CCH) ¶ 97,362 (N.D. Ill. Jan. 22, 1993)\*

*Nielsen v. Greenwood*, 873 F. Supp. 138 (N.D. Ill.), *affirmed sub nom. Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 919 (1996)

*Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993)

*Pride Communications Ltd. v. WCKG, Inc.*, 851 F. Supp. 895 (N.D. Ill. 1994)

*CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp. 819 (N.D. Ill. 1994)

*Mid America Title Co. v. Kirk*, 867 F. Supp. 673 (N.D. Ill. 1994), *aff'd* 59 F.3d 719 (7th Cir.), *cert. denied*, 116 S. Ct. 520 (1995).

*Reich v. ABC/York-Estes Corp.*, 157 F.R.D. 668 (N.D. Ill. 1994), *modified*, 64 F.3d 316 (7th Cir. 1995).

*Nielsen v. Greenwood*, 873 F. Supp. 138 (N.D. Ill. 1995), *aff'd* 66 F.3d 145 (7th Cir. 1995)

*In re Soybean Futures Litigation*, 892 F. Supp. 1025 (N.D. Ill. 1995)

\* A copy of this decision is attached as part of Exhibit G.

- (2) Citation for appellate opinions where my decisions were reversed or modified with significant criticism of my rulings:

- (a) *Mark I, Inc. v. Gruber*, 38 F.3d 369 (7th Cir. 1994)

Plaintiff and corporate defendant, a sole proprietorship, consented to my jurisdiction pursuant to 28 U.S.C. § 636(c), but when the sole proprietor substituted for the corporation, the clerk neglected to obtain his consent. The Court of Appeals concluded, *sua sponte*, that I acted without jurisdiction in conducting a trial and entering judgment.

- (b) *Local 744, Int'l Bhd. of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996)

Seventh Circuit concluded that question of which employees were members of the collective bargaining unit was a dispute that the parties had not agreed to arbitrate.



- (c) *Reich v. ABC/York-Estes Corp.*, 157 F.R.D. 668 (N.D. Ill. 1994), *modified*, 64 F.3d 316 (7th Cir. 1995)

Seventh Circuit affirmed determination that default judgment was appropriate as a discovery sanction against defendant employer charged with Fair Labor Standard Acts violations, but reversed denial of petition for leave to intervene filed by a group of employees.

Copies of my unreported opinions in *Mark I, Inc. v. Gruber* and *Local 744, Int'l Bhd of Teamsters v. Hinckley & Schmitt Inc.* are attached as Exhibit F.

- (3) *Zumbro, Inc. v. Merck & Co., Inc.*, 819 F. Supp. 1387 (N.D. Ill. 1993)

*Scholes v. Moore*, No. 90 C 6615, 1993 WL 84428, FED. SEC. L. REP. (CCH) ¶ 97,362 (N.D. Ill. Jan. 22, 1993)\*

*Nielsen v. Greenwood*, 873 F. Supp. 138 (N.D. Ill.), *affirmed sub nom. Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 919 (1996)

*Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993)

*Pride Communications Ltd. v. WCKG, Inc.*, 851 F. Supp. 895 (N.D. Ill. 1994)

*CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp. 819 (N.D. Ill. 1994)

*Mid America Title Co. v. Kirk*, 867 F. Supp. 673 (N.D. Ill. 1994), *aff'd* 59 F.3d 719 (7th Cir.), *cert. denied*, 116 S. Ct. 520 (1995).

*Reich v. ABC/York-Estes Corp.*, 157 F.R.D. 668 (N.D. Ill. 1994), *modified*, 64 F.3d 316 (7th Cir. 1995).

*Nielsen v. Greenwood*, 873 F. Supp. 138 (N.D. Ill. 1995), *aff'd* 66 F.3d 145 (7th Cir. 1995)

*Board of Education v. Leininger*, 822 F. Supp. 516 (N.D. Ill. 1993)

*Nielsen v. Greenwood*, 849 F. Supp. 1233 (N.D. Ill. 1994) (Lindberg, J. adopting Report & Recommendation of Feb. 26, 1993 and Report & Recommendation of Aug. 6, 1993).

*Nielsen v. Greenwood*, 91 C 6537, 1993 WL 144857, FED. SEC. L. REP. (CCH) ¶ 97,408 (N.D. Ill. Feb. 26, 1993), R&R adopted by 1993 WL 339042, FED. SEC. L. REP. (CCH) ¶ 98,124 (N.D. Ill. Aug. 30, 1993).\*

*Advanced Seal Technology, Inc. v. William Perry*, 873 F. Supp. 1144 (N.D. Ill. 1995)

*Ewig Int'l Marine Corp. v. American Airlines, Inc.*, 914 F. Supp. 1543 (N.D. Ill. 1995)

*Coleman v. Lane*, 949 F. Supp. 604 (N.D. Ill. 1996)

*In re Soybean Futures Litigation*, 892 F. Supp. 1025 (N.D. Ill. 1995)

*Dell v. Board of Education, Township High School District 113*, 918 F. Supp. 212 (N.D. Ill. 1995)

*Dicker v. Allstate Life Ins. Co.*, No. 89 C 4982, 1997 WL 182290 (N.D. Ill. Apr. 9, 1997).\*

*Sucec v. Austin Consulting Division*, Ch. No. 1998 CF 0657, ALS No. 3037 (Interim Recommended Order and Decision to Illinois Human Rights Commission, May 24, 1991).\*

\* Copies of these decisions are attached as Exhibit G.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

**September 1979-**

**August 1980: Clerk to Justice Rosalie E. Wahl  
Minnesota Supreme Court  
State Capitol Building  
St. Paul, Minnesota 55402**

2. whether you practiced alone, and if so, the addresses and dates;

**N/A**

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

**Associate, 1980-85 (commercial litigation)  
Hopkins & Sutter  
Three First National Plaza  
Suite 4200  
Chicago, Illinois 60602**

**Administrative Law Judge, 1985-91  
Judge in quasi-judicial state agency  
Illinois Human Rights Commission  
State of Illinois Center  
100 West Randolph Drive  
Suite 5-100  
Chicago, Illinois 60601**

**U.S. Magistrate Judge  
Northern District of Illinois  
219 South Dearborn Street  
Room 2578  
Chicago, Illinois 60604**

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

**I was engaged in a general commercial litigation practice from 1980 until my departure from the firm in 1985.**

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

**My typical former clients included institutions such as banks, corporations, and state and local governmental agencies. I had a broad-range commercial litigation practice, but focused to some degree on employment-related disputes. I also represented indigent individuals as a volunteer with Chicago Volunteer Legal Services.**

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

**I appeared in court regularly, several times per week, throughout my tenure with the firm.**

2. What percentage of these appearances was in:

(a) federal courts;

**40%**

(b) state courts of record;

**40%**

(c) other courts.

**20%**



3. What percentage of your litigation was:

(a) civil;

**99%**

(b) criminal.

**1%**

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**Two cases for which I was sole counsel, eight to ten of which I was associate counsel.**

5. What percentage of these trials was:

(a) jury;

**20%**

(b) non-jury.

**80%**

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

- (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- (1) *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 90 F.2d 1343 (11th Cir. 1982)

**Capsule summary:** Plaintiff was a member of a group of railroads that formed Defendant Trailer Train Company and contracted with Defendant to use flat cars supplied by Defendant on a *per diem* basis. The contract contained an arbitration clause. Later Plaintiff entered into a separate lease agreement for certain cars, an agreement pursuant to which Plaintiff claimed entitlement to investment tax credits. Upon disallowance of the tax credit by the IRS, Plaintiff sued Defendant for breach of the lease agreement and sought arbitration pursuant to the arbitration clause in the earlier contract. The district court denied Plaintiff's request to compel arbitration, and the Eleventh Circuit affirmed.

**Significance:** Holding that parties cannot be compelled to arbitrate disputes which they did not agree to arbitrate and that Court of Appeals has jurisdiction to hear appeal from order denying arbitration.

**My client:** Defendant-Appellee Trailer Train Co.

**Nature of my participation:** Prepared discovery requests and responses; defended depositions; prepared summary judgment motion, supporting briefs and affidavits; prepared brief to Eleventh Circuit and assisted in preparation of oral argument.

**Final disposition:** The Eleventh Circuit concluded it had jurisdiction to hear the appeal and ruled on the merits in favor of my client, affirming the district court's order denying arbitration.

**Dates:** June 1981 through January 1983

**Courts:** Honorable Howell J. Melton, Jr.  
U.S. District Court for Middle District of Florida

Honorable Phyllis A. Kravitch  
U. S. Court of Appeals for the Eleventh Circuit

**Co-Counsel:** Michael M. Conway  
Hopkins & Sutter  
Suite 4200  
Three First National Plaza  
Chicago, IL 60602  
(312) 558-6600

**Local Counsel:** Stephen B. Durant  
Martin, Ade, Birchfield & Johnson  
3000 Independence Square  
Jacksonville, FL 32202  
(904) 354-2050

**Opposing Counsel:** Peter J. Kellogg  
Grissett, Humphries & Kellogg  
801 Blackstone Building  
233 East Bay Street  
Jacksonville, FL 32202  
(904) 354-3100

- (2) *O'Connor v. Insurance Co. of North America*, 622 F. Supp. 611 (N.D. Ill. 1985), *aff'd*, 908 F.2d 1375 (7th Cir. 1990)

**Capsule summary:** Plaintiff was the court-appointed liquidator of an insolvent liability insurer. Prior to its liquidation, the insurer had participated in a reinsurance pool, and the receiver brought an action to recover certain debts owed by pool members to the insurers, including reinsurance proceeds, earned and unearned premiums, and unearned commissions. The court concluded that the debts owed by the insolvent insurer to the pool and the debts owed by the pool to the insolvent were "mutual" debts for purposes of set-offs under the Illinois law governing insurance liquidations. Thus, the Defendant reinsurers were entitled to reduce their debts to the liquidator by certain debts owed by the insolvent reinsurer. Further, defendants' cancellation of the insolvent insurer's policies prior to the liquidation did not constitute a voidable preference.

**Significance:** The decision recognized the right of reinsurance pool participants to enforce provisions of pool agreements.

**My client:** Philip R. O'Connor, Liquidator of the estate of Reserve Insurance Co.

**Nature of my participation:** Prepared discovery requests and responses; performed all legal research; prepared summary judgment materials, including affidavits and briefs to district court.

**Final disposition:** Seventh Circuit affirmed district court's determination in favor of defendant reinsurance pool participants.

**Dates:** I participated in this litigation from 1981 until my departure from the firm in 1985.

**Court:** Honorable Paul Plunkett  
U.S. District Court, Northern District of Illinois

**Co-Counsel:** John N. Gavin  
Hopkins & Sutter  
Three First National Plaza  
Suite 4200  
Chicago, IL 60602  
(312) 558-6600

**Opposing Counsel:** David M. Spector\*  
Isham, Lincoln & Beale  
Three First National Plaza  
Chicago, IL 60602

\*The Isham firm has since dissolved. Mr. Spector is currently a partner at Hopkins & Sutter, where he can be reached at (312) 558-6600.

(3) *Matviuw v. Johnson*, 111 Ill. App. 3d 629, 444 N.E.2d 606 (1st Dist. 1982)

**Capsule summary:** Plaintiff physician alleged that defendant physician defamed him at hospital's medical executive committee meetings. Defendant physician and intervenor hospital moved to bar discovery of statements made at peer review meetings, but the court held that newly-enacted statutory provisions barring admission of such statements were not enforceable retroactively.

**Significance:** Holding that amendment to Medical Studies Act could not be applied in pending case.



**My client:** Intervenor-Defendant Alexian Brothers Medical Center

**Nature of my participation:** Conducted all discovery, performed legal research, prepared briefs to trial court and appellate court, conducted oral argument in trial court.

**Dates:** 1980-1982

**Courts:** Honorable Edwin M. Berman  
Circuit Court of Cook County

Honorable Daniel J. McNamara  
Appellate Court for the First District

**Co-Counsel:** Peter B. Freeman\*  
Thomas C. Shields\*\*  
Hopkins & Sutter

\* Mr. Freeman now practices with Jenner & Block, One IBM Plaza, 42nd Floor, Chicago, Illinois 60611 (312) 222-9350.

\*\* Mr. Shields now practices with Bell, Boyd & Lloyd, Three First National Plaza, Suite 3200, Chicago, Illinois 60602 (312) 807-4232.

Marc D. Ginsburg\*  
Tenney & Bentley

\*Mr. Ginsburg now practices with Rooks, Pitts & Poust, 10 South Wacker Drive, Suite 2300, Chicago, Illinois 60606, (312) 627-2132.

**Opposing Counsel:** Michael A. Reiter\*  
Katten, Muchin & Zavis

\*Mr. Reiter now practices with Holleb & Coff, 55 East Monroe Street, Chicago, IL 60603, and can be reached at (312) 807-4600.

- (4) *DSN Enterprises, Inc. v. Horizon Leasing Corp. and Lincoln First Bank, N.A.*, No. 82 CH 1469 and 82 CH 1470, Circuit Court of Cook County, Chancery Division

**Capsule summary:** Plaintiff, the customer of two letters of credit drawn on third-party defendant Continental Illinois National Bank, sought a declaratory

judgment and injunction prohibiting our client, the beneficiary of the letters of credit, from drawing on them. Plaintiff argued that the materials presented by our client did not strictly conform with the terms of the credit. The court rejected this argument, concluding that our client's presentment did conform with the credit. Accordingly, the court denied plaintiff's motion for declaratory and injunctive relief and granted judgment in the amount of the credit to our client.

**Significance:** The court upheld the enforceability of letters of credit against bank's formalistic defenses to payment.

**My client:** Defendant and Third-Party Plaintiff Lincoln First Bank of Rochester, N.Y.

**Nature of my participation:** Conducted expedited discovery, presented evidence, prepared witnesses, and conducted direct and cross-examinations of witnesses at preliminary injunction hearing; prepared trial briefs and post-trial memoranda; prepared and argued motion for summary judgment against payor bank.

**Final disposition:** Trial court denied motion for preliminary injunction against my client and granted our motion for summary judgment against payor bank.

**Dates:** September 1982 through May 1983

**Court:** Honorable Anthony J. Scottillo

**Co-Counsel:** Michael M. Conway  
Hopkins & Sutter  
Three First National Plaza  
Suite 4200  
Chicago, IL 60602  
(312) 558-6600

**Opposing Counsel:** (for Plaintiff DSN) Michael R. Hassan  
Lord, Bissell & Brook  
115 South LaSalle Street  
31st Floor  
Chicago, IL 60603  
(312) 443-0461

(For Continental) Gerald D. Mindell  
 Gerald D. Mindell & Associates  
 55 West Monroe Street  
 Suite 600  
 Chicago, IL 60603  
 (312) 759-5993

- (5) *Caputo v. City of Chicago*, 113 Ill. App. 3d 45, 446 N.E.2d 1240 (1st Dist. 1983)

**Capsule summary:** Plaintiff was a traffic maintenance supervisor in the City of Chicago's Department of Streets and Sanitation. He was terminated without the notice and hearing guaranteed to career service employees under the Chicago Municipal Code and challenged his termination as a violation of both municipal law and the U.S. Constitution. Plaintiff prevailed on the merits of his lawsuit, but the court denied his petition for attorneys' fees pursuant 42 U.S.C. § 1983 on the basis that the decision in Plaintiff's favor on the merits rested solely on municipal law, without reference to federal statutory or constitutional rights.

**Significance:** This case establishes precedent for Illinois courts to deny attorneys' fees available under federal statutes to a plaintiff who brings a federal claim in state court but prevails on a parallel state law theory.

**My client:** City of Chicago, Department of Streets and Sanitation

**Nature of my participation:** Preparation of briefs in trial court and Illinois appellate court; client contact; assist in preparation for oral argument in appellate court.

**Final disposition:** Appellate court affirmed trial court's denial of attorneys fees award against my client.

**Dates:** September 1981 through March 1983

**Courts:** Arthur L. Dunne  
 Circuit Court of Cook County

Honorable McGloin  
 Illinois Appellate Court, First District

**Co-Counsel:** John L. Conlon\*  
Hopkins & Sutter

\*Mr. Conlon now practices with Schwartz, Cooper, Greenberger & Krauss, Chtd., 180 North LaSalle Street, Suite 2700, Chicago, Illinois 60601 (312) 845-5435.

**Opposing Counsel:** J. Peter Dowd\*  
Jacobs, Burns, Sugarman & Orlove

\*Mr. Dowd now practices with Dowd & Block, 8 South Michigan Avenue, Suite 3100, Chicago, Illinois 60603 (312) 372-1361.

- (6) *Defreader Brown v. Montgomery Ward & Co.*, 81 L 5764, Circuit Court of Cook County, Illinois, Law Division

**Capsule summary:** Plaintiff sought declaration of eligibility for total disability benefits under company plan following denial of such benefits by plan administrators.

**Significance:** Denial of benefits under plan governed by ERISA must be affirmed absent abuse of discretion.

**My client:** Montgomery Ward & Co.

**Nature of my participation:** Performed discovery and prepared motion for summary judgment, supporting affidavit of plan administrator's consulting physician, and memorandum of law; argued the motion on the merits before Circuit Court.

**Final disposition:** Judgment in favor of my client.

**Dates:** June 1982 to July 1983

**Court:** Honorable James C. Murray  
Retired Appellate Court Justice  
9432 South Leavitt  
Chicago, Illinois 60620-5621  
(773) 239-5427



**Co-Counsel:** Glen H. Kanwit  
 Hopkins & Sutter  
 Three First National Plaza  
 Suite 4200  
 Chicago, IL 60602  
 (312) 558-6600

**Opposing Counsel:** Donald J. Kaufman  
 \*Schaeffer & Helfand

\*Mr. Kaufman now practices at 4161 North Damen, Chicago, Illinois 60618 (773) 404-0675.

- (7) *Trustees for Central States, Southeast & Southwest Areas Teamsters Pension Fund v. Chicago Title & Trust Co., as Trustee Under Trust Agreement dated August 11, 1969 and known as Trust No. 54089, No. 81 CH 198, Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois*

**Capsule summary:** Plaintiff Pension Fund moved to foreclose its first mortgage on the Aurora Downs Race Track property. Defendant holder of the beneficial interest in title to the property counterclaimed, alleging that the Pension Fund had conspired with local unions to prevent successful operation of a racing business on the property.

**Significance:** Issues arising from foreclosure of commercial property, including the enforceability of purported loan modification agreements, conspiracy allegations, and bankruptcy proceedings.

**My client:** Plaintiff, Central States, Southeast and Southwest Areas Pension Fund

**Nature of my participation:** Discovery, court appearances and client contact.

**Final disposition:** Pension Fund was awarded a judgment of foreclosure, and counterclaim was settled in Defendant's bankruptcy estate.

**Dates:** I was involved in this litigation from approximately 1982 until my departure from the firm in 1985.

**Court:** Honorable William H. Ellsworth  
 Circuit Court for the Sixteenth Judicial Circuit  
 Kane County, Illinois

**Co-Counsel:** John L. Rogers, III  
 Hopkins & Sutter  
 Three First National Plaza  
 Suite 4200  
 Chicago, Illinois 60602  
 (312) 558-6600

**Opposing Counsel:** Jerome H. Torshen\*  
 Janet F. Gerske\*\*

\*Mr. Jerome H. Torshen now practices at Torshen, Spreyer & Garmisa, Ltd., 105 West Adams Street, Suite 3200, Chicago, Illinois 60603 (312) 372-9282.

\*\*Ms. Janet F. Gerske now practices at 203 North LaSalle Street, Suite 1630, Chicago, Illinois 60601 (312) 845-9060.

- (8) *Joseph Del Giudice v. Cahners Publishing Co.*, 84 L 19852, Circuit Court of Cook County, Illinois, Law Division

**Capsule summary:** Plaintiff advertising sales representative claimed he was discharged by publishing company in retaliation for his refusal to lie to advertisers concerning the publication dates of two of Defendant's magazines.

**Significance:** Issues concerning the emerging tort of retaliatory discharge under Illinois law.

**My client:** Cahners Publishing Co.

**Nature of my participation:** Discovery, client contact, filing of pleadings and preparation of pre-trial motions.

**Final disposition:** Case settled after my departure from the firm.

**Dates:** June 1984 through February 1985.

**Court:** Honorable Benjamin Novoselsky  
 Circuit Court of Cook County, Illinois

**Co-Counsel:** Michael M. Conway  
 Three First National Plaza  
 Suite 4200  
 Chicago, IL 60602  
 (312) 558-6600

**Opposing Counsel:** Donald W. Cohen  
 Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd.  
 125 West Wacker Drive  
 Suite 1100  
 Chicago, Illinois 60606  
 (312) 263-1500

- (9) *Eugene P. Holland v. Coder Taylor Associates, Inc. and Alden E. Orput*, No. 82 L 9712, Circuit Court of Cook County, Law Division

**Capsule summary:** Plaintiff Eugene Holland, a consulting architect and engineer, sought recovery of a \$35,000.00 bonus payment due him pursuant to a written agreement with his former employer. In addition, Holland sought recovery of a contribution to his pension plan account that should have been made as a result of the bonus payment.

**Significance:** Enforcement of employee's rights under a professional employment agreement.

**My client:** Plaintiff Eugene P. Holland

**Nature of my participation:** Discovery, client contact, preparation of summary judgment motion and supporting briefs and affidavits, oral argument of motion to trial court.

**Final disposition:** Judgment in favor of Plaintiff following a bench trial.

**Dates:** May 1982 through 1985

**Court:** Circuit Court of Cook County  
 Retired Judge Myron T. Gomberg

**Co-Counsel:** Michael M. Conway  
 Hopkins & Sutter  
 Three First National Plaza  
 Suite 4200  
 Chicago, IL 60602  
 (312) 558-6600

**Opposing Counsel:** William T. Dwyer, Jr.  
 O'Brien, O'Rourke & Hogan  
 135 South LaSalle Street  
 Suite 830  
 Chicago, Illinois 60603  
 (312) 372-1462

- (10) *Wheeling Trust & Savings Bank v. Des Plaines East Venture, Norman Edidion, Raymond T. Green, Transcontinental Development Corp., Samuel Pancotto and Milton Levenfeld*, No. 81 L 26310, Circuit Court of Cook County, Law Division

**Capsule summary:** Plaintiff sued on a promissory note executed on May 3, 1981 by Des Plaines East Venture. In an amended complaint, Plaintiff sued to enforce guaranties of notes to the borrower and on guaranties of notes given as collateral security for the May 3, 1981 note. Our client, one of the guarantors, argued that the underlying notes were not properly endorsed to Plaintiff and that Plaintiff's rights were therefore subject to the guarantor's defenses to payment on their guaranties.

**Significance:** Rights of assignee to recover on a note as to which the payor has defenses against assignor.

**My client:** Defendant Sam Pancotto

**Nature of my participation:** Discovery, client contact, preparation of briefs and other pleadings, court appearances.

**Final disposition:** Settlement releasing Defendant Pancotto.

**Dates:** 1983 through April 1984

**Courts:** Circuit Court of Cook County  
 Judge Brian Barnett Duff



**Co-Counsel: John L. Conlon**

Schwartz, Cooper, Greenberger & Krauss, Chtd.  
 180 North LaSalle Street  
 Suite 2700  
 Chicago, Illinois 60601  
 (312) 845-5435

**Opposing Counsel:**

Charles W. Siragusa  
 Cynthia M. Hinman\*  
 Crowley, Barrett & Karaba,  
 Ltd.  
 20 South Clark Street  
 Suite 2310  
 Chicago, Illinois 60603  
 (312) 726-2468

Jeffrey N. Cole  
 Cole & Staes  
 321 South Plymouth Court  
 Suite 1150  
 Chicago, Illinois 60604  
 (312) 697-0200

Benjamin D. Schwartz  
 Altheimer & Gray  
 10 South Wacker drive  
 Suite 4000  
 Chicago, Illinois 60606  
 (312) 715-4580

**\*Ms. Hinman is now Assistant Professor at The John Marshall Law School,  
 315 South Plymouth Court, Chicago, Illinois 60604 (312) 987-2379.**

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

I began my legal career as a law clerk to Justice Rosalie Wahl of the Minnesota Supreme Court, where I drafted bench memos and opinions on a wide variety of federal and state law issues. Following my clerkship in Minnesota, I moved with my husband to Chicago and became associated with the law firm of Hopkins & Sutter. In addition to the traditional commercial litigation described above, I worked on several other challenging projects including (a) supervision of discovery on behalf of a glass manufacturer named in a complaint of nationwide price fixing; (b) a study of the state constitutional implications of conversion from

a property-tax-based system to an income-tax-based system for the funding of local public schools; and (c) supervision of the liquidation, under state law, of the country's largest liability insurer. In addition to my private practice, I represented indigents in civil litigation as a volunteer with Chicago Volunteer Legal Services.

After five years with the firm, I applied and was selected for a position as an administrative law judge with the Illinois Human Rights Commission, a quasi-judicial state agency charged with adjudicating civil rights complaints. The Commission's procedures are formal; parties are ordinarily represented by counsel, trials are conducted on the record, and the rules of evidence apply. Illinois' state anti-discrimination statute prohibits discrimination on the bases of race, sex, religion, disability, ethnicity, and national origin.

Since 1991, I have served as a U.S. Magistrate Judge in the Northern District of Illinois. Magistrate Judges in this district exercise a full range of responsibilities under the Federal Magistrates Act. I have conducted trials and evidentiary hearings and prepared written decisions and recommended decisions on hundreds of issues ranging from securities fraud and patent cases to civil rights, common law torts and contracts, and Social Security appeals.

During my career as a practicing attorney and as a judicial officer, I have developed a particular interest and expertise in legal issues arising in the employment setting. I conducted dozens of bench trials in employment discrimination cases at the Illinois Human Rights Commission and frequently conduct bench and jury trials on the consent of the parties in such cases in federal court. I maintain current outlines identifying significant employment and labor cases and am often invited to speak on issues in this area of the law.

I am a member of the Chicago Bar Association and chaired the Young Lawyers' Section Committee on Labor and Employment Law for two years. I am also past chair of the Association's Committee on the Development of the Law, a committee that researches, discusses, and makes recommendations to the Bar Association on emerging issues related to the legal profession such as law school accreditation, civil and criminal forfeiture statutes, mandatory continuing legal education, and merit selection of judges. I am also a member of the Federal Magistrate Judges' Association, the Chicago Chapter of the Federal Bar Association, and the Women's Bar Association of Illinois, and I serve (or have served) on the boards of each of these organizations.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

**I have been acting as a judge or judicial officer for more than twelve years and do not anticipate any conflicts of interest stemming from my practice of law in the early 1980's. I have had no other business or professional employment. In any situation in which my impartiality might reasonably be questioned, I adhere to the mandate of Canon 3C of the the Code of Judicial Conduct for United States Judges that I disqualify myself.**

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**A copy of my financial disclosure report is attached.**

5. Please complete the attached financial net worth statement in detail (Add schedule as called for).

**A copy of my financial net worth statement is attached.**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

**No.**



AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial)	<b>2. Court or Organization</b>	<b>3. Date of Report</b>
Pallmeyer, Rebecca R.	Northern District of Illinois	07/31/1997
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	<b>5. Report Type (check type)</b>	<b>6. Reporting Period</b>
U.S. District Judge Nominee	<input checked="" type="checkbox"/> Nomination, Date 07/31/1997	01/01/1996 to 07/01/1997
	Initial Annual Final	
<b>7. Chambers or Office Address</b>	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>	
Room 2578 219 South Dearborn Street Chicago, Illinois 60604	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
2	
3	

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	
2	
3	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income.)		
1 1995	U.S. Magistrate Judge Salary	
2 1995	Northwestern University Salary (S)	
3 1996	U.S. Magistrate Judge Salary	
4 1996	Northwestern University Salary (S)	
5 4/01/96	Honorarium, Virginia Commonwealth University (S)	

Name of Person Reporting

Date of Report

## FINANCIAL DISCLOSURE REPORT

Palmeier, Rebecca R.

07/31/1997

## IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

SOURCE		DESCRIPTION
NONE (No such reportable reimbursements or gifts)		
1	Exempt	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

SOURCE		DESCRIPTION	VALUE
NONE (No such reportable gifts)			
1	Exempt		
2			
3			
4			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

X	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1			
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

Date of Report  
07/31/1997

**VII. Page 1 INVESTMENTS and TRUSTS**

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
<i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(0)" after each asset exempt from prior disclosure.</i>		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (no reportable income, assets, or transactions)									
1	Checking: Bank One, Evanston, IL	A	Interest	L	T					
2	The American Funds	A	Interest	J	T					
3	CD: Bank One, Evanston, IL	A	Interest	J	T					
4	Checking: Bank One, Evanston, IL		None	J	T					
5	Van Kampen Merritt Municipal Opportunity Trust	A	Dividend	J	T					
6	Brown Group, Inc. Common	A	Dividend	J	T					
7	TIAA - CREP		None	M	T					

1 <b>Inc/Gain Codes:</b> A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000	E=\$15,001-\$50,000
2 <b>Val Codes:</b> J=\$15,000 or less (Col. C1, D3)	G=\$100,001-\$1,000,000	H=\$1,000,001-\$5,000,000	I2=\$5,000,001 or more	N=\$250,001-\$500,000
3 <b>Val Mth Codes:</b> Q=Appraisal (Col. C2)	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	P4=\$50,000,001 or more
	O=\$500,001-\$1,000,000	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000
				P4=\$50,000,001 or more
		R=Cost (real estate only)	S=Assessment	T=Cash/Market
		V=Other	W=Estimated	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pallmeyer, Rebecca R.	07/31/1997

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. (Indicate part of report.)

☐ NONE (No additional information or explanations.)



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Pallmeyer, Rebecca R.

Date of Report  
07/31/1997

## SECTION HEADING. (Indicate part of report.)

## SECTION 3. NON-INVESTMENT INCOME (cont'd.)

Li. Date Parties and Terms Gross Income

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=====
6 6/14/96 Honorarium, Wisconsin Medical College (S)      $      0.00
7 11/07/96 Honorarium, Wellesley College (S)              $      0.00
8 12/10/96 Honorarium, University of Illinois (S)         $      0.00
9 1/31/96 Royalty, American Psychological Association (S)  $      0.00
10 5/01/96 Royalty, Harcourt Brace Publishers (S)         $      0.00
11 5/08/96 Royalty, Guilford Press (S)                    $      0.00
12 10/29/96 Royalty, Harcourt Brace Publishers (S)        $      0.00
13 12/17/96 Royalty, Cambridge University Press (S)       $      0.00
14 4/07/97 Royalty, Guilford Press                        $      0.00
15 4/08/97 Honorarium, Spencer Foundation                 $      0.00
16 5/01/97 Royalty, Harcourt Brace Jovanovich              $      0.00
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**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting

Pallmeyer, Rebecca R.

Date of Report

07/31/1997

**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature Rebecca R. PallmeyerDate July 31, 1997

**Note:** Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	\$64,000		Notes payable to banks—secured	None	
U.S. Government securities—add schedule	None		Notes payable to banks—unsecured	None	
Listed securities—add schedule	\$38,500		Notes payable to relatives	None	
Unlisted securities—add schedule	None		Notes payable to others	None	
Accounts and notes receivable:	None		Accounts and bills due	None	
Due from relatives and friends			Unpaid income tax	None	
Due from others			Other unpaid tax and interest	None	
Doubtful			Real estate mortgages payable—add schedule	\$400,000	
Real estate owned—add schedule	\$617,500		Chattel mortgages and other liens payable	None	
Real estate mortgages receivable	None		Other debts—itemize:	None	
Autos and other personal property	\$120,000				
Cash value—life insurance	\$ 24,000				
Other assets—itemize:					
TIAA-CREF retirement plan (spouse)	\$162,000				
Federal Thrift Investment Plan	\$ 53,000		Total Liabilities	\$400,000	
			Net Worth	\$679,000	
Total Assets	\$1,079,000.00		Total liabilities and net worth	\$1,079,000.00	
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add schedule.)	No	
On leases or contracts			Are you defendant in any suits or legal actions?	No	
Car lease	\$277.51/month		Have you ever taken bankruptcy?	No	
Legal Claims	None				
Provision for Federal Income Tax	None				
Other special debt	None				

**Schedule of Assets and Liabilities**  
**Net Worth Statement for Rebecca R. Pallmeyer**

**Listed securities:**

Brown Group, Inc.	\$ 2,650.00
Centennial Money Market Trust	10,300.00
Van Kampen American Capital Trust	3,150.00
3Com Corp.	4,350.00
The American Funds (IRA)	18,050.00

**Real estate owned:**

Personal residence in Wilmette, IL	\$617,500.00
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**Liability on lease:**

Toyota Motor Credit Lease for 1996 Toyota Camry	\$277.51/month through 7/15/99
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**Real estate mortgages payable:**

Mortgage on personal residence payable to Olk Kent Mortgage Services	\$400,000.00
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## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

**Beginning in September 1996, my husband and I became sponsors for an African-American student who is now a freshman at Providence St. Mel's High School. Through LINK Unlimited, a Chicago organization, we pay the student's tuition and meet with her and her family on a regular basis in an effort to promote her success.**

**I have devoted time to the following other projects during recent years: From 1990-91, I served on the Board of Governors of Augustana Center, a home for developmentally disabled children. Prior to its closing in 1995, Augustana, an institution near my former home in Chicago, provided high-quality care to children with profound needs. Through my church, I assisted in the resettlement of a Somali family in Chicago. I also have served as a volunteer at a food pantry staffed by my congregation.**

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership

policies? If so, list, with dates of membership. What have you done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes, there is a selection commission in the Northern District of Illinois, appointed by Senators Moseley-Braun and Durbin to recommend candidates for nomination to the federal courts. I was one of six candidates recommended by the commission for nomination to one of two seats on the district court.

My experience in the process was as follows: I submitted a formal written application to the Commission in March 1997 and was interviewed by the Commission in April. Following my selection as one of six finalists for the position, I was screened by several bar associations. After reviewing my application and conducting interviews, the bar associations issued their findings to the Senators. I was found well qualified by the Illinois State Bar Association; well qualified by the Chicago Council of Lawyers; extremely well qualified by the Women's Bar Association of Illinois; well qualified by the Asian American Bar Association; qualified (the highest ranking the Association awards) by the Chicago Bar Association. I also was recommended by the Cook County Bar Association.

On Tuesday, May 13, 1997, Senators Moseley-Braun and Durbin interviewed each of the six finalists in Washington. On Monday, May 19, 1997, the Senators advised me that they would be recommending my name to the President for nomination. Since May, I have been interviewed by personnel at the Department of Justice, had a background check conducted by the FBI, and been evaluated by the ABA's Standing Committee on Federal Judiciary. On July 31, 1997, President Clinton nominated me for a vacancy on the U.S. District Court.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**Our constitutional democracy requires that each of the branches of government act within the restraints imposed by the separation of powers. In my view, the courts function best in their**

traditional role of resolving individual disputes under the rule of law. Federal courts have great power to reach fair resolutions of disputes between parties. Having no enforcement power of their own, however, the courts must ultimately depend for their legitimacy on the respect of citizens and other government institutions. As the only branch of government not elected by the citizenry, it is crucially important that the judiciary justify its decisions by reference to statutes and precedent, and that court decisions not be seen as an avenue for exercise of the judge's personal views concerning matters of public policy.

Unlike the executive or legislative branches, which have the power to investigate issues from a variety of perspectives, courts are limited in reaching their decisions to information on issues as framed by the parties. Principles of standing and ripeness impose appropriate restraints on the judicial process. Because of these restraints, and because their enforcement powers depend on the respect of the public, courts have limited abilities to administer institutions or address broad problems of public policy.



## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

JEANNE ELLEN SCOTT

2. Address: List current place of residence and office address(es).

Residence: Springfield, Illinois

Office: 732 Sangamon County Complex  
200 South Ninth Street  
Springfield, Illinois 62701

3. Date and place of birth.

Date of birth: 8-17-48

Place of birth: Springfield, Illinois

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Single

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

College: Bradley University

Dates of attendance: September 1966 - June 1970

Degree received: Bachelor of Arts, Magna Cum Laude

Date degree was granted: June 7, 1970

Law School: Northwestern University School of Law

Dates of attendance: September 1970 - June 1973

Degree received: Juris Doctor

Date degree was granted: June 16, 1973

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations,

nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

June 1970 - September 1970: Taxpayers' Federation of Illinois, researcher

June 1972 - September 1972: Illinois Defender Project (predecessor to Office of Illinois Appellate Defender), legal intern who prepared appellate briefs for indigent criminal defendants

September 1973 - July 1978: Sangamon County State's Attorney's Office, Assistant State's Attorney

July 1978 - March 26, 1976: Charles J. Gramlich Law Offices, Associate Attorney in general law practice

March 26, 1979 - December 5, 1988: State of Illinois, Associate Circuit Judge, Seventh Judicial Circuit

December 5, 1988 - Present: State of Illinois, Circuit Judge, Seventh Judicial Circuit

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Scholarships: Bradley University merit scholarship;  
Springfield Marine Bank student of the year  
runner-up scholarship.

Fellowships: None

Honorary Degrees: None

Honorary society memberships in college: Phi Kappa Phi (academic), Pi Sigma Alpha (political science), Pi Kappa Delta (forensics), Pi Gamma Mu (social sciences), Mortar Board, President (women's honorary for academic achievement and student activities). Received the Pi Sigma Alpha key, as the top graduate in political science department. Chosen one of three outstanding student senators (student government) in senior year.

Honorary society memberships in law school: Vice President of the Julius Miner Moot Court Program (1973)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

A. BAR ASSOCIATIONS

1. Currently: Lincoln-Douglas American Inn of Court; Charter Member; President (Oct. '94 - May '95)

Illinois State Bar Association

Sangamon County Bar Association

Central Illinois Women's Bar Association

National Association of Women Judges

Illinois Judges Association; Director (1981-84 and 1987-90)

2. Past: American Bar Association, for approximately one year in the 1970's.

B. Judicial-related committees or conferences

1. ILLINOIS JUDICIAL CONFERENCE:

(a) Faculty member and chair of regional seminar for Illinois State Court Judges on "Constitutional Issues in Criminal Law" (1994).

(b) Member of criminal law committee for Illinois Judicial Conference (1990).

(c) Member of criminal law committee for Illinois Associate Circuit Judges' Judicial Conference (1981).

(d) Member of the steering committee to plan the annual Associate Circuit Judges' conference (1980-1983).

C. Illinois Supreme Court Committee on Judicial Conduct:

Member (1992-present); Chair of committee (1996-1998)

D. Attended and participated as panelist in "The Future and the Courts of Illinois" conference, sponsored jointly by the Illinois Supreme Court and the American Judicature Society (1992).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations that lobby before public bodies:

The Illinois State Bar Association

Other organizations to which I belong:

(1) The Altrusa Club of Springfield -- service club. The by-laws are attached.

(2) The Club Fitness Center -- membership is open to anyone who pays to join. The Club is affiliated with the International Health, Racquet and Sportsclub Association and subscribes to its nondiscriminatory membership policies which are attached.

(3) The Rail Golf Course -- women's golf league. The Rail is open to the public. One could play in the league as often or as infrequently as one wished by signing up one week in advance. I played approximately eight times in 1997.

(4) Bradley University Council -- advisory board.

(5) League of Women Voters of the Springfield area.

(6) St. Agnes Church

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Admitted to practice in the State Courts of Illinois:  
November 27, 1973.

Admitted to practice in the United States District Court for the Southern District of Illinois (which at that time included what is now the Central District of Illinois):  
March 23, 1976.



12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published writings:

(1) "Women on the Illinois State Court Bench", Illinois Bar Journal, Volume 74, Number 9 (May 1986). A copy is attached.

(2) "Judge's Forum", I.D.C. Quarterly, (Fourth Quarter 1995). A copy is attached.

(3) An outline on special sentencing provisions that apply to alcoholics and addicts -- which was handed out at the 1990 Illinois Judicial Conference as part of the written materials on criminal law. A copy of the outline is attached.

(4) A report of the Illinois Supreme Court Committee on Judicial Conduct (1993). A copy of the report is attached.

Other writing: In 1994 I served as Chief Judge of the Seventh Judicial Circuit of Illinois. I submitted a written proposal to the finance committee of the Sangamon County Board (then chaired by current Illinois State Senator Larry Bomke) for the county to establish a full-time public defender's office and to separate that office from the Court (except for the Court's statutory duty to appoint the chief public defender). A copy of the proposal I submitted is attached.

Speeches: Attached are speeches or notes from speeches I have given:

(1) A speech to a State-wide meeting of Illinois probation officers, held in Springfield, Illinois on 10-26-94. I am not aware of any press reports on this speech.

(2) Notes used in speaking on the court system to various school and civic groups over the years. I am not aware of any press reports on any of those speeches.

(3) A handwritten speech dealing with the historic contributions women have made in Springfield, Illinois.

I have given this speech a number of times, primarily to women's groups, over the years. I am not aware of any press reports on any of these speeches.

Additional Public Comments:

(1) I gave an interview on 10-25-93 to Springfield, Illinois radio station WSSU in connection with a five part series it was doing on probation. I have attached a cassette tape of that series; my interview is heard in Segment 3.

(2) I spoke on "Police Interrogation: Fifth and Sixth Amendment Issues" at the 1994 regional seminar dealing with Constitutional Issues in Criminal Law (sponsored by the Illinois Judicial Conference). I have no notes from that presentation and know of no press reports concerning it.

(3) I was a panelist at "The Future and the Courts of Illinois Conference" in 1992. Three professors gave their vision, from a research perspective, on the courts of the future, and two other judges and I gave a reaction from the trial judge's perspective. I have no notes from that presentation, and I am not aware of any press reports on that panel discussion.

(4) I served as a panelist on criminal law at the 1990 Illinois Judicial Conference. I specifically addressed special considerations for the trial judge in sentencing the alcoholic or addict. My outline from that presentation is attached. I know of no press accounts of that presentation.

(5) I participated as a panelist, discussing (in a general sense) the role of the grand jury in criminal proceedings at the Lincoln Library (Springfield public library) in April 1984. A clipping from the Illinois State Journal Register concerning that discussion is attached. I have no notes from that event.

(6) I served as a panelist discussing criminal law at the 1981 annual Associate Circuit Judge's Conference. I have no notes from that event and know of no press accounts of it.

(7) I was a panelist at a seminar on trial techniques, sponsored by the Illinois State Bar Association, April 1, 1994, at Bloomington, Illinois. My particular topic was problems with jury instructions. I have no notes from that event and know of no press accounts of it.

(8) I spoke on a panel discussing public defender services for indigents (sponsored by the Illinois ACLU, and/or Sangamon State University), 10-23-93. I have no notes from that event and know of no press accounts.

(9) I was a panelist at the semi-annual meeting of the Illinois State Bar Association in Chicago in December of 1993 or 1994, addressing the topic of what trial judges expect from attorneys in the way of preparation. I have no notes from that presentation and know of no press accounts of it.

(10) I was a panelist at the semi-annual joint meeting of the Illinois State Bar Association and the Illinois Judges' Association in Chicago in December, 1997, on the topic of the judge's role in the community. I have no notes from that presentation. I have attached an article from the Chicago Daily Law Bulletin concerning that discussion.

13. Health: What is the present state of your health? List the date of your last physical examination.

Very good. My last physical examination was on October 10, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Previous Judicial Office: Associate Circuit Judge, Seventh Judicial Circuit, State of Illinois.

Period: 3-26-79 to 12-5-88

This is an appointed position; the Associate Circuit Judges are appointed by vote of the Circuit Judges of the circuit. The Circuit Court is a trial court of original and general jurisdiction. Associate Circuit Judges have jurisdiction to hear all matters in the trial court, with the exception that Associate Circuit Judges do not hear felony trials or motions to suppress in felony cases unless authorized to do so by the Illinois Supreme Court at the request of the Chief Judge of the circuit. I was authorized by the Illinois Supreme Court to hear felony trials beginning on 1-1-80 and continuing throughout my service as an Associate Circuit Judge.

Current Judicial Office: Circuit Judge, Seventh Judicial Circuit, State of Illinois.

Period: December 5, 1988 - present

This is an elected position; the circuit includes six Illinois counties (Sangamon, Morgan, Macoupin, Jersey, Greene and Scott). I was elected by the people of the Seventh Judicial Circuit in 1988, for a six-year term and then retained by the voters in 1994, for another six year term. From December, 1992, until December, 1994, I served as Chief Judge of the Seventh Judicial Circuit. The Chief Judge is elected by vote of the Circuit Judges of the Circuit.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

- (1) People v. Britz, Sangamon County Case 85-CF-24, affirmed in 174 Ill. 2d 163 (1996).

People ex rel Bonafeste vs B.D.H. Rentals, et all, Sangamon County Consolidated Cases 90-TX-11(13), 91-TX-9(14), 92-TX-4(14), and 93-TX-17(13), affirmed in 277 Ill. App. 3d 614 (1996).

Hopkins v. Zegar, Sangamon County Case 91-L-503, affirmed in an unpublished decision, Docket No. 4-96-0561 (1997).

Haddad's of Illinois, Inc., v. Credit Union One, Sangamon County Case 93-L-323, affirmed in 286 Ill. App. 3d 1069 (1997).

Roach v. Springfield Clinic, Sangamon County Case 88-L-46, affirmed in 223 Ill. App. 3d 597 (1992), but reversed in 157 Ill. 2d 29 (1993).

McClanahan v. Dimension Cable Services, Sangamon County Case 92-L-275. This case was not appealed.

People v. Crayton, Sangamon County Case 87-CF-405, affirmed in an unpublished decision, Docket No. 4-93-0964 (1994).

Royer v. Midwest Emergency Medical, Sangamon County Case 94-L-679. This case was not appealed.

Leasing Associates of Barrington v. Lewis, Sangamon County Case 94-L-329. This case was not appealed.

City of Springfield v. Lascelles, 92-ED-7, and City of Springfield v. Pierce, 93-ED-7 (Sangamon County cases), affirmed in an unpublished decision, Docket Nos. 4-97-0148 and 4-97-0149 consolidated (1997).

- (2) (a) Wixon v. Edgar, 215 Ill. App. 3d 490 (1991). Wixon sought judicial review of a decision by the Illinois Secretary of State denying Wixon's petition for reinstatement of his full driving privileges, as well as denying his alternative request for a restricted driving permit. His driver's license had been revoked as a result of a conviction for driving under the influence of alcohol. The hearing officer and the Secretary of State found that Wixon had failed to prove that he would be a safe and responsible driver. I affirmed the decision of the Secretary of State; the Appellate Court reversed, finding the Secretary of State's determination to be against the manifest weight of the evidence. My ruling is attached.

(b) Illinois Breaktime Services, Inc. v. Department of Revenue, et al, unpublished order, Docket No. 4-96-0630 (1997). A copy of the order of the Appellate Court is attached. Petitioner sought three credits from the Illinois Department of Revenue for alleged overpayments of retailer's occupation taxes. The Department of Revenue denied all three claims for refund. On administrative review I affirmed one ruling of the Department and reversed two denials of refunds. The Appellate Court affirmed the ruling in which I had upheld the Department and reversed the two rulings in which I had reversed the Department. My docket entry (93-MR-237) containing my ruling is attached.

(c) Central Illinois Mobile Home Co., et al v. Auto-Owners Insurance Company, 158 Ill. App. 3d 1104 (1987) A default judgment had been



entered in favor of Plaintiffs and against Defendant. I allowed a Motion to Vacate the Default Judgment, filed pursuant to Section 2-1401 of the Illinois Code of Civil Procedure. The Appellate Court reversed finding that the motion to vacate the default judgment did not adequately allege the existence of a meritorious defense. The default judgment was reinstated. A copy of my ruling is enclosed on the docket entry of 1-29-87.

(d) People v. Robert W. Johnson, unpublished opinion, Docket No. 4-89-0810 (1990) A copy of the Appellate Court order is attached. The Defendant was convicted of criminal sexual assault and sentenced to six years in prison. On appeal he claimed there were errors in the sentencing hearing with respect to the consideration given to the amount of force that was used. He also claimed he should have received an extra day's credit on the sentence. The Appellate Court found that he was entitled to one extra day of credit on the sentence, but affirmed all other rulings. My orders are attached.

(e) Sunley v. Miller, unpublished opinion, Docket No. 4-87-0780 (1988) A copy of the appellate opinion is attached. The Defendant hired Plaintiff to repair a damaged garage wall. Defendant thought the work was poorly done and refused to pay Plaintiff. Plaintiff sued and Defendant counterclaimed for the cost to finish the work. I ruled for Plaintiff for \$1,000. The Appellate Court affirmed on all issues except damages and remanded for a new hearing on damages only. The Appellate Court stated that the record did not reflect the basis of the calculation of damages. Copies of my orders are attached.

(f) In the Matter of Barbara Franklin, 186 Ill. App. 3d 245 (1989) The respondent had been found mentally ill and a danger to herself or others and committed to a mental health facility for treatment in June, 1988. She did not appeal that decision. In August, 1988, a second hearing that was mandated by statute was held to see if she was still in need of involuntary hospitalization. After

that hearing, the respondent was again found to be a person subject to involuntary commitment and ordered hospitalized. The Appellate Court found that the petition for the August hearing was not properly served on the respondent and that she was not given the statutory notice of when the follow-up examination by a physician would occur. The August order of civil commitment was reversed for failure to comply with the procedural requirements of the Mental Health Code. My orders for the August hearing are attached.

(g) Gallant v. Civil Service Commission, unpublished opinion, No.4-96-0707 (1997). A copy of the opinion is attached. Plaintiff was discharged from her position with the Department of Public Aid when she failed to return to work following a medical leave of absence. Evidence indicated that Plaintiff's medical leave would have been extended if she had filed a doctor's certificate prior to the time her leave expired. Plaintiff had sent the form to her doctor, but the doctor went on vacation without filing the form. It was conceded that good cause existed to extend the medical leave if the requisite form from the doctor had been filed on time. A hearing officer ruled, in administrative proceedings, that Plaintiff had filed the form as soon as it had been physically possible for her to do so. The hearing officer ordered Plaintiff reinstated. The Department overruled the hearing officer. On administrative review I reversed the Department; on appeal the Appellate Court reversed me, finding that it was the employee's responsibility to see that the form was filed on time and that she was capable of doing so. My judgment order is attached.

(h) People v. Danny Joe McCarty, 93 Ill. App. 3d 898 (1981), 86 Ill. 2d 247 (1981). The Defendant was charged with the offense of unlawful delivery of cocaine. In a pretrial motion to dismiss, the Defendant argued that the classification of cocaine as a narcotic drug in Schedule II of the Illinois Act was unconstitutional. Another judge, Simon Friedman, denied the motion to dismiss and then assigned the case to me for trial. The Defendant was then tried, convicted by a

jury, and sentenced to three years in prison. In his post-trial motion the Defendant renewed his motion to dismiss, which I again denied. On appeal the Illinois Appellate Court ruled that cocaine was not a narcotic and that the classification of cocaine as a narcotic drug violated the Defendant's right to equal protection. The Appellate Court ordered the conviction reduced from a Class 2 felony to a Class 3 felony and remanded the case for a new sentencing hearing. The Illinois Supreme Court then granted the State's petition for leave to appeal and upheld the classification of cocaine as a narcotic. The Illinois Supreme Court reversed the Appellate Court and affirmed the decision of the trial court.

(i) Davidsmeyer v. Johnson, et al, 120 Ill. App. 3d 1173 (1984) Plaintiffs were tenants who sued the landlord for the return of their security deposit when they moved. The Defendant (landlord) had provided a list of purported damages, but had done so more than thirty days after Plaintiffs vacated the apartment. At a bench trial I awarded Plaintiffs an amount equal to the security deposit (\$235), plus costs, but did not award the special statutory damages for a refusal to supply the itemized damage list within thirty days. The Appellate Court remanded for damages to be assessed in accordance with the statute that provided for double damages and attorneys' fees. The trial court file, according to the Circuit Clerk, has been destroyed; I have no additional recollection of this case.

(j) Town & Country Bank v. Country Mutual Insurance Company, 121 Ill. App. 3d 216 (1984) Charles Austin owed Plaintiff \$4,000 plus interest on a note. Charles Austin settled a personal injury claim he had brought against a person insured by Defendant. Austin executed an assignment to Plaintiff of that part of the insurance proceeds from the personal injury settlement that would pay off the note held by Plaintiff and forwarded a copy of the assignment to Defendant. Thereafter Defendant paid the proceeds of the personal injury settlement to Austin, without paying any of the amount to

the Plaintiff. Plaintiff sued Defendant for failing to honor the assignment. I ruled for Plaintiff, finding that while a cause of action for personal injury could not be assigned, an expectancy in the proceeds of the cause of action could be assigned. The Appellate Court reversed, ruling that one could not assign an expectancy in the proceeds of a personal injury action. The trial court file has been destroyed.

(k) Springfield Park District v. Buckley and Springfield Park District v. Christie, consolidated for appeal, 140 Ill. App., 3d 524 (1986) The Defendants were charged with violating a Springfield Park District ordinance that prohibited the operation of a motorcycle on park roadways. One of my colleagues, Judge Stuart H. Shiffman, denied the Defendants' motions to dismiss the traffic citations. Thereafter I presided at a bench trial and found the Defendants guilty and imposed fines. The Appellate Court struck the ordinance as invalid and reversed. The trial court file has been destroyed; I cannot retrieve my docket ruling.

(l) People v. Roux, unpublished order, No. 4-89-0735 (1990) A copy of the order is attached. Even though the Appellate Court opinion indicates that I was the trial judge, I was not the judge who took the plea and imposed the sentence. That judge was Honorable Jerry S. Rhodes. I have included this case since the appellate record lists me as the trial court judge, but the original transcripts reflect Judge Rhodes was the sentencing judge. At a sentencing hearing, following a plea of guilty to the offenses of residential burglary, felony murder, and arson, Judge Jerry S. Rhodes noted that the Defendant's conduct had caused serious harm, including death. The Appellate Court reversed the sentence and remanded for a new sentencing hearing, ruling that the judge had improperly considered a fact implicit in the crime as an aggravating factor. The ruling is referenced in the appellate opinion. After the sentence was imposed, the Defendant moved to withdraw his guilty plea, claiming that his attorney had promised him a specific sentence. I presided at the hearing on the

motion to withdraw the guilty plea, on 9-5-89, since Judge Rhodes had retired by then. After a hearing, that motion was denied. No issue was raised on appeal concerning that ruling. I have attached copies of the transcripts of the hearings before Judge Rhodes on 8-20-87 and 1-20-87 because those transcripts contain the remarks of the trial court that are discussed in the appellate decision.

(m) Ball v. Edgar, 165 Ill. App. 3d 349 (1988) Ball sought judicial review of a decision by the Illinois Secretary of State denying both Ball's petition for reinstatement of his full driving privileges and his alternative request for a restricted driving permit. Following an administrative review hearing, I affirmed the decision of the Secretary of State denying full reinstatement, but found the decision denying Ball a restricted driving permit to be against the manifest weight of the evidence. There was no appeal of that decision, and the Secretary of State issued Ball a restricted driving permit allowing him to drive to and from work for 90 days. At the end of the 90 day period, the Secretary of State indicated the permit would not be renewed, even though Ball had done nothing wrong during the 90 day period. Ball petitioned the Court to modify the prior order to direct the Secretary to renew the permit. I ruled that the Secretary should renew the permit unless there was evidence that Ball had violated the conditions of the permit or the motor vehicle laws. The Appellate Court reversed, ruling that I had lost jurisdiction and that Ball would have to begin again with a hearing before the Secretary of State's hearing officer and proceed through all of the administrative stages before seeking relief from the Court. A copy of my docket order is attached.

(n) St. Clair v. Department of Revenue, unpublished order, No. 4-96-0827 (1997) A copy of the order of the Appellate Court is attached. St. Clair brought an administrative review action of a decision by the Illinois Department of Revenue denying his protest of a tax assessment for his



failure to have purchased drug tax stamps. The administrative review action was not brought until four years after the Illinois Department of Revenue ruling. However, in that interval the United States Supreme Court in Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) held that a similar tax statute in Montana violated the double jeopardy clause's prohibition against successive punishment for the same offense and the Illinois Supreme Court in Wilson v. Department of Revenue 169 Ill. 2d 306 (1996) ruled the Illinois tax statute unconstitutional on double jeopardy grounds. St. Clair claimed in his administrative review action that since the statute had been ruled unconstitutional on its face, he should be entitled to challenge the assessment at any time. I ruled in favor of St. Clair, granting his motion for summary judgment. The Appellate Court reversed, finding that St. Clair had waived the issue by failing to raise it initially and by failing to seek administrative review at the time his protest was denied. The Appellate Court also deemed that St. Clair had paid the tax voluntarily since he did not pay the taxes under protest and seek a court order at that time to enjoin transfer of his payment to the State Treasury. A copy of my docket order is attached.

(o) Rice v. AAA Aerostar, Inc. and State Farm Fire and Casualty, an unpublished opinion as of this date, No. 4-97-0488 (1998) A copy of the opinion is attached. Plaintiff fell at Defendant's restaurant and was injured. Defendant was insured by State Farm. Counsel for Plaintiff, before filing suit, contacted State Farm and discussed the incident. State Farm denied liability on the part of the Defendant. Thereafter Plaintiff filed suit and later obtained a judgment against Defendant. Neither Plaintiff, nor Plaintiff's counsel, nor Defendant notified State Farm of the suit. After the judgment was obtained, Plaintiff filed a garnishment proceeding against State Farm seeking to have the insurance company pay the judgment. State Farm moved for summary judgment and filed an affidavit stating that State Farm

"was not informed by plaintiff, plaintiff's attorney, any representative of Plaintiff, or any entity that Defendant had been served with summons" for the lawsuit. I granted State Farm's motion for summary judgment. The Appellate Court ruled that, under the facts of this case, State Farm did not have the burden to try to determine whether a suit had been filed against its insured. However, the Appellate Court reversed the award of summary judgment, finding that the affidavit submitted in support of the motion failed adequately to address whether State Farm was aware of the lawsuit. A copy of my docket order is attached.

(p) Millard v. The Industrial Commission, unpublished order, No. 4-96-0271C (1996) A copy of the order is attached. The industrial commission made an award of temporary total disability, under the Illinois worker's compensation laws, to Plaintiff. The commission also ordered that the case be remanded to the hearing officer for further hearing on the issue of rehabilitation, but only after the time for seeking administrative review of the award for temporary total disability had passed. On administrative review, I affirmed the award of temporary total disability. On appeal, the employer argued, for the first time, that the Court lacked jurisdiction. The Appellate Court ruled that the commission was without authority to allow appeal of the temporary total disability award while attempting to reserve the rehabilitation issue. The Appellate Court found that it and the Circuit Court were without jurisdiction to review the commission's decision and vacated the order of the Circuit Court and remanded the matter to the industrial commission. A copy of my docket order is attached.

(q) People v. Robert Brown, unpublished summary order, No. 4-94-0112 (1995) A copy of the order is attached. Defendant received a three-year prison sentence following a plea of guilty. Thereafter he filed a motion to reconsider the sentence. The same lawyer who had represented the Defendant initially represented him in connection with the motion

to reconsider. That lawyer failed to file a certificate strictly complying with Supreme Court Rule 604(d) (saying that counsel has consulted with the Defendant, reviewed the court file and record of proceedings, and raised all applicable issues). I denied the Defendant's motion to reconsider. On appeal, the Appellate Court vacated the order denying the motion to reconsider and remanded for a new hearing after counsel filed the Rule 604(d) certificate. After the case was remanded, a new attorney was appointed for the Defendant. The attorney filed the Rule 604(d) certificate, and the Defendant then withdrew his motion to reconsider the sentence. My docket orders are attached.

(r) People v. James W. Williams, Jr., affirmed in 90 Ill. App. 3d 158 (1980), reversed in 87 Ill. 2d 161 (1981) In a traffic case the Defendant filed a discovery motion for the names of those witnesses the State intended to call at trial. This motion was allowed in accordance with an Illinois statute. The State then moved for disclosure of the names of any potential witnesses the defense might call. I allowed the State's motion. Defense counsel refused to comply and was found in contempt (to enable an appeal) The Defendant appealed claiming that the Supreme Court rules on discovery only applied to felonies and that there was no discretion for the trial court to order a misdemeanor defendant to provide a list of witnesses. The Appellate Court affirmed, finding a basis in the case law for the trial court to enter such a ruling. The Illinois Supreme Court then reversed and ruled that there was no authority in nonfelony cases for the Court to compel disclosure by a Defendant of anything to the State. The trial court file has been destroyed; I cannot provide a copy of my order.

(s) Sutton v. Hope School, an unpublished order, No. 4-91-0474 (1992). A copy of the order is attached. I dismissed certain counts of a wrongful death complaint in which claims for damages for loss of society were brought on behalf of siblings of the deceased. In ruling, I noted that I was following an Appellate Court decision, Carter

v. Chicago & Illinois Midland Ry. Co., 168 Ill. App. 3d 653, which had held that siblings could not recover for loss of society. While the Sutton case was pending on appeal, the Illinois Supreme Court changed the law on this point and ruled that siblings could recover for loss of society in a wrongful death action (In Re Estate of Finley). The Appellate Court then reversed my ruling in Sutton, but in doing so noted that I had correctly followed the Carter precedent at the time I ruled. A copy of my docket ruling is attached.

(t) Roach v. Springfield Clinic, affirmed in 223 Ill. App. 3d 597 (1997), reversed in 157 Ill. 2d 29 (1993) I made a ruling on a pretrial motion that certain information obtained by a doctor who was investigating why anesthesiologists were late in getting to an operating room was privileged under an Illinois statute which made certain data and information used in quality control in hospitals, for improvement of patient care, privileged and inadmissible. The Appellate Court affirmed; the Illinois Supreme Court reversed. The Illinois Supreme Court construed the statute as affording the privilege only to the hospital's committees on peer review and quality control. A copy of my ruling is attached.

(u) Laborers' International Union of North America v. Human Rights Commission, Department of Human Rights and Helen Metzger, unpublished opinion, No. 4-96-0476 (1996) A copy of the opinion is attached. The Department of Human Rights investigates complaints of discrimination. It can then bring a complaint which is heard before the Human Rights Commission; they are separate state agencies. An attorney for the union had filed an appearance on behalf of the union with the Department while the Department was investigating a complaint made against the union by an employee (Metzger). The Department then filed a complaint with the Commission and served the complaint on the attorney for the union, but not on the union representative. The Commission rules required that the complaint be served on the parties. The Commission also had a rule that

an appearance by an attorney before the Department, before the filing of a complaint, constitutes an appearance before the Commission; the Department had no such reciprocal rule. The union filed a special appearance before the Commission contesting the jurisdiction since the union representative had not been served. The Commission denied the special appearance. The union then filed for injunctive relief in Circuit Court seeking to enjoin the proceeding before the Commission until the union was served. I entered the injunction finding that the Commission's rule failed to notify counsel that an appearance before the Department would also constitute an appearance before the Commission. The Appellate Court reversed, finding that this rule did not violate the union's right to due process and further finding that there was no irreparable harm to the union. A copy of my order is attached.

(v) People v. Eric Jackson, unpublished opinion, No. 4-94-0697 (1996) A copy of the opinion is attached. Defendant was convicted of first-degree murder and aggravated battery with a firearm. He raised issues on appeal concerning the prosecutor's closing argument, the introduction of certain items of evidence, and the fact that the aggravated battery conviction should be vacated since it arose from the same physical act as the murder. The conviction and sentence for first degree murder were affirmed, and the conviction for aggravated battery was vacated since it arose from the same act as the murder. A copy of my docket order reflecting the sentence is attached.

(w) Bybee v. O'Hagen, 243 Ill. App. 3d 49 (1993) A fire in a mobile home killed one child and injured others. The landlord was sued under a theory of strict liability for violating an Illinois statute which required that each dwelling place have an approved and operating smoke detector within fifteen feet of each room used for sleeping purposes. I denied a defense motion to dismiss finding an implied private right of action in strict liability for a violation of the smoke detector act. The questions of whether there



is an implied private right of action and, if so, whether a strict liability claim can be brought, were certified for appeal. The Appellate Court found the existence of an implied private right of action, but it is founded on negligence rather than on strict liability. A copy of my ruling is attached.

(x) People v. Alfred McBride, unpublished order, No. 4-93-0210 (1994) A copy of the Appellate Court order is attached. The Defendant was convicted of first degree murder, sentenced to 45 years in prison, and given credit for 239 days served. On appeal he argued that the sentence was excessive and that he was entitled to 241 days credit for time already served as of the date of sentence. The Appellate Court affirmed the conviction and the sentence but remanded with directions that the Defendant be given credit for 241 days served as of the sentencing date. A copy of my docket order is attached.

(y) People v. Christopher Harris, unpublished order, No. 4-91-0685 (1992) A copy of the Appellate Court decision is attached. Defendant was convicted by a jury of unlawful possession of a controlled substance with intent to deliver. The evidence indicated that a police officer observed three men huddled together looking at something. As the officer approached, the men stepped apart and the Defendant dropped an object. The officer retrieved the object and found it to be a piece of a sack containing five clear plastic bag corners, with cocaine, secured by a twist tie. The Appellate Court ruled that there was insufficient evidence that the Defendant intended to deliver the drugs. The Appellate Court reduced the conviction to unlawful possession of a controlled substance and remanded the case for a new sentencing hearing on that offense. A copy of my docket order is attached.

(3) People v. Wanda Brandstetter, Sangamon County, Illinois Case No. 80-CF-321, 103 Ill. App. 3d 259 (1982) A copy of the portion of the transcript containing my ruling in the trial court is attached.

County of Sangamon v. Donewald, Sangamon County, Illinois Case No. 86-MR-56. A copy of my ruling in the trial court is attached; the ruling was not appealed. A similar ruling on a related statute, that applied only to Cook County, had previously been affirmed in Boynnton v. Kusper, 112 Ill. 2d 356 (1986).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was an Assistant State's Attorney in Sangamon County, Illinois from September 1973 until July 1978. This was an appointed position; I was appointed by then State's Attorney C. Joseph Cavanagh.

In 1984, I ran for election for the position of Circuit Judge in the Seventh Judicial Circuit (6 counties: Sangamon, Morgan, Macoupin, Jersey, Greene, and Scott). In a close vote, I was defeated in the general election by Raymond L. Terrell. The final vote was: Terrell--72,019; Scott--70,427.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not clerk for a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

(A) September 1973 - July 1978:  
Assistant State's Attorney, Sangamon County, Illinois. A new County Building has been built since I served and the current address of the office is:

Sangamon Co. State's Attorney's Office  
 Sangamon County Complex  
 200 South Ninth  
 Springfield, Illinois 62701  
 Phone: (217) 753-6690

(B) July 1978 - March 26, 1979: Associate, Charles J. Gramlich Law Offices. The firm was then located at 918 East Capitol, Springfield, Illinois. It is now located at 1019 South Sixth Street, Springfield, Illinois 62703, Phone: (217) 525-0520.

(C) March 26, 1979 - December 5, 1988: Associate Circuit Judge, Seventh Judicial Circuit. I served as a trial court judge and officed in the Sangamon County Building, Eighth and Monroe, Springfield, Illinois 62701, Phone (217) 753-6733.

(D) December 5, 1988 - Present: Circuit Judge. I serve as a trial court judge. My office is in the Sangamon County Building, Springfield, Illinois 62701, Phone (217) 753-6733.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

(A) 1973-1978: The general character of my practice was that of a criminal prosecuting attorney. For approximately nine months I prosecuted traffic and misdemeanors, while also serving as supervisor of that division for roughly six of those nine months. For the next four years, I was a felony trial attorney, handling a wide variety of felony prosecutions (e.g. burglary, armed robbery, forgery, rape, deviate sexual assault, and murder). I tried several hundred bench trials in the traffic and misdemeanor division (we averaged three or four per day). In the felony division, I prosecuted roughly 150-200 cases including approximately 45 jury trials. I also handled the appeals in 5-10 cases. At the time I left the office, I was the senior felony trial attorney (after the State's Attorney and First Assistant). The

office employed 10-12 attorneys in addition to the State's Attorney.

(B) 1978-1979: The general character of my practice was that of a general legal practitioner.

This was a three person law firm which engaged in general legal practice. I worked on a variety of matters, with some emphasis on real estate. A major client of the firm's was undertaking to develop a planned urban development, and much of my time was devoted to zoning matters and preparation of leases and contracts to purchase in connection with that development. I also did a small amount of criminal defense work and some civil litigation (personal injury).

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

When I was an Assistant State's Attorney my typical "clients" were the victims of serious crimes.

When I was in private practice, my typical clients were one major real estate developer, numerous people purchasing real estate (title searches and opinions), people charged with relatively minor crimes and traffic offenses, and those injured in auto collisions.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court frequently.

2. What percentage of these appearances was in:

- (a) federal courts: Less than 1%
- (b) state courts of record: 99+%
- (c) other courts: None

3. What percentage of your litigation was:

- (a) civil: 5%
- (b) criminal 95%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

The number of cases I tried to verdict (including traffic and misdemeanors) was at least 250. I believe I was associate counsel on 5 cases, sole counsel in 230 cases, and lead counsel on 15 cases.

5. What percentage of these trials was:

- (a) jury: 24%  
(b) non-jury: 76%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;  
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and  
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) People v. Glenn Wilson, Sangamon County Case No. 76-CF-424. The Defendant was charged with armed robbery and aggravated battery. He and several juveniles robbed and beat the 85 year-old proprietor of a family-owned grocery store. The perpetrators cut the telephone line at the store, robbed the victim at gunpoint (taking all of the money from the store and the victim's person, as well as the victim's heart medication). Mr. Wilson then stuck his thumb in the victim's eye and attempted to rip his eyeball out. Mr. Wilson also struck the victim in the back of the head with the gun (causing a laceration) and left him locked in either an office or meat cooler. The trial was complicated because the victim picked out someone other than the Defendant at a police line-up, and the State had to use some of the juveniles, who were also involved, as witnesses.



The victim's testimony was riveting, even though he could not identify the Defendant; I recall that he had to stop and take a nitroglycerin tablet while testifying. I drafted the charges, interviewed the witnesses before trial, represented the State at the preliminary hearing, the trial, and the sentencing hearing. The Defendant was convicted by a jury of Armed Robbery and Aggravated Battery. He was sentenced to 10-30 years for Armed Robbery and 3-9 years for Aggravated Battery. The Appellate Court upheld the convictions.

(a) Dates of representation: 9-20-76 through 1-6-77

(b) Circuit Court of Sangamon County, Illinois, Honorable John Wright, presiding

(c) <u>Counsel for State</u> I was sole counsel for the State.	<u>Counsel for Defense</u> George H. Ray 200 South Ninth Street Springfield, Ill. 61701 Phone: (217) 753-6812
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(2) People v. James Eddington, Sangamon County Case No. 75-CF-237. The Defendant was charged with solicitation to murder a police officer. The Defendant offered \$1,000 to a man to kill an agent of the Illinois Bureau of Investigation who was scheduled to testify against him in a separate drug prosecution. The man who received the offer reported it to police and agreed to cooperate with police and record the Defendant's conversations. Tapes of conversations in which the Defendant described how to kill the officer were a focal point of both the pre-trial and trial proceedings. Initially a trial court judge suppressed the tapes on the basis that they were unclear; that ruling was overturned in an interlocutory appeal. At trial the tapes were used, and the Defendant was convicted by a jury of solicitation to commit murder. This case was enormously important to police in Sangamon County. The Defendant was sentenced to 20-60 years. I did not handle the pretrial proceedings but was assigned to prosecute the case just before the trial.

The conviction was upheld on appeal by both the Illinois Appellate and Supreme Courts.

(a) Dates of representation: 8-1-77 through 10-20-77

(b) Circuit Court of Sangamon County, Illinois, Honorable Ben K. Miller, presiding

<u>(c) Counsel for State</u>	<u>Counsel for Defense</u>
Jeanne E. Scott and J. William Roberts 400 South Ninth Street, Springfield, Ill. 62701 (217) 528-7375	Bruce Beeman 413 South Seventh Street Springfield, Ill. 62701 (217) 753-4220

(3) People v. John R. Olson, Sangamon County Case No. 76-CF-230. The Defendant was charged with Murder for shooting to death his ex-girlfriend's new boyfriend. The Defendant confronted the victim and the Defendant's ex-girlfriend in her apartment. There the Defendant pointed a gun at the victim and for hours taunted him and threatened to kill him. The Defendant forced the victim to crawl on the floor, bark like a dog, and beg for his life. In the end the Defendant put the gun to the victim's head and shot and killed him. The defense at trial was that the gun discharged accidentally. I was able to defeat that contention with scientific evidence showing that the gun had a heavy trigger pull. The Defendant was convicted of Murder and sentenced to 14-45 years. I was the lead prosecuting attorney and handled the case from the filing of the initial charges through trial and sentencing. The conviction was upheld on appeal.

(a) Dates of representation: 5-17-76 through 10-26-76

(b) Circuit Court of Sangamon County, Illinois, Honorable Simon L. Friedman, presiding.

(c) Counsel for State      Counsel for Defense

Jeanne E. Scott	Michael J. Costello
James A. Grohne	843 South Fifth Street
(Second Chair)	Springfield, Ill. 62703
200 South Ninth St.	(217) 544-5500
Springfield, Ill. 62701	
(217) 753-6690	and

H. Carl Runge, Jr.  
P.O. Box 533  
Collinsville, Ill. 62234  
(618) 345-7272

(4) People v. Earl Krueger, Sangamon County Case No. 75-CF-123. The Defendant was charged with Murder in connection with the beating death of his wife. The Defendant beat his wife in the head with a claw hammer with such force that the head of the hammer flew off. He then beat her with a cast iron skillet until such time that (according to the pathologist who performed the autopsy) her head was reduced to a two dimensional object. The Defendant was mentally retarded and had a lengthy history of alcoholism. The defenses at trial were an inability to form a specific intent due to intoxication and insanity. The jury returned a verdict of Voluntary Manslaughter (a lesser included offense), and the judge sentenced him to 1-10 years in prison. I handled the lead in the prosecution from the time the indictment was returned through trial and sentencing. The conviction was upheld on appeal.

(a) Dates of representation: 4-1-75 through 10-24-75

(b) Circuit Court of Sangamon County, Illinois, Honorable Simon L. Friedman, presiding.

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott	Walter Kasten
Albert J. Gardner	844 South Second Street
(Second Chair)	Springfield, Ill. 62704
A.G. Edwards	(217) 523-6651
2941 Greenbriar	
Springfield, Ill. 62704	
(217) 546-6112	

(5) People v. Robert Lindsey, Sangamon County Case No. 77-CF-541. The Defendant was charged with rape and deviate sexual assault; these offenses occurred three days after the Defendant had been released from the state penitentiary after serving sentences for three prior rape convictions from Cook County. The Defendant grabbed a woman who was returning to her car after an evening meeting in downtown Springfield. He forced her into her car at knifepoint, drove down an alley adjacent to the Salvation Army and sexually assaulted her. The incident was witnessed by a retarded man who was staying at the Salvation Army hospitality house and looking out the window. He testified that the parties appeared to have consensual sex. The Defendant was convicted of Rape and Deviate Sexual Assault and was sentenced to concurrent terms of 40-60 years on each count. The conviction was affirmed on appeal. I handled the prosecution from the filing of the charges through sentencing (preliminary hearing, motions to suppress, trial and sentencing).

(a) Dates of representation: 9-27-77 through 4-7-78

(b) Circuit Court of Sangamon County, Illinois, Honorable Ben K. Miller, presiding

(c) Counsel for State      Counsel for Defendant

Jeanne E. Scott	Bruce Locher
John A. Mehlick	1212 South Seventh St.
(Second Chair)	Springfield, Ill. 62703
200 South Ninth St.	(217) 528-9546
Springfield, Ill. 62701	
(217) 753-6389	

(6) People v. Phillip R. Donaldson, Sangamon County Case No. 75-CF-257. The Defendant was charged with the offenses of Deviate Sexual Assault, Aggravated Kidnapping, and Armed Robbery. As a woman was entering her car near the State capitol in Springfield, the Defendant jumped in beside her, placed a knife to her throat and forced her to lie on the seat of the car. He then drove her car to a secluded place on a county road and forced her to commit two acts of oral sex. For three hours he told her he was with "the syndicate", struck her in the face, and threatened to kill her. It was also alleged that he took some money from her person while armed with the knife. The jury convicted the Defendant of Deviate Sexual Assault and Aggravated Kidnapping, but acquitted him of the Armed Robbery charge. On appeal the conviction for Deviate Sexual Assault was vacated since the Appellate Court found it to be an included offense in the Aggravated Kidnapping. The Aggravated Kidnapping conviction was affirmed. The Defendant was sentenced to 6-18 years. I handled the case for the prosecution from the filing of the charges through the trial, as well as the appeal.

(a) Dates of representation: 5-28-75 through 9-29-76

(b) Circuit Court of Sangamon County, Honorable Byron Koch, presiding.

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott	Walter Kasten
	844 South Second Street
	Springfield, Ill. 62704
	(217) 523-6651

(7) People vs Charles Henson, Sangamon County Case No. 76-CF-358

and

(8) People vs Stanley Stigleman, Sangamon County Case No. 76-CF-360.



These cases were consolidated for pretrial proceedings; however, they were tried separately due to the existence of a statement by Henson that implicated both defendants. The two Defendants climbed through an open apartment window in the middle of the night and awakened two young women who resided there, put scissors to their necks, and sexually assaulted them. Each Defendant personally sexually assaulted one victim, but each was charged with both rapes (under an accountability theory for the one he did not personally perform). Mr. Henson's defense was consent; he was convicted by a jury on all counts, including two counts of rape, one count of deviate sexual assault, and one count of burglary. Defendant Henson was sentenced to 2-6 years for burglary, and 8-24 years on each of the other three convictions. The sentences ran concurrently. The convictions were upheld on appeal.

(a) Dates of representation in Defendant Henson's case: 9-1-76 through 12-17-76

(b) Circuit Court of Sangamon County, Illinois, Honorable Simon L. Friedman, presiding

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott	George H. Ray 200 South Ninth Street Springfield, Ill. 62701 (217) 753-6812
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Defendant Stigleman was convicted by a jury of all counts filed against him, including two counts of rape and burglary. He was sentenced to 2-6 years for burglary and 7-20 years for each rape conviction. The sentences ran concurrently. The convictions were upheld on appeal.

I handled the prosecution of both cases from the filing of the charges through sentencing.

(a) Dates of representation in Defendant Stigleman's case: 8-20-76 through 12-14-76

(b) Circuit Court of Sangamon County, Illinois,  
Honorable Harvey Beam, presiding

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott

Theodis Lewis  
200 South Ninth Street  
Springfield, Ill. 62701  
(217) 753-6392

(9) People v. Nathaniel Gregory, Sangamon County Case No. 77-CF-374. The Defendant was charged with one count of rape and two counts of armed robbery. He robbed the male night managers of the Springfield Forum XXX Hotel at gunpoint and then locked them in a room. He then forced a female night auditor into another room and raped her. He took some identification from her purse and told her he would come to her home and kill her and her child if she reported the incident. The Defendant was arrested shortly thereafter, due to an incredibly detailed and accurate description that the female victim provided to the police. The Defendant was convicted by a jury on all counts. The sentencing hearing had to be redone because the judge, on his own, commented on arrests of the Defendant that did not lead to convictions. At the second sentencing hearing the judge increased the sentence, due to an intervening crime that the Defendant had committed in prison. Ultimately the appellate court simply modified the sentence and affirmed concurrent sentences of 8 years for each armed robbery and 15 years for rape. I handled the prosecution from the preparation of the charges through the first sentencing hearing.

(a) Dates of representation: 8-1-77 through 6-30-78

(b) Circuit Court of Sangamon County, Illinois,  
Honorable Harvey Beam, presiding

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott

George H. Ray  
200 South Ninth Street  
Springfield, Ill. 62701  
(217) 753-6812

(10) People v. Clarence Neville, Sangamon County Case No. 74-CF-20. The Defendant was charged with and convicted by a jury on three counts of unlawful possession of motor vehicle parts with knowledge that the identification numbers had been removed. The case stands for the proposition that the Illinois statute that prohibited possession of such parts did not place an unreasonable burden on interstate commerce. It further stands for the proposition that the statute's applicability only to used car dealers did not violate the equal protection rights of the used car dealer. I prepared the charges and had the lead role at trial and sentencing for the State. The Defendant was sentenced to two years probation and fined \$7,500.00. The conviction was upheld on appeal, 42 Ill. App. 3d 9 (1976).

(a) Dates of representation: 2-20-74 through 8-1-74

(b) Circuit Court of Sangamon County, Illinois, Honorable Simon L. Friedman, presiding

(c) COUNSEL FOR STATE      COUNSEL FOR DEFENSE

Jeanne E. Scott  
Walter F. Farrand  
(Deceased)

Robert G. Heckenkamp  
700 East Adams, Suite 202  
Springfield, Ill. 62701  
(217) 528-5627

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

From 1992 to the present time I have served on the Illinois Supreme Court Committee on Judicial Conduct. In 1993, in accordance with the Supreme Court's charge to the Committee, the Committee submitted proposed revisions to the Illinois Supreme Court Rules on Judicial Conduct relating to political and campaign activities of judges, ex parte communications, and disqualification of judges. The Committee also proposed adding a preamble to the Code. I actively participated in the committee discussions and in the determination of the language of the rule changes.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I am vested in the Illinois Judges' Retirement System. Based on the number of years of service that I presently have, I would be entitled to receive, beginning 9-1-2008, an annual pension equal to 80% of my current salary as an Illinois State Court Judge. I also have \$3,843.49 in the Illinois Municipal Retirement Fund, representing four years and eleven months of service. This money could be withdrawn or added as reciprocal service credit to the amount I have contributed towards the pension under the Illinois Judges' Retirement System. I intend to leave the money on deposit for use towards the reciprocal credit provision.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will recuse myself in cases being handled by the Springfield, Illinois law firm of Scott and Scott (the firm has my uncle and two first cousins in it). That firm practices primarily in State Court, with the exception of one cousin who does a substantial amount of bankruptcy work. I am hopeful that the Federal Magistrate will be able to handle any bankruptcy appeals involving that firm.

I will also disqualify myself in any of the situations required by 28 U.S.C. 455. In making these determinations, I will stay informed about my financial interests.

The only potential conflicts I would anticipate during my initial service would be cases in which the Springfield law firm of Scott and Scott represents one of the parties.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See the attached financial disclosure form required by the Ethics in Government Act of 1978.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. I was a candidate for Circuit Judge in the Seventh Judicial Circuit, State of Illinois (six counties: Sangamon, Morgan, Macoupin, Scott, Jersey and Greene) in 1984. My opponent was Raymond L. Terrell; the final vote was Terrell -- 72,019 and Scott -- 70,427.

In 1988, I was again a candidate for Circuit Judge in the Seventh Judicial Circuit, State of Illinois. My opponent was Dwight H. O'Keefe; the final vote was O'Keefe -- 58,913 and Scott -- 80,048.

In 1994, I ran for retention to the Office of Circuit Judge in the Seventh Judicial Circuit, State of Illinois. I received "Yes" votes to be retained from 80.81% of those who voted.



FD-278 (a)

Rev. 11/94

# FINANCIAL DISCLOSURE REPORT NOMINATION

Supreme Court of Illinois  
Judges Act of 1977, Part 2, Sec.  
101-194, November 30, 1977  
U.S.C. App. 4, Sec. 101-193

<b>1. PERSON REPORTING</b> Scott, Jeanne E.	<b>2. COURT OR ORGANIZATION</b> U.S. Dist. Ct. Cent. Dis. Ill.	<b>3. DATE OF REPORT</b> 04/03/1998
<b>4. TITLE</b> (Article 777 judges indicate active or senior status; non-judges indicate full- or part-time) U.S. District Judge Nominee	<b>5. REPORT TYPE (CHECK TYPE)</b> <input checked="" type="checkbox"/> NOMINATION, DATE 02/1998 _____ INITIAL _____ ANNUAL _____ FINAL	<b>6. REPORTING PERIOD</b> 01/01/1997 TO 03/30/1998
<b>7. CHAMBERS OR OFFICE ADDRESS</b> 732 Sangamon County Complex 200 South Ninth Street Springfield, Ill. 62701	<b>8. ON THE BASIS OF THE INFORMATION CONTAINED HEREIN, IT IS MY RESPONSIBILITY TO DISCLOSE ANY MODIFICATIONS PERTAINING THERETO, IT IS IN ACCORDANCE WITH APPLICABLE LAWS AND REGULATIONS.</b> REVIEWING OFFICER _____ DATE _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the "NONE" box for each section where you have no reportable information. Sign on the last page.

## I. POSITIONS (See instructions only; see pp. 9-13 of Instructions.)

POSITION	NAME OF ORGANIZATION / ENTITY
<input checked="" type="checkbox"/> NONE (NO REPORTABLE POSITIONS)	
1 _____	_____
2 _____	_____
3 _____	_____

## II. AGREEMENTS (See instructions only; see pp. 16-17 of Instructions.)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (NO REPORTABLE AGREEMENTS)	
1 1979	Ill. Judges' Retirement System -- vested right to future pension benefit.
2 _____	_____
3 _____	_____

## III. NON-INVESTMENT INCOME (See instructions only; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (YOURS, NOT SPOUSES)
<input checked="" type="checkbox"/> NONE (NO REPORTABLE NON-INVESTMENT INCOME)		
1 1996	State of Ill. (Salary - net)	\$ 70,733.72
2 1997	State of Ill. (Salary - net)	\$ 72,820.63
3 1998	State of Ill. (Salary - net)	\$ 18,514.83
4 1997	Franklin Life Ins. Co. - interest on policy	\$ 399.66
5 _____	_____	_____

NAME OF PERSON REPORTING

## FINANCIAL DISCLOSURE REPORT

DATE RECEIVED  
04/03/1998

## IV. REIMBURSEMENTS AND GIFTS LODGING, FOOD, ENTERTAINMENT.

*(Exclude those to spouse and dependent children: use the parentheticals "S" and "D" to indicate separate reimbursements and gifts received by spouse and dependent children, respectively. See pp. 30-37 of Instructions.)*

SOURCE NONE NO SUCH REPORTABLE REIMBURSEMENTS OR GIFTS)	DESCRIPTION
1 Exempt	
2	
3	
4	
5	
6	
7	

## V. OTHER GIFTS

*(Exclude those to spouse and dependent children: use the parentheticals "S" and "D" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)*

SOURCE NONE NO SUCH REPORTABLE GIFTS)	DESCRIPTION	VALUE
1 Exempt		
2		
3		
4		

## VI. LIABILITIES

*(Exclude those of spouse and dependent children: indicate where applicable, person responsible for liability by using the parentheticals "S" for separate liability of the spouse, "D" for joint liability of reporting individual and spouse, and "DE" for liability of a dependent child. See pp. 30-36 of Instructions.)*

CREDITOR NONE NO REPORTABLE LIABILITIES)	DESCRIPTION	VALUE CODE
X		
1		
2		
3		
4		
5		
6		
7		

\* VAL CODES: J=\$15,000 OR LESS K=\$15,001-\$50,000 L=\$50,001 TO \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
O=\$500,001-\$1,000,000 P=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 OR MORE

## FINANCIAL DISCLOSURE REPORT

DATE OF REPORT  
04/03/1998

## VII. PAGE INVESTMENTS AND TRUSTS

A. DESCRIPTION OF ASSETS  <i>Indicate where applicable, name of the trust by using the parenthetical "B" for joint ownership of reporting individual and spouse, "S" for separate ownership by spouse, "D" for ownership by dependent child.</i>  <i>Please "D" often and omit except from joint disclosure.</i>	B. INCOME DURING REPORTING PERIOD		C. GROSS VALUE AT END OF REPORTING PERIOD		D. TRANSACTIONS DURING REPORTING PERIOD				
	(1) AMT CO DE (A)	(2) TYPE (E.G. DIVIDEND RENT OR	(1) VAL UE COD E (J-F)	(2) VALUE METH OD CODE (Q-W)	(1) TYPE (E.G. BUY, SELL, MERGER	IF NOT EXEMPT FROM DISCLOSURE			
						(2) DATE MONTH	(3) VAL UE COD E	(4) GAIN COD E	(5) IDENTITY OF BUYER/SELLER (IF PRIVATE TRANSACTION)
EXEMPT									
NON-REPORTABLE INCOME/ASSETS, OR TRANSACTIONS									
1 Alumax common stock		None	J	T					
2 AT&T common stock	A	Dividend	J	T					
3 Amer. Express common stock	A	Dividend	K	T					
4 Amer. Genl. Co. common stock	A	Dividend	J	T					
5 AMP Inc. common stock	A	Dividend	J	T					
6 Atl. Rich. common stock	A	Dividend	J	T					
7 Baxter Int. common stock	A	Dividend	J	T					
8 Belden common stock	A	Dividend	J	T					
9 Bristol Myers Sq. common stock	A	Dividend	K	T					
10 Bowling Ferris common stock	A	Dividend	J	T					
11 Burlington Resc. common stock	A	Dividend	J	T					
12 Chase Manhtn common stock	A	Dividend	J	T					
13 Electr Data Sys. common stock	A	Dividend	J	T					
14 Eastman Kodak common stock	A	Dividend	J	T					
15 General RE common stock	A	Dividend	J	T					
16 Intel common stock	A	Dividend	J	T					
17 Lee Ent. common stock	A	Dividend	J	T					
1 Inc Gain Codes: A=\$1,000 or less    B=\$1,001-\$2,500    C=\$2,501-\$5,000    D=\$5,001-\$15,000    E=\$15,001-\$50,000 (Col B1, D4)    F=\$50,001-\$100,000    G=\$100,001-\$1,000,000    H1=\$1,000,001-\$5,000,000    H2=\$5,000,001 or more									
2 Val Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000 (Col C1, D3)    O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more									
3 Val Mth Codes: Q=Appraisal    R=Cost (real estate only)    S=Assessment    T=Cash/Market (Col C2)    U=Book Value    V=Other    W=Estimated									

NAME OF PERSON REPORTING

DATE OF REPORT

## FINANCIAL DISCLOSURE REPORT

04/03/1998

## VII. PAGE INVESTMENTS AND TRUSTS

\* Income, unless otherwise indicated (underlines those of spouse and pp. 57-58 of Instructions.)

A DESCRIPTION OF ASSETS  <i>Indicate where applicable, owner of the asset by using the parenthetical "(S)" for joint ownership of reporting individual and spouse, "(SI)" for separate ownership by spouse, "(D)" for ownership by dependent child.  Place "(2)" after each asset except from prior disclosure.</i>	B INCOME DURING REPORTING PERIOD		C GROSS VALUE AT END OF REPORTING PERIOD		D TRANSACTIONS DURING REPORTING PERIOD				
	(1) AMT CODE (A)	(2) TYPE (E.G., DIVIDEND RENT OR	(1) VALUE CODE (F)	(2) VALUE METHOD CODE (Q-W)	(1) TYPE (E.G., BUY, SELL, MERGER	EXEMPT IF NOT EXEMPT FROM DISCLOSURE			
						(2) DATE MONTH H	(3) VAL CODE L	(4) GAIN CODE E	(5) IDENTITY OF BUYER/SELLER (IF PRIVATE TRANSACTION)
<b>NON-REPORTABLE INCOME ASSETS, OR TRANSACTIONS</b>									
18 PG&E common stock	A	Dividend	J	T					
19 Pepsico common stock	A	Dividend	J	T					
20 Schlumberger common stock	A	Dividend	J	T					
21 SW Airlines common stock	A	Dividend	J	T					
22 Varian Assoc. common stock	A	Dividend	J	T					
23 Weingarten Rity Invs. common stock	A	Dividend	J	T					
24 Farm rental prop., Sangamon Co., Ill., appraisal: 2-12-90	B	Rent	K	Q					
25 Bank One (savings)	B	Interest	L	T					
26 First of Amer. Ill. (savings)	A	Interest	K	T					
27 First Natl. Bank-Centr. Ill. (savings ACC)	A	Interest	K	T					
28 Prairie State Bank & Trust (CD)	B	Interest							
29 GT Inv Fds Inc. Gbl Grth & Inc Fd Cl B	A	Dividend	J	T					
30 Putnam Intl New Opps Fd Cl B	A	Dividend	J	T					
31 Templeton Grwth Fd Inc. Cl 1	A	Dividend	J	T					
32 ML Gbl Holdings Fd. Cl D		None	J	T					
33 ML Capital Fund Cl B	A	Dividend	J	T					
34 ML Pacific Fund Cl B	A	Dividend	J	T					
1 Inc/Gam Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more									
2 Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 (Col. C1, D3) O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more									
3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market (Col. C2) U=Book Value V=Other W=Estimated									

## DISCLOSURE

04/03/1998

## VII. INVESTMENTS AND TRUSTS

... income, unless otherwise indicated (includes those of spouse and dependent children) (See 27-56 of Instructions.)

A DESCRIPTION OF ASSETS  <i>Indicate where applicable, name of the trust by using the parenthetical "PT" for joint ownership of reporting individual and spouse, "LT" for separate ownership by spouse, "DT" for ownership by dependent child.</i>  <i>Please "CE" after each asset except from prior disclosure.</i>	B INCOME DURING REPORTING PERIOD		C GROSS VALUE AT END OF REPORTING PERIOD		D TRANSACTIONS DURING REPORTING PERIOD  <i>EXEMPT</i>				
	(1) AMT CO DE (A)	(2) TYPE (E.G., DIVIDEND RENT OR	(1) VAL UE COD E (J-P)	(2) VALUE METH OD CODE (Q-W)	(1) TYPE (E.G., BUY, SELL, MERGER	IF NOT EXEMPT FROM DISCLOSURE			
						(2) DATE MONT H	(3) VAL UE COD E	(4) GAIN COD E	(5) IDENTITY OF BUYER/SELLER (IF PRIVATE TRANSACTION)
NON-REPORTABLE INCOME/ASSETS, OR TRANSACTIONS									
35 Ivy Internatl Fd 11 Cl B		None	J	T					
36 GT Invst. Fds. Inc. Gbl Emg. Markets Fd Cl B	A	Distributi on	J	T					
37 Vanguard Index Trust 500 Fd.	A	Dividend	J	T					
38 Pioneer Tax-Free Inc. Fd Cl A	A	Dividend	J	T					
39 ML CMA Money Fund	A	Dividend	K	T					
40 ML CMA Tax-exempt Money Fund	A	Dividend	J	T					
41 ML Retirement Reserves Fund (IRA)	A	Dividend	J	T					
42 ML Capital Fd Cl B (IRA)	A	Dividend	K	T					
43 Putnam New Opp. Fd Cl B (IRA)	A	Dividend	J	T					
44 Putnam Int. New Opp. Fd Cl E (IRA)	A	Dividend	J	T					
45 Unit AMFAC/OMB Hawaii NTS Cl A 4 B	A	Interest	J	W					
46 Intermountain Pwr Agcy Ut Pwr Sup B Rv Bond 7.1% Jun89 01 Jul01 02	A	Interest	K	T					
47 Phil. Pa Wtr-Swr Rev 7% Bond 14th ser Jun89 01 Oct01 08	A	Interest	K	T					
48 Washington St 7.05%CI Bond Oct89 01 Aug1 05	A	Interest	J	T					
49 Chi IL Wtr Rev Cap App 7.2%CI Bond Dec89 01 Nov15 05	B	Interest	K	T					
50 Galveston Tx Pub Impt Cap App 7.05%CI Bond May90 01 May01 03	B	Interest	K	T					
51 Brighton MI Area Sch Dist 7.5%CI SR 1 Bond May90 01 May01 15	B	Interest	K	T					
1 Inc Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 (Col B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more									
2 Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 (Col C1, D3) O=\$500,001-\$1,000,000 P1=\$1,000,001-\$3,000,000 P2=\$3,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more									
3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market (Col C2) U=Book Value V=Other W=Estimated									



**TRUSTS** pp. 37-38 of Particulars.)

1 Inc Gain Codes: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500 F=\$50,000-\$100,000	C=\$2,501-\$5,000 G=\$100,001-\$1,000,000	D=\$5,001-\$15,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000
2 Val Codes: A=\$15,000 or less (Col. C1, D3)	B=\$15,001-\$50,000 O=\$50,001-\$1,000,000	K=\$50,001-\$100,000 P1=\$1,000,001-\$3,000,000	L=\$50,001-\$100,000 P2=\$3,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more
3 Val Mth Codes: Q=Appraisal (Col. C2)	R=Cost (real estate only) U=Book Value	S=Assessment V=Other	T=Cash/Market W=Estimated	

FINANCIAL DISCLOSURE	REPORT ne E.	DATE OF REPORT 04/03/1998
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS**

NONE (NO ADDITIONAL INFORMATION OR EXPLANATIONS.)

The interest shown on items 46-64 of Part VII is original issue discount.

**IX. CERTIFICATION**

IN COMPLIANCE WITH THE PROVISIONS OF 28 U.S.C. 455 AND OF ADVISORY OPINION NO. 57 OF THE ADVISORY COMMITTEE ON JUDICIAL ACTIVITIES, AND TO THE BEST OF MY KNOWLEDGE AT THE TIME AFTER REASONABLE INQUIRY, I DID NOT PERFORM ANY ADJUDICATORY FUNCTION IN ANY LITIGATION DURING THE PERIOD COVERED BY THIS REPORT IN WHICH I, MY SPOUSE, OR MY MINOR OR DEPENDENT CHILDREN HAD A FINANCIAL INTEREST, AS DEFINED IN CANON 3C(3)(C), IN THE OUTCOME OF SUCH LITIGATION.

I CERTIFY THAT ALL THE INFORMATION GIVEN ABOVE (INCLUDING INFORMATION PERTAINING TO MY SPOUSE AND MINOR OR DEPENDENT CHILDREN, IF ANY) IS ACCURATE, TRUE, AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT ANY INFORMATION NOT REPORTED WAS WITHHELD BECAUSE IT MET APPLICABLE STATUTORY PROVISIONS PERMITTING NON-DISCLOSURE.

I FURTHER CERTIFY THAT EARNED INCOME FROM OUTSIDE EMPLOYMENT AND HONORARIA AND THE ACCEPTANCE OF GIFTS WHICH HAVE BEEN REPORTED ARE IN COMPLIANCE WITH THE PROVISIONS OF 5 U.S.C. APP. 4, SECTION 501 ET. SEQ., 5 U.S.C. 7353 AND JUDICIAL CONFERENCE REGULATIONS.

SIGNATURE

*Jeanne E. Scott*

DATE

*April 3, 1998*

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL

AND CRIMINAL SANCTIONS (5 U.S.C. APP. 4, SECTION 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	130.	722.	06	Notes payable to banks-secured	0
U S Government securities...add schedule	0			Notes payable to banks-unsecured	0
Listed securities...add schedule	935.	298	76	Notes payable to relatives	0
Unlisted securities...add schedule	0			Notes payable to others	0
Accounts and notes receivable	2.	985.	00	Accounts and bills due	0
Due from relatives and friends	0			Unpaid Income tax	0
Due from others	2.	985.	00	Other unpaid tax and interest	0
Doubtful	0			Real estate mortgages payable...add schedule	13. 365. 15
Real estate mortgages receivable	0			_____ mortgages and other liens payable	0
Autos and other personal property	16.	500	00	Other debts-itemize	0
Cash value-life insurance	18.	344	89		
Other assets-itemize					
Real Estate	122.	050	00		
				Total Liabilities	13. 365. 15
				Net Worth	1,212. 535. 56
Total Assets	1,225.	900	71	Total liabilities and net worth	1,225 900 71
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	0			Are any assets pledged? (add schedule)	No
On leases or contracts	0			Are you defendant in any suits or legal actions?	No
Legal Claims	0			Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	0				
Other special debt	0				

Jeanne E. Scott

Schedule -- Real Estate

<u>Description</u>	<u>Value</u>	<u>Mortgage Balance</u>
1. An undivided one-half interest in part of the East Half of the Northeast Quarter of Section 21, Township 15 North, Range 4 West of the Third Principal Meridian, described more particularly as follows: Beginning at an iron pipe marking the Southwest Corner of the East Half of the Northeast Quarter of Section 21, thence North 00 degrees 03' 15" West along the Quarter, Quarter Section Line a distance of 1323.28 feet to a point on the East Line of said Section 21, thence South 00 degrees 00' " East along the Section Line a distance of 748.57 feet to an iron pipe marking the Southeast Corner of the Northeast Quarter of Section 21, then North 87 degrees 55' 05" West along the Quarter Section Line a distance of 1322.57 feet to the point of beginning, all in Sangamon County, Illinois.	\$ 23,850.00	\$ 0
2. Lot 75 of Monroe Park West Sixth Plat, being part of the West half of the Southwest Quarter of Section 31, Township 16 North, Range 5 West of the Third Principal Meridian, situated in Sangamon County, Illinois.	\$ 98,200.00	\$ 13365.15
Total:	\$122,050.00	\$ 13365.15



Jeanne E. Scott

Schedule -- Listed SecuritiesI. Common Stock

<u>Quantity</u>	<u>Description</u>	<u>Value</u>
215 shares	Alumax Inc.	\$ 9728.00
200 shares	AT&T Corp.	13150.00
180 shares	Amer. Express Comp.	16525.00
150 shares	Amer. Genl. Corp.	9703.00
200 shares	AMP Inc.	8762.00
60 shares	Atl. Richfield Co. Del.	4717.00
190 shares	Baxter International Inc.	10473.00
240 shares	Belden Inc.	10050.00
160 shares	Bristol Myers Squibb Co.	16689.00
230 shares	Browning Ferris Inds.	7503.00
140 shares	Burlington Resources Inc.	6711.00
100 shares	Chase Manhatn. Corp.	13487.00
240 shares	Electr Data Sys. Corp.	11010.00
100 shares	Eastman Kodak	6487.00
50 shares	General RE Corp.	11031.00
140 shares	Intel Corp.	10928.00
200 shares	Lee Enterprises Inc.	6712.00
24 shares	National Standard Co.	144.00
360 shares	PG&E Corp.	11880.00
190 shares	Pepsico Inc.	8110.00
160 shares	Schlumberger Ltd.	12120.00
420 shares	Southwest Airlines Co.	12416.00
19 shares	Tricon Global Restrmts	571.00
120 shares	Varian Associates Inc.	6645.00
100 shares	Weingarten Rlty Invs.	<u>4475.00</u>
	<u>Subtotal:</u>	\$230027.00

II. Mutual Funds

944.635 shares	Merrill LynchCapital Fund, Cl. B	34624.00
247.839 shares	Putnam New Opp. Fund, Cl. B	13369.00
842.371 shares	Putnam Int. New Opp. Fd., Cl. B	10611.00
956.000 shares	Merrill Lynch Retirement Reserves Fund	956.00
26180.00 shares	Merrill Lynch CMA Money FD.	26180.00
637.389 shares	Templeton Growth Fd. Inc., Cl. 1	13641.00
1697.00 shares	GT Inv. Fds. Inc. Gbl. Grth. & Inc. Fd., Cl. B	15646.00
1069.00 shares	GT Inv. Fds. Inc. Gbl. Emg. Markets Fund, Cl. B	12794.00

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Jeanne E. Scott

<u>Quantitv</u>	<u>Description</u>	<u>Value</u>
481 shares	Ivy Int. Fd. II, Cl. B	\$4963.00
669.012 shares	Merrill Lynch Global Holdings Fd., Cl. D	9861.00
363.401 shares	Merrill Lynch Pacific Fund, Cl. B	6308.00
8179 shares	Merrill Lynch CMA Tax-Exempt Fund	8170.00
130.102 shares	Vanguard Index Trust - 500 Fd.	13297.73
360.876 shares	Pioneer Tax-Free Inc. Fd., Cl. A	<u>4381.03</u>
	Subtotal:	\$ 174801.76

III. Municipal Bonds

50000	Intermountain Pwr Agy Ut Pwr Sup Rv A 7.1%CI Jun89 0% Jul 01 02	\$41608.00
25000	Corpus Christi Tx Gn Imp 8.2% Dec87 0% Nov01 02	20536.00
50000	Galveston, Tex Pub Impt Cap App 7.05%CI May90 0% May01 03	39996.00
50000	California St CPN M-TIGR 11% 8/1/03 5.5%CI Ser BI Aug94 0% Aug01 03	39891.00
50000	Penn. Convention Ctr At Rev Ser A Jan90 0% Sep01 03	39520.00
50000	Indiana Transn Fin Auth Hwy Rev A 7.3%CI Jun90 0% Jun01 04	37977.00
5000	Washington St 7.05%CI Oct89 0% Aug01 05	3592.00
50000	Chicago Il Wtr Rev 7.2%CI Dec89 0% Nov15 05	35273.00
50000	Alaska Energy At Pwr Rv Cap App 7.1%CI Oct89 0% Jul01 06	34185.00

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Jeanne E. Scott

<u>Quantity</u>	<u>Description</u>	<u>Value</u>
50000	Hillsborough Cnty Fl Util Ref Rev 7.25%CI A Sep91 0% Aug01 06	\$34479.00
25000	Chartiers Valley Pa Sch Dist 6.35%CI Jan93 0% Feb01 07	14855.00
25000	Judson Tex Isd Sch Bldg 5.85%CI RFDG Mar94 0% Feb01 07	16599.00
50000	Thornton Col. 6.75%CI RFDG Mar91 0% Dec01 07	32335.00
50000	Broward Cnty Fla Sch Dist RFDG 6.55%CI Jun92 0% Feb15 08	31852.00
25000	Phil. Pa Wtr-Swr Rv 7.0%CI 14th Ser Jun89 0% Oct01 08	15286.00
25000	Oak Lawn Il Wtr-Swr Rev 6.8%CI Ser A Rf Jun92 0% Oct01 09	14489.00
40000	Conn. St College Savings Ser A 6.65%CI May92 0% May15 10	22534.00
50000	Montour Pa Sch Dt New Sch Ser B 5.75%CI Aug93 0% Jan01 11	26771.00
80000	Brighton Mi Area Sd SR 1 Q-SBLF 7.5% CI May90 0% May01 15	28692.00
	<u>Subtotal:</u>	<u>\$ 530470.00</u>
	<u>Total Listed Securities:</u>	<u>\$ 935298.76</u>

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
 

As an attorney I served as guardian ad litem in four or five adoption cases, without fee (approximately 10 hours).

As Chief Judge I sent a letter to members of the Sangamon County Bar Association encouraging pro bono work. (30 minutes) (See attached letter and attached response)

I spoke on the judicial system at the People's Law School (open to the public), sponsored by minority lawyers. (several hours)

I volunteered one-half day to work on a Habitat for Humanity house (doing mudding and taping of drywall).

I spoke at a meeting of the Young Lawyers of Sangamon County on the importance of pro bono work. (1 hour)

On four occasions I helped haul and sort canned goods in connection with a food drive for food pantries in Springfield. (3 hours on each occasion)

I have participated as a judge in the Illinois State Bar Association's high school mock trial program on six different occasions (1/2 day each time) and donated one day per year for fifteen years for presiding at student trials at the University of Illinois College of Law's trial advocacy class.

I helped prepare and serve a Thanksgiving dinner (three days before Thanksgiving, 1997) at the Sojourn Women's Center (center for battered women and children). (3 hours)
2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of

membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I have been a member of the Altrusa Club of Springfield since 1975. This service club has never discriminated on the basis of race or religion, but until 1987 its membership was only open to business and professional women. I joined it at a time when women were not accepted for membership in clubs like Rotary or Lions Club. The Altrusa Club of Springfield is a not-for-profit corporation (organized under the laws of the State of Illinois), and it is an affiliate of Altrusa International, Inc. I have attached a copy of the Altrusa Club of Springfield's statement of purpose, which was filed with its Articles of Incorporation in 1977. After the United States Supreme Court decision (Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)), upholding a California statute requiring Rotary to open its membership to women, I served on a committee appointed by then Altrusa International president, Norma Jean Najim, 602 Williams Blvd, Springfield, IL 62704, (217) 522-9468, to make recommendations on any needed changes to the Altrusa membership rules. I recommended that the membership restriction of women-only be eliminated, and the committee accepted the recommendation. That recommendation was forwarded to the board of Altrusa International, and the board voted in July, 1987 to open membership to men as well as women. Ever since that date, all Altrusa Clubs have been open to membership by men as well as women. I have attached a booklet containing the By-Laws and Policies of Altrusa International.

Also, in 1997, I played golf in a women's golf league at The Rail golf course on Saturdays mornings. The Rail golf course is open to the public. The league ran from May through September. One could play as often or as infrequently as one wished -- by signing up one week in advance. I played approximately eight times.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes, there is a selection commission in Illinois which recommends candidates for nomination to the federal bench.



The selection commission recommended three finalists to Senators Carol Moseley-Braun and Richard J. Durbin; I was one of the three finalists recommended by the commission.

Around October 20, 1997, I obtained an application form from the Springfield, Illinois office of Senator Richard J. Durbin for the position of United States District Judge for the Central District of Illinois. I completed the form and sent it on November 13, 1997, to the Chair of the nominating commission. On December 27, I was interviewed in Springfield, Illinois by the members of the nominating commission; the other applicants (8, I believe) were interviewed that day as well. On the evening of December 27, 1997, I was called at my home and told that I had been selected as a finalist. Thereafter, I submitted authorizations to release tax returns to Senator Moseley-Braun and forwarded statements from my doctors to Senator Moseley-Braun.

On January 16, 1998, I was interviewed at the Illinois State Bar Association's office in Chicago, Illinois, by a panel of Illinois attorneys. They rated me exceptionally well qualified. On February 7, 1998, the other two finalists and I were interviewed by Senators Moseley-Braun and Durbin in the Springfield, Illinois office of Senator Carol Moseley-Braun.

On the morning of February 10, 1998, Senator Carol Moseley-Braun called me at my office and informed me that she and Senator Durbin were going to submit my name to the President for the Springfield vacancy.

On February 18, 1998, I received a telephone call from the White House Counsel's Office and was told that I would receive forms to complete. I had several telephone conversations with a Department of Justice attorney assigned to me, including one on February 26, 1998, which lasted 2 - 2 1/2 hours, in which we discussed my career to date. On March 5, 1998, I was interviewed at the Justice Department in Washington, D.C. I also delivered my responses to SF 86 form and the Supplement to that form.

On March 6, 1998, I sent my responses to the ABA's Personal Data Questionnaire to the Chair of the ABA Committee on the Federal Judiciary, and to the Seventh Circuit representative on the ABA's Standing Committee on Federal Judiciary. I was interviewed by the ABA representative on April 3, 1998, at my office in Springfield, Illinois. I was also interviewed by the

FBI on March 10, 1998, at my office in Springfield, Illinois.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A Judge should rule upon the issues in the case before him or her and should not attempt to craft social policy or address far-reaching problems that are not present in the case before the Court. The Judge's role is to study the Constitution, the statutes, and the case law and to rule on the issues presented in a given case in accordance with the law. The issues presented in a given case are defined by the pleadings, and the

Judge should confine his or her ruling to those issues. It is not appropriate for a judge to use an individual plaintiff as a vehicle for imposing orders on broad classes of individuals who are not properly before the Court.

Judges also must avoid ruling on issues that are not ripe for ruling. Those who seek relief in Court should be required to meet traditional notions of standing, as defined by the case law.

Judges should respect the role of the other branches of government. It is up to the legislative branch of government to make the laws. The Judge's responsibility is to follow the Constitution and apply the law in each case.

STATE OF ILLINOIS  
CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

JEANNE E. SCOTT  
CIRCUIT JUDGE

SEVENTH FLOOR  
200 So. NINTH STREET  
SPRINGFIELD, ILLINOIS 62781  
TELEPHONE (217) 753-6733

COUNTIES:  
GREENE  
JERRY  
MACDOUGHER  
MORGAN  
SANGAMON  
SCOTT

May 1, 1994

Dear SCBA Member:

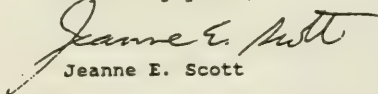
The Pro Bono Committee of the Sangamon County Bar Association has developed a plan to provide pro bono representation to indigent persons residing in Sangamon County. I am writing you to encourage you to support and participate in this Program.

A few years ago, the Illinois Legal Needs Study found that traditional, federally-funded legal services agencies were capable of meeting only twenty per cent of the legal needs of the poor, because of inadequate funding and resources. Here in Sangamon County, attorneys at the Land of Lincoln Legal Assistance Foundation, Inc., are forced to turn away many needy clients. Funding at the Federal and State levels has remained inadequate to meet the need. Meanwhile, reductions in revenue have been exacerbated by the increasing cost of delivering legal services to the poor. As a result, there now is only one legal aid lawyer for every nine thousand indigent clients in the service territory covered by the Springfield office of the Land of Lincoln Legal Assistance Foundation, Inc.

The SCBA Pro Bono Program contemplates that each lawyer would provide uncompensated representation in only one or two cases per year. The Sangamon County Bar Association plans to publicize the successful results of the Pro Bono Program. Thus, the public will be informed of the continuing efforts of our local bar association to be of service to the community as a whole.

Your help desperately is needed to insure that the courthouse doors are not barred to those who lack funds. Please help to make equal justice for all a reality in our community by completing and returning the enclosed Enrollment Form today.

Very truly yours,

  
Jeanne E. Scott

LAND OF LINCOLN  
LEGAL ASSISTANCE FOUNDATION, INC.

EXECUTIVE DIRECTOR  
2420 BLOOMER DRIVE  
ALTON, ILLINOIS 62002

800 WEST CAPITOL  
P.O. BOX 2206  
SPRINGFIELD, ILLINOIS 62705-2206

ADMINISTRATIVE OFFICE  
327 MISSOURI AVENUE  
SUITE 605  
EAST ST. LOUIS, ILLINOIS 62201

TELEPHONE (217) 783-3300  
TOLL FREE (800) 232-8629  
FAX and TDD (217) 783-6291

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ALTON  
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MT. VERNON  
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SPRINGFIELD

June 9, 1994

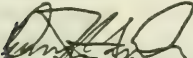
Honorable Jeanne E. Scott  
Circuit Judge  
Sangamon County Building  
7th Floor  
200 South 9th Street  
Springfield, Illinois 62701

Dear Judge Scott:

Thank you very much for your letter endorsing the Sangamon County Bar Association's Pro Bono Program. I am informed by the organizers of other successful pro bono programs that support such as yours is critical to the success of a pro bono program.

Your efforts are deeply appreciated.

Sincerely,

  
Donald S. Hanrahan  
Directing Attorney

DJH:kld

cc: Esteban Sanchez



## SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used):

CARL JOSEPH BARBIER

2. Address: List current place of residence and office address(es):

Residence: New Orleans, Louisiana 70131

Office: 858 Camp Street  
New Orleans, Louisiana 70130

3. Date and place of birth:

August 21, 1944 in New Orleans, Louisiana

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I have been married since January 21, 1967 to Peggy Elizabeth McDonald. Peggy is a homemaker and part-time, self-employed bookkeeper. Her business address is 858 Camp Street, New Orleans, Louisiana 70130.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Loyola University, New Orleans  
Fall semester, 1962  
No degree

Southeastern Louisiana University (SLU), Hammond, LA.  
Spring, 1963 through Spring, 1966  
Bachelor of Arts, *cum laude*  
Awarded June 4, 1966

Loyola School of Law, New Orleans  
Fall, 1966 through Spring, 1970  
Juris Doctor, *cum laude*  
Awarded May 22, 1970

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Boeing Company (Michoud Facility, New Orleans)  
Employed as cost accountant,  
May, 1966 through September, 1966

Jefferson Parish School Board  
Employed as teacher  
September, 1966 through May, 1967

Shell Oil Company, New Orleans  
Employed as accountant  
May, 1967 through June, 1969

Louisiana Court of Appeal, Fourth Circuit  
Employed as law clerk to Judge William V. Redmann  
July, 1969 through July, 1970

United States District Court, Eastern District of Louisiana  
Employed as law clerk to Judge Fred J. Cassibry  
August, 1970 through June, 1971

Badeaux and Discon (law partnership), New Orleans  
Associate Attorney, June, 1971 through December, 1973

Badeaux, Discon, Cumberland and Barbier (law partnership)  
Partner, January, 1974 through December, 1982

Law Offices of Carl J. Barbier, New Orleans  
Sole Practitioner  
January, 1983 through December, 1984

Barbier and Cumberland (law partnership), New Orleans  
Partner, January, 1985 through March, 1992

Law Offices of Carl J. Barbier, New Orleans  
Sole Practitioner  
April, 1992 through August, 1993

Barbier Law Firm, New Orleans  
Owner/Attorney, September, 1993 to Present

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

1962 – Academic partial scholarship to attend Loyola University, New Orleans to study journalism and public relations

1963-66 – Athletic scholarship to Southeastern Louisiana University, Hammond, LA.

1966 – Awarded Bachelor of Arts degree *cum laude*, Southeastern Louisiana University, Hammond, LA.

1970 – Awarded Juris Doctor degree *cum laude*, Loyola Law School, New Orleans

1970 – *Loyola Law Review*, member 1967-70; associate editor, 1969-70

Alpha Sigma Nu (National Jesuit Honor Society)

Loyola Law School, Student Bar Association: Honor Code Committee

1970 - Accepted for Attorney General's Honors Program

Loyola Law School: Received awards for highest grades in Successions; Louisiana Procedure I & II; and Legal Ethics

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Federal Bar Association of Fifth Circuit

United States District Court- Eastern District of Louisiana

Appointed to Committee on Disciplinary Rules in June, 1982

Member, Standing Committee appointed pursuant to the Court's Rules of Disciplinary Enforcement from August 1984 until the committee system was replaced in July of 1989

Appointed as member of Merit Selection Panel to recommend to the Court regarding reappointment of U.S. Magistrate on September 14, 1989

Appointed as member of committee to review applications and recommend three finalists to court for U.S. Magistrate's position.

Louisiana State Bar Association- 1970 to Present

House of Delegates, 1994 to Present

Served as special counsel to Committee on Bar Admissions and occasionally to Committee on Professional Responsibility, during period of 1974 to approximately 1989 or 1990.

Member, Bench-Bar Section

Louisiana Bar Foundation- fellow

Strategic Planning Committee, 1997-98

American Bar Association –

Past member, Rules Procedure Committee

New Orleans Bar Association –

Guest on "It's The Law", television program (various dates)

Jefferson Bar Association –

CLE speaker (1996)

Louisiana Trial Lawyers Association-

President, 1989-90

Board of Governors, 1985- Present

Executive Committee, 1987 – 1991

Association of Trial Lawyers of America

State Delegate, 1991-1993

Academy of New Orleans Trial Lawyers

CLE Speaker (annual "legislative update" program)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations that lobby public bodies:

Louisiana Trial Lawyers Association

Association of Trial Lawyers of America

Other organizations:

Phi Alpha Delta (Alumni) Law Fraternity

Alpha Sigma Nu (Alumni) (National Jesuit Honor Society)

Park Timbers Homeowners Association

Southeastern Louisiana University Alumni Association

Loyola School of Law Alumni Association

English Turn Country Club (Clubhouse member) (copy of by-laws attached)

Manhattan Athletic Club (Harvey, Louisiana)

Waterbury Fitness Center, Sheraton Hotel (New Orleans)



11. Court Admission: List all courts to which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any such memberships lapsed. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Louisiana and all inferior courts  
Admitted September 11, 1970

United States District Court  
Eastern District of Louisiana  
Admitted December 9, 1970

United States Court of Appeal  
Fifth Circuit  
Admitted April 27, 1971

United States Court of Appeal  
Eleventh Circuit  
Admitted November 6, 1981

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Casenote, *Persons-Change of Child Custody-Jurisdiction and Venue*,  
14 Loyola Law Review 256 (1967-68)

Casenote, *Persons-Divorce-Living Two Years Separate And Apart Outside Louisiana- R. S. 9:301*, 14 Loyola Law Review 424 (1967-68)

Comment, *A Historical Comment On The Substantive Adoption Law of Louisiana*, 15 Loyola Law Review 297 (1969)

April 7, 1996 "Commentary" article published in the Sunday Advocate regarding automobile insurance legislation

May 26, 1996 letter to the editor, The Times Picayune, regarding automobile insurance rates

August 30, 1996 letter to the editor, The Times Picayune, on Labor Day

April 29, 1997 press report in The Daily Review regarding debate on automobile insurance legislation

May 20, 1997 press report in The Advocate newspaper regarding talk given to the Press Club of Baton Rouge

May 27, 1997 letter to the editor regarding no fault insurance bill

June 17, 1997 article in The Advocate newspaper regarding approval of "no pay, no play" legislation by state Senate.

June 18, 1997 letter to the editor, The Times Picayune, regarding automobile insurance/collateral source bill

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical examination was September 24, 1997.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

This question is not applicable to me since I am not and have never been a judge.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was appointed as a member of the Louisiana Insurance Rating Commission in January, 1992 and served a four year term ending in March, 1996.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:

I served as a law clerk to the Honorable William V. Redmann, Louisiana Court of Appeal, Fourth Circuit, from July, 1969 through July, 1970. I also served as a law clerk to the Honorable Fred J. Cassibry, United States District Court, Eastern District of Louisiana, from August, 1970 through June, 1971.

2. whether you practiced alone, and if so, the addresses and dates:

I practiced alone as a sole practitioner at 234 Loyola Avenue, Suite 630, New Orleans, LA. 70112, from January, 1983 through December, 1984. I also practiced as a sole practitioner at 858 Camp Street, New Orleans, LA. 70130, from April, 1992 through August 1993.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each:

I practiced as an associate attorney with the law firm of Badeaux and Discon, 234 Loyola Avenue, New Orleans, LA. 70112, from June, 1971 through December, 1973. I was a partner in the law firm of Badeaux, Discon, Cumberland and Barbier, 234 Loyola Avenue, Suite 409, New Orleans, LA. 70112, from January, 1974 through December, 1982. I was a partner in the law firm of Barbier and Cumberland, 858 Camp Street, New Orleans, LA. 70130, from January, 1985 through March, 1992. Since September, 1993, I have been senior partner/owner of the Barbier Law Firm, 858 Camp Street, New Orleans, LA. 70130.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

During the period from June, 1971 through the end of 1982, I worked in a small law firm, first as an associate attorney and later as a partner. Having come to this firm directly from a clerkship in federal district court, I was hired primarily to handle maritime personal injury litigation and trial work. At that time, my practice was concentrated primarily in federal court. However, I also handled a variety of other types of cases, including workers' compensation; longshore claims; criminal cases; domestic or family law matters; bankruptcies; social security disability claims; wills and successions; incorporations; as well as a wide variety of personal injury litigation in both state and federal courts. During that time period, I also volunteered to represent indigent defendants in both state and federal courts.

Beginning in 1974, I was asked by the Louisiana State Bar Association to serve as special counsel to its Committee on Bar Admissions and, occasionally, its Committee for Professional Responsibility. These matters typically involved representing the Bar and its committees when they were sued in federal court by litigants who had either failed the bar examination or were the subject of disciplinary action. These cases often raised various federal constitutional issues. For many years, I did this work pro bono and without any remuneration. Later, upon the insistence of the then executive director of the Bar, I received a modest fee for such work. I ended this representation around 1989 or 1990 when the structure of the disciplinary system began to change and eventually that role was removed from the Bar.

During 1983 and 1984, I practiced alone as a sole practitioner. I handled generally the same types of cases and litigation practice that I had done at the Badeaux law firm. The primary difference was that there was not as much concentration in maritime cases and my practice became more broadly based personal injury cases. I also continued to handle the various other types of civil cases described above, as well as some criminal matters.

Beginning in 1985, I began practicing in a law partnership with J. Michael Cumberland. Again, the nature of our practice was primarily a varied personal injury practice, including maritime personal injury litigation; product liability; workers' compensation; longshore claims; social security disability claims; and other general



civil practice in both state and federal courts. This partnership was dissolved March 31, 1992.

Since April 1, 1992, I have practiced in the same location under the firm name of Barbier Law Firm. My daughter Kelly Barbier became associated with the firm in 1993. The nature of our practice is essentially unchanged from what it was with the firm of Barbier and Cumberland.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

During the course of the last 26 years in private practice the typical clients I have represented have been individuals and consumers. These individuals have come from many different and diverse backgrounds, across the economic and social spectrum. However, for the most part my clients have been primarily working people. I have also occasionally represented and performed legal services for small companies. I also at one time acted as special counsel to two separate committees of the state bar association.

While I do not have a certified legal specialty, I have concentrated my practice primarily in maritime personal injury and other personal injury litigation.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Over the course of my 26 years in private practice, I have frequently appeared in court. Because of the nature of my practice, there have been variances from year to year in the frequency of court appearances. However, during the initial 15 or 20 years of practice, I would say that I appeared in court more frequently than I have in the last five year period. During my first 15 years of practice, I handled a substantial number of maritime personal injury cases that were filed primarily in federal district court. Many of those cases were jury trials. I also handled a number of criminal cases in both federal and state courts during that time. I also tried other personal injury cases in state court. Over a period of time, the practice changed in that there was less concentration of maritime cases and instead I developed a broader type of civil law practice. I continued to appear in court on a regular basis, although



not as frequently as before. Of course, numerous court appearances were related to discovery matters, and pre-trial motion practice in cases that were successfully concluded either through settlement negotiation or formal mediation before trial.

2. What percentage of these appearances was in:

- (a) federal courts - 35%
- (b) state courts of record - 60%
- (c) other courts - 5%

[Note: These percentages represent my best estimate of my appearances, if averaged over the entire 26 years of practice. For the first 15 or 20 years, the percentage for federal court was higher; for the last five years, it has been lower.]

3. What percentage of your litigation was:

- (a) civil - 95%
- (b) criminal - 5%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have not maintained statistics or data on the exact number of cases that I have tried to verdict in each of the 26 years of practice. This number varied significantly from one year to the next, due to the nature of my practice over such a long period of time. However, I can state that I did try more cases to verdict during the first 15 or 20 years of my practice than I have during the last five year period. My best estimate would be that I tried three or four cases to verdict per year, on average, during that first 15 or 20 year period. In approximately 50% of those cases I acted as chief counsel. In the remaining 50% of the cases, I acted as sole counsel. During the last five year period, I have averaged one or two trials per year. About half of those were as chief counsel and the other half as associate or co-counsel.

5. What percentage of these trials was:

- (a) jury – 40%
- (b) non-jury – 60%

[Note: This is my best estimate for the percentages of jury and non-jury trials when averaged over 26 years of practice.]

18. Litigation: Describe the ten most significant litigated matters which you have personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) **LANKFORD J. MCILWAIN VS. PLACID OIL COMPANY, 472 F.2d 248 (5<sup>th</sup> Cir. 1973):**

Trial Judge: Fred J. Cassibry, Section E, United States District Court, Eastern District of Louisiana.

Chief Counsel for Plaintiff: Reginald T. Badeaux, Jr.  
P. O. Box 1735  
Covington, LA. 70434-1735  
504-893-4905

Counsel for Placid and Penrod:  
William K. Christovich,  
601 Poydras Street, Suite 2300  
New Orleans, LA. 70130  
504-561-5700

Counsel for McDermott: John R. Peters, Jr.  
201 St. Charles Avenue  
48<sup>th</sup> Floor  
504-582-8183

I acted as co-counsel at trial with Regniald T. Badeaux, who was chief counsel at the trial. Our client, Mr. McIlwain, was employed as a driller by Penrod Drilling Company. He sustained serious personal injuries when he fell through an unsecured grating on a platform owned by Placid Oil Company. The platform had been built by McDermott. The factual issue at trial was whether the section of grating had not been welded during original construction or had somehow broken loose due to subsequent neglect. A Jones Act suit was filed against Penrod on the grounds that as Mr. McIlwain's employer it owed a non-delegable duty to provide a safe place to work. Placid was sued as the platform owner for negligence and for strict liability under Louisiana law for the defect or vice in its structure. McDermott was sued for failing to properly construct the platform. The case was tried to a jury over several days.

There were several interesting legal issues in the case. First was whether or not the platform, located offshore on the outer continental shelf, was a "building" within the meaning of La. Civil Code article 2322, which provided for strict liability for vices or defects in buildings. Another issue was the liability of Penrod, as the Jones Act employer, for failing to provide McIlwain a safe place to work, even though the accident occurred on someone else's premises. The jury found Penrod and Placid both negligent and also found Placid, as owner of the platform, strictly liable. McDermott was absolved of any negligence. The jury awarded Mr. McIlwain \$300,000 in damages. Penrod and Placid appealed the jury verdict, which was ultimately affirmed by the Fifth Circuit Court of Appeals in January, 1973. My participation in the case included substantial pre-trial preparation, preparing the pre-trial order, preparing jury charges, preparing for and assisting in examination of witnesses, assisting in preparing the opening and closing statements. I also researched and assisted in writing the appellate brief.

This case was later cited and relied upon by the Louisiana Supreme Court in the landmark case of Olsen v. Shell Oil Company, 365 So.2d 1285 (La. 1979) for the proposition that a fixed offshore drilling platform constituted a "building" under La. Civil Code art. 2322 for purposes of imposing strict liability on its owner.

- (2) **IN THE MATTER OF AROSITA SHIPPING COMPANY, CIVIL ACTION NO. 92-3181; C/W : DINOT V. AROSITA SHIPPING CO., CIVIL ACTION NO. 94-525; AMERICAN RIVER TRANSPORTATION CO., V. S S KAVO KALIAKRA, CIVIL ACTION NO. 92-1103, SECTION "T", UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA**

Trial Judge: G.Thomas Porteous, Jr., United States District Judge,  
Section "T", United States District Court, Eastern District of  
Louisiana

Co-Counsel for personal injury claimants:

Fernand L. Laudumiey, III  
839 St. Charles Avenue  
Suite 306  
New Orleans, LA. 70130  
504-581-3610

Frank M. Buck, Jr.  
1100 Poydras Street  
Suite 2600  
New Orleans, LA. 70163

Counsel for Arosita Shipping Company:

Ashton R. O'Dwyer, Jr.  
Brandon E. Mary  
2100 Pan-American Life Center  
601 Poydras Street  
New Orleans, LA. 70130  
504-586-1241

Counsel for American River Transportation Company:

Andre' J. Mouledoux  
650 Poydras Street  
Suite 2150  
New Orleans, LA. 70130  
504-595-3000

Counsel for Compass Condo Corporation:

Terrence C. Forstall  
730 Camp Street  
New Orleans, LA. 70130  
504-566-1801

This was a maritime limitation action arising out of a collision which occurred on the Mississippi River in March, 1992, between a Greek tanker and a fleet of barges moored on the river. My client was Randy Dinot, a young man who was a welder in the barge fleet and who sustained a back injury when he fell while running off the barges moments before the collision.

By the time the case was referred to me, the vessel owner had filed a limitation action in federal court. I immediately filed a formal claim on behalf of my client in the limitation proceeding. There were a number of other personal injury claimants as well as property damage claims by the fleet and barge owners. Some of the personal injury claimants had separate damage suits in state court, which were automatically stayed as a result of the filing of the limitation action by the vessel owner. Although there was no formal committee, I took the lead among counsel for the personal injury claimants. I researched, prepared and filed a motion to lift the stay, which would allow the personal injury claimants to pursue their individual claims. After considering our memoranda and oral arguments, the federal district judge granted our motion to lift the stay.

Individual suits on behalf of all of the personal injury claimants were filed in state court. Named as defendants were the owners and operators of the Greek vessel, as well as the local compulsory pilot who was at the wheel at the time of the collision. Despite the obvious lack of diversity of citizenship, the vessel owner nevertheless removed the case to federal court, alleging that we had no valid claim against the non-diverse pilot. This required me to prepare and orally argue a motion to remand the case to state court. The district court denied our motion to remand. A notice of interlocutory appeal was filed. Ultimately, because of the delays involved, counsel for the personal injury claimants decided to dismiss the appeal and proceed in the federal limitation action.

A great deal of discovery ensued, including depositions of all of the 15 or so personal injury claimants, the operators of the vessel, other witnesses, expert marine surveyors, coast guard investigators, etc. At that point, counsel for the vessel owner requested mediation of the personal injury claims, on an individual or case by case basis. My client's case was chosen as the first to be mediated. The mediation occurred on May 11, 1995 and Mr. Dinot's claim was settled for \$325,000. Eventually all of the personal injury claims were settled and the case proceeded to trial solely on the property damage claims and the limitation action. The trial judge denied limitation to the vessel owner and held the vessel solely at fault in causing the collision.



**(3) WILDA PEAR V. LABICHE'S, INC., 301 So. 2d 336 (La. 1974):**

Trial Judge: Hon. Thomas C. Wicker, Jr., 24<sup>th</sup> Judicial District Court  
for Jefferson Parish, Louisiana

Counsel for defendants: Herschel L. Abbott, Jr.  
South Central Bell  
365 Canal Street  
New Orleans, LA. 70130  
504-528-7000

I was sole counsel for the plaintiff, Wilda Pear, in this interesting case. My client was a customer at an appliance store. She sat in a metal folding chair, which collapsed, causing Mrs. Pear to fall to the floor and to injure her back. The case was tried to the Court in March 1973. At trial, the defendant was unable to produce the actual chair, which apparently had been thrown away. The only evidence as to what may have caused the chair to collapse was testimony of someone who looked at the chair immediately after the accident and observed a worn-out rivet, which was not apparent until after the chair broke.

The trial court found that the store was not liable because the worn-out rivet could not have been reasonably discovered even if an adequate inspection had been done prior to the accident. We appealed this decision and argued that the store, as owner and custodian of the chair, should be held liable under La. Civil Code article 2317, which provided for strict liability for defective "things" in one's custody. Alternatively, we argued that the doctrine of "res ipsa loquitur" should have been applied by the trial court to hold the store responsible. The court of appeal rejected our arguments and affirmed the trial court. We then applied for a writ of review to the Louisiana Supreme Court. Writs were granted and the case was fully briefed and argued before the Supreme Court. The Supreme Court held that the doctrine of res ipsa should have been applied and that the defendant had failed to overcome its burden to exclude all other possible causes for the chair's collapse. The Court unanimously reversed the lower courts and remanded the case with instructions to render judgment for Mrs. Pear.

The significance of this case is that the "strict liability" argument I made was adopted by the Louisiana Supreme Court the very next year in Loescher v. Parr, 324 So.2d 441 (1975), a landmark case written by the late Justice Albert Tate, who later became a judge on the federal Fifth Circuit Court of Appeals.

(4) **UNITED STATES V. JOHN EDWARD KIRSCH, III**  
**493 F. 2d 465 (5<sup>th</sup> Cir. 1974):**

Trial Judge: Hon. James A. Comiskey, United States District Court, Eastern District of Louisiana (now retired and serving as president of Bank of Louisiana, 300 St. Charles Avenue, New Orleans, 70130, telephone 504-592-0600)

Counsel for United States:	Steven A. Mayo, Assistant U.S. Attorney (current address or phone number is unknown; last known address is below) U. S. Attorney's Office 500 Camp Street New Orleans, LA. 70130 504-680-3000
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I was appointed by the court to represent John Kirsch, who had been charged by the government with violation of 18 U.S.C. Appendix § 1202(a) by being a convicted felon in possession of a firearm. The primary issue raised at trial was the illegality of the stopping and frisking of Mr. Kirsch by the arresting police officers. We argued that the frisking, which led to discovery of the firearm, was unconstitutional under the guidelines set forth by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. (1968). A motion to quash was filed before trial. The trial court conducted an evidentiary hearing and overruled the motion.

The case proceeded to trial before a jury in federal court. The trial court allowed admission of the firearm and the testimony of the police officers relating to the stop and frisk. We again objected to this evidence and also objected to several of the court's jury instructions, including failure to instruct the jury that the government had to prove that the firearm had been transported in interstate commerce. The jury convicted Mr. Kirsch and he was sentenced to five years. We appealed the conviction and the matter was briefed and argued to the Fifth Circuit Court of Appeals, which reversed Mr. Kirsch's conviction and remanded the case. The charges were subsequently dropped for lack of evidence. The basis for the Fifth Circuit's holding was that the investigating officer had admitted he was not in fear of his life when he stopped Mr. Kirsch and had no basis to believe that Kirsch was armed or dangerous at the time of the frisk. Therefore, the Court found the frisk to be unconstitutional under Terry.

(5) **SINGLETON V. LOUISIANA STATE BAR ASSOCIATION, 413 F.Supp. 1092 (E. D. La. 1976):**

Trial Court: Statutory three-judge court. Composed of Circuit Judge Wisdom, and District Judges Christenberry and Boyle

Counsel for Plaintiffs: Willie J. Singleton, *Pro Se*  
 Current address:  
 4050 Linwood Avenue  
 Shreveport, LA. 71108  
 318-621-9400

Ernest Lee Caulfield, *Pro Se*  
 Current address unknown

Co-Counsel for Louisiana State Bar Association:

Alvin R. Christovich, Sr. (deceased)

M. Truman Woodward, Jr. (deceased)

I acted as co-counsel on behalf of the state bar association. Plaintiffs were unsuccessful bar applicants who sued under the Civil Rights Act seeking declaratory and injunctive relief, as well as damages, for alleged unconstitutional administration of the Louisiana bar examination. Plaintiffs alleged violation of their constitutional rights of due process and equal protection of law due to (1) failure to provide an appeal or hearing to a failing applicant; (2) destruction of examination papers before notification to failing applicants; and (3) failure to provide objective written criteria for grading.

I was primarily responsible for preparing pleadings and legal research. Extensive discovery was conducted and I prepared and filed a motion to dismiss and/or for summary judgment. The constitutional issues were thoroughly briefed and orally argued to the three-judge panel. The court granted defendant's motion for summary judgment. Writing for a unanimous court, Circuit Judge Wisdom, held that (1) the general and specific criteria employed in grading the bar examination were satisfactory and that plaintiffs' real complaint was with the essay type examination, which had been uniformly found to be valid; (2) due process did not require a hearing or review for a failing applicant in light of the built-in "internal review" used by the committee on bar admissions and the liberal opportunity afforded applicants to retake the examination;

(3) for the same reasons, the destruction of the examination papers before notification did not offend constitutional requirements.

The significance of this case is that it upheld the integrity of the Louisiana bar examination and the validity of the procedures used to administer and grade the examination. This decision was cited in a number of later cases when unsuccessful bar applicants challenged the Louisiana bar examination on constitutional grounds.

**(6) LORRAINE S. PREVOST V. NEW ORLEANS PUBLIC SERVICE, INC.,  
357 So. 2d 1371 (La. App. 4<sup>th</sup> Cir. 1978):**

Trial Court: Hon. Paul P. Garofalo, Division G, Civil District Court for the Parish of Orleans, Louisiana.

Counsel for defendant:     Floyd F. Greene  
                                    (current address or phone unknown)  
                                    formerly:  
                                    New Orleans Public Service, Inc.  
                                    (now known as Entergy)  
                                    639 Loyola Avenue  
                                    New Orleans, LA. 70113  
                                    504-576-4000

I was sole counsel for the plaintiff, Lorraine Prevost, who was injured while riding as passenger on a transit bus. Defendant denied liability. After pre-trial discovery, the case proceeded to trial before a jury. We presented evidence at trial which proved the accident was caused by the bus driver negligently turning the vehicle too sharply, striking a high curbing and throwing Mrs. Prevost from her seat.

The more interesting issues in the case, however, were related to the medical issues. Mrs. Prevost had undergone a lumber myelogram that suggested a possible ruptured disc. Surgery was recommended. When the surgery was performed, however, the surgeon found the disc itself appeared normal. The only abnormal finding by the surgeon was described as a "hot" nerve root, meaning the lumber nerve root at that level was chronically inflamed or irritated. Through the use of an expert in neurosurgery, who reviewed the medical records and the operative report, we were able to prove Mrs. Prevost suffered a partially herniated or protruded disc in the accident, causing the nerve root



at that level to become irritated or inflamed. By the time the surgery was performed a year later, the disc itself had healed and the protrusion had receded. However, as a result of the initial injury, Mrs. Prevost was left with a chronic and painful condition for which there was no surgical treatment available. The jury found the bus company liable and awarded \$300,000 to Mrs. Prevost. The defendant appealed and the judgment was affirmed on appeal.

**(7) J. W. O'BRYAN V. FOLK CONSTRUCTION COMPANY, 594 So.2d 900 (La. App. 4<sup>th</sup> Cir. 1992):**

Trial Court: Hon. Emile E. Martin, III, 25<sup>th</sup> Judicial District Court for Plaquemines Parish, Louisiana

Co-counsel for plaintiff: Terry A. Bell  
P. O. Box 460  
Belle Chasse, LA. 70037-0460  
504-392-5403

Counsel for defendant: Wilton E. Bland  
650 Poydras Street  
Suite 2150  
New Orleans, LA. 70130  
504-595-3000

I was chief counsel at trial for the plaintiff, J. W. O'Bryan. Mr. O'Bryan was injured while working as a "shoreman" for the defendant dredging company on a project to rebuild earthen dykes near the mouth of the Mississippi River. Mr. O'Bryan seriously injured his knee when he slipped and fell while ashore, helping to secure sheets of visquene on a rock levee. He was paid state workers' compensation benefits by his employer. After investigating the case, I determined that Mr. O'Bryan might qualify as a seaman under the Jones Act. A suit was filed alleging that Mr. O'Bryan was a member of the dredge crew, and that he was injured due to his employer's negligence in not providing a safe place to work. There were multiple issues raised by the defendant in this case. After discovery was completed, the defendant moved for summary judgment on seaman status. The trial court denied this motion and the defendant applied for a writ of review to the Fourth Circuit Court of Appeal. The appellate court considered the application and our opposition, and then denied the writ. The case proceeded to trial to the court. The trial court rendered judgment in plaintiff's favor,



finding Mr. O'Bryan to be a seaman, the defendant guilty of negligence and awarding \$364,000 in damages.

The evidence presented at trial convinced the trial court that O'Bryan met the requirements for seaman status under the Jones Act, 46 U.S.C. § 688, as interpreted by the federal Fifth Circuit in Offshore Company v. Robison, 266 F.2d 769 (5<sup>th</sup> Cir. 1959) and Barrett v. Chevron, USA, Inc., 781 F.2d 1067 (5<sup>th</sup> Cir. 1986). Although Mr. O'Bryan was classified as a "shoreman" and worked primarily on shore, the trial court concluded that the evidence supported a finding that plaintiff also performed a number of duties aboard the dredge boat and spent approximately half of his time aboard the dredge. The court further noted that all of plaintiff's duties, even those ashore, contributed to the mission and function of the dredge. The judgment was affirmed on appeal.

**(8) WILSON V. COMPASS DOCKSIDE, INC., 635 So. 2d 1171 (La. App. 4<sup>th</sup> Cir. 1994):**

Trial Court: Hon. Gerald P. Federoff, Division E, Civil District Court for Orleans Parish, Louisiana

Counsel for defendants: Paul N. Vance  
201 St. Charles Avenue  
36<sup>th</sup> Floor  
New Orleans, LA. 70170  
504-523-2600

I acted as chief counsel for the plaintiff, Charles Wilson, in this Jones Act case. The suit was vigorously defended on several issues, including whether an accident had even occurred. There was substantial pre-trial discovery. At trial, defendant alleged that Mr. Wilson had undergone unnecessary surgery. The main issue at trial was whether or not the lumbar fusion performed on Mr. Wilson was causally related to his on the job accident. The defendant alleged an intervening accident.

The case was tried to the court in 1992. The trial court rendered judgment initially finding that the fusion was not caused by the accident. We applied for a new trial, pointing out that the two treating physicians had clearly testified that the surgery was based on objective medical findings and related to the accident on the vessel. The new trial was granted and the trial court rendered judgment for the plaintiff in the amount of \$322,000.

On appeal, the defendant raised several issues. The primary issue was again whether the trial court was correct in finding that the surgery was related to the accident. This involved discussion of the proper standard for appellate review in a Jones Act case brought in state court. The defendant also argued that plaintiff had failed to mitigate his damages by engaging in improper conduct after the accident. Issues were also raised as to the general damage award and whether the trial court had properly awarded prejudgment interest. After briefing and oral arguments, the Court of Appeal affirmed the trial court's judgment. The Louisiana Supreme Court denied supervisory writs.

Before the judgment the defendant employer filed for protection from creditors in bankruptcy court. We were compelled to pursue collection from the surety on the appeal bond. Ultimately, the marine insurer agreed to pay \$500,000 to satisfy the final judgment in full, with interest and costs.

**(9) WILLIAM L. DESILVEY, JR. V. OCEAN DRILLING & EXPLORATION COMPANY, CIVIL ACTION NO. 77-1669, SECTION B, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA**

Trial Judge: Hon. Frederick J. R. Heebe, United States District Judge

Counsel for Defendants: John E. Galloway  
701 Poydras Street  
Suite 4040  
New Orleans, LA. 70139  
504-525-6802

Peter L. Hilbert, Jr.  
643 Magazine Street  
New Orleans, LA. 70130  
596-2767

I served as sole counsel for the plaintiff, William DeSilvey in this Jones Act and general maritime case. DeSilvey was employed by the defendant ODECO as a rig electrician. He was assigned to and worked on several different offshore drilling vessels. In 1976, Mr. DeSilvey was sent to Hiroshima, Japan as an electronics

technician to complete the installation of electronics gear aboard a newly constructed drilling vessel, the "OCEAN BOUNTY".

One of the main issues in the case was seaman status. Defendant contended that the vessel had not been completed and thus was not a "vessel in navigation" for purposes of either the Jones Act or general maritime law. Defendant moved for summary judgment on the issue of status. After conducting a great deal of discovery on the issue, we were able to show that at the time of Mr. DeSilvey's injury, the vessel's hull was completed and it was floating in the Inland Sea of Japan during the final construction phase. Mr. DeSilvey participated in sea trials after his arrival. The vessel had received an interim certificate from the American Bureau of Shipping. The vessel's owner, ODECO, had accepted delivery of the vessel from the shipyard although all construction and outfitting of the vessel had not been completed. Summary judgment was denied.

The case went to trial before a jury in federal court in May, 1980. In addition to the issues of status and liability, there was a serious issue as to whether and to what extent this accident might have aggravated a pre-existing back condition suffered by Mr. DeSilvey. The jury found Mr. DeSilvey was a seaman at the time of his injury, found the defendant negligent and awarded \$300,000 in damages. The defendant filed an appeal. Appellate briefs were prepared and filed. While awaiting oral argument, the case was settled for nearly judgment value.

**(10) GRAHAM REID V. WATERCRAFT, INC., CIVIL ACTION NO. 80-2126, SECTION J, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (CONSOLIDATED WITH JAMES V. WATERCRAFT, CIVIL ACTION NO. 80-0762)**

Trial Judge: Hon. Patrick Carr, United States District Judge, Section "J", Eastern District of Louisiana

Co-counsel for Plaintiff, Graham Reid: John G. Discon  
424 N. Causeway Blvd.  
# A  
Mandeville, La. 70448  
504-835-6435

Counsel for Plaintiff, Jesse E. James:	Donald R. Brown P. O. Box 2837 Monroe, LA. 71207 318-388-4176
Counsel for Watercraft, Inc.:	Donald Hoffman Robert Siegel 650 Poydras Street Suite 2100 New Orleans, LA. 70130 504-523-1385
Counsel for Texaco, Inc.	Robert M. Contois, Jr. 201 St. Charles Avenue 50 <sup>th</sup> Floor New Orleans, LA. 70170 504-582-8282

I was chief counsel for plaintiff, Graham Reid. Mr. Reid was injured when an "escape capsule" manufactured by the defendant Watercraft fell unexpectedly from a Texaco owned platform approximately 60 feet to the waters of the Gulf of Mexico. Reid and two others had just boarded the escape capsule for a safety drill. They did not intend to lower or release the capsule. I was primarily responsible for conducting substantial discovery. Since Mr. Reid's injuries appeared to be the more serious, I took the lead in prosecuting the suit. Mr. Reid had suffered fractures of both ankles and had required fusion of one of his ankles.

At trial, both sides presented expert testimony. Our experts testified that the probable cause of the accident was a defective design of the safety pin on the capsule's release mechanism. Because of the unsafe design, the pin could vibrate and turn to a position that would allow it to come out of its intended position which served to prevent the release handle from being moved. In normal use, the capsule would first be lowered to the water and then the safety pin would be removed and the release lever activated to release the capsule from its lines. None of the men in the capsule had intended to lower or release the capsule. Yet, it released while still hanging 60 feet above the water. Despite the seriousness of the injuries, the defendants offered nothing in settlement.



The consolidated cases were tried to a jury in federal court in February, 1982. After a trial which lasted several days, the jury returned a verdict finding Watercraft, Inc. liable and awarding Mr. Reid damages in excess of \$400,000. Texaco was exonerated from any liability. Although Watercraft filed notice of appeal, it paid the judgment before briefs were filed.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Beginning in 1974, I was asked to act as special counsel for the Committee on Bar Admissions, which administers the bar examination in Louisiana for the Louisiana Supreme Court and the Louisiana State Bar Association. In the first one or two cases, I was co-counsel with two distinguished past presidents of the state bar, Truman Woodward and Alvin Christovich, Sr., both now deceased. Later, I acted as sole counsel. Typically, these cases were brought in federal court by unsuccessful bar applicants. The cases usually raised various constitutional issues, often involving due process and/or equal protection principles.

Later, I was also asked to serve on occasion as special counsel to the Committee on Professional Responsibility, which at that time was responsible for investigation and enforcement of disciplinary rules against members of the bar. These cases were also usually brought in federal court and alleged various constitutional theories. The disciplinary function has now been removed from the bar association and now is under the Office of Disciplinary Counsel, directly responsible to the Supreme Court. A few of the cases I handled were before the Louisiana Supreme Court and involved requested waivers by foreign trained law graduates seeking permission to sit for the bar examination.

During the time I was doing this work, I defended at least 30 different lawsuits of the types described above, primarily in federal court. For the most part, these cases involved pretrial discovery, pre-trial motion practice, and a great deal of legal research and writing. Often, these cases were resolved on motions for summary judgment, although there were a few that involved either trial or



formal hearings in court. A number of these cases were appealed to the federal Fifth Circuit and I was required to research and write the appellate briefs. During this period, I was asked on many occasions to provide advice and counsel to the Committees on various legal issues. As a result of this work, a body of jurisprudence developed which upheld the integrity of the bar examination and the validity of the grading procedures.

From August, 1984 until July, 1989, I served as a member of the Standing Committee appointed by the Judges of the Eastern District of Louisiana pursuant to the Rules of Disciplinary Enforcement. This committee conducted preliminary investigations and hearing when a disciplinary complaint was filed against a member of the Eastern District Bar. Recommendations were then submitted to the Court which made the ultimate decision on whether to take disciplinary action against the attorney. I served on this Committee until that system was replaced in July, 1989.

In 1989, I was appointed by the Judges of the Eastern District as a member of a Merit Selection Panel to recommend to the Court regarding the appointment of a U.S. Magistrate. This involved soliciting and reviewing a large number of applications, interviewing approximately ten of the applicants, and then recommending three finalists to the Court. In the same year, I also served on a similar panel that solicited comments from the bar and public regarding the performance of a sitting U.S. Magistrate. The panel reviewed the comments received and the Magistrate's record and then made a recommendation to the Court regarding reappointment.

From 1994 to the present, I have served as a member of the House of Delegates of the Louisiana State Bar Association. I was elected to this position by the members of the bar in Orleans Parish. This body meets semi-annually to vote on resolutions to recommend by-law changes or other action to the Board of Governors or to the Louisiana Supreme Court.

In 1998, I became a member of the Strategic Planning Committee of the Louisiana Bar Foundation. The Foundation is funded by voluntary contributions from members of the bar, as well as IOLTA funds, with the cooperation of Louisiana banks. I am presently working as a member of a subcommittee to establish a speaker's bureau to educate and inform the public of the work of the Foundation.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Because of the nature of my practice, all of my fees are contingent based upon successful completion of each client's case. For those cases that are pending at the time of my appointment, I anticipate that at the conclusion of the case I will be reimbursed for any case related expenses and advances made on behalf of the client while I handled the case. I estimate that amount, for all cases, to be approximately \$200,000.00 as of the present time.

As a part of my practice, it is occasionally necessary for a client to borrow money in order to obtain medical or hospital treatment. On those occasions, if the client has no other source of funds, I will arrange with my bank to loan such funds to the client. To meet these needs, I have had a long standing line of credit with Hibernia National Bank in New Orleans. In order to make these loans, the bank requires that I co-sign the loan. While the case is pending, I advance on a periodic basis the sums necessary to pay the interest on the loan. Upon successful conclusion of the case, the client reimburses my office for the advanced interest payments and pays off the principal loan amount to the bank. At the present time the total amount of outstanding loans against the line of credit is approximately \$86,000.00. If any of these clients' cases are pending at the time of my appointment, I anticipate that the loans will be paid out at the time of successful completion of each case. Although I would remain personally liable for repayment of the loans as a co-signer, I do not anticipate having to pay the loans personally in view of my past experience which has always resulted in the client paying off the loan upon conclusion of the case. I anticipate that the attorney who assumes responsibility for handling the case after my appointment would also assume responsibility for advancing the periodic interest payments.

I anticipate that I will be entitled to receive a share of the attorneys fees earned in the cases that are pending at the time of my appointment. I understand that such shares must fairly represent the proportion of the work I have done on each case prior to my appointment. I will not share in any part of the fees which represent

work performed after my appointment by the attorney who handles the cases to conclusion. Because all of my cases involve individual clients and contingent fee arrangements, it is not possible at this time to provide either a specific dollar amount or a specific percentage for future fee income. Ethical rules require that at the time of my appointment, I will have to give written notice to the client in each pending case of their right to either allow my daughter, Kelly Barbier, to continue with their representation, or if they prefer, to select new counsel. My entitlement to any specific percentage of a legal fee which may be earned in the future will have to be determined on a case-by-case basis at that time. The assigned percentage for each case will fairly represent the work performed by me prior to my appointment.

Except for the above, I do not anticipate receipts from any deferred income arrangements, stock options, uncompleted contracts, or other future benefits from any previous business relationships, professional services, firm memberships, former employers, clients or customers.

2.

Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will request that my staff review all cases that are assigned to me initially to determine the identities of all parties involved; the identities of all attorneys involved; the nature of the litigation. I will then take appropriate action to recuse myself as required in those cases in which I have either previously represented one of the parties or in which I have any financial interest in the outcome of the litigation. For example, I would recuse myself in any case involving any attorney who has assumed representation of my client in any case pending at the time of my appointment. I would follow this rule until there is no longer any future fee income due to me from the cases assumed by that attorney.

Of course, I will follow the laws, rules and code of ethics that govern the federal judiciary with regard to full disclosure of all of my assets and liabilities, and all of my income and sources, and follow the required course of action with regard to recusal where appropriate.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**Please refer to copy of Financial Disclosure Report, AO-10, attached hereto.**

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

**PLEASE SEE ATTACHED FINANCIAL NET WORTH STATEMENT**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No. I have never held a title or been employed by any political candidate. The extent of my involvement has been to contribute or occasionally to help raise campaign funds for various candidates. I have on rare occasion consulted with candidates on an informal, unpaid basis. I have also volunteered to knock on doors in my neighborhood for two candidates that I can recall. Those were Steve Windhorst, Republican candidate for state representative (1991) and Francis Heitmeier, Democratic candidate for state senator (1995). I have never held a paid or unpaid official position with any political candidate's campaign.



### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

When I was a young lawyer, I volunteered to represent indigent defendants in both state and federal courts. I did this for a number of years, until formal public defender programs were established. I also joined and served as a board member of the New Orleans Legal Aid Society, which provided legal services to indigents in various civil matters.

I have also performed charitable work as a member of my church, where I served as a member of the parish council and the church's men's club. I have participated in many community service projects, such as preparing and delivering meals to less fortunate families at Thanksgiving and Christmas; collecting funds and clothing to be available to help families in crisis; etc. When my children were in school, my wife and I often participated in school-related charitable activities in the community.

In the course of my private practice of law for over 26 years, I have represented a number of individuals in need on a pro bono basis, or many times simply for court costs. This is not part of any formal or public pro bono program, but I have always considered it to be a way of giving something back to my community in the form of my time and talents. I have also been a supporter of the New Orleans Pro Bono Project, which is sponsored by the bar association. Several years ago, I became a "fellow" of the Louisiana Bar Foundation, which provides financial grants to a large number of public interest and non-profit organizations and programs.

More recently, I have volunteered to assist with the "Campaign for Children" program sponsored by the Louisiana Supreme Court. This program is being designed to provide pro bono legal services in Juvenile Court for abused and neglected children.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

No, not to the best of my knowledge.



3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission.

The process began in February 1997 when I wrote to both of my U.S. Senators, advising that I was interested in being considered for a vacant seat in the Eastern District of Louisiana. I furnished each Senator with a resume. I was later invited to Washington for personal interviews with each Senator and members of their staffs. I obtained letters and calls of support from various members of the bar and other persons across the political spectrum. On September 12, 1997, the two Senators submitted my name to the White House for one of the vacant judgeships in the Eastern District. On October 14, 1997, I was interviewed by representatives of the Department of Justice in Washington, D.C. I was nominated by the President on May 19, 1998.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism". The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

With my background working in the federal court system, first as a law clerk to a federal judge and later as an attorney, I believe I have a very clear understanding of the role that should be played by the federal judiciary. Although the judiciary is the third branch of the federal government, in many ways its role is limited by the Constitution and statutes enacted by Congress. Unlike their state counterparts, federal courts are courts of limited jurisdiction. Congress has the role of defining the jurisdiction to be exercised by the lower federal courts. Federal judges

are therefore limited in what types of cases they can consider and have authority to notice, upon the court's own motion, lack of jurisdiction over the subject matter involved in a particular case.

The federal courts are also duty bound to only decide real cases or controversies and to ensure that the party bringing the litigation has real and substantial standing to do so. The federal judge must be conscious of the requirement of standing and act decisively where necessary to dismiss suits where standing is absent.

Finally, a federal judge must always be aware of the fact that the judiciary is merely one of the three branches of government created by the federal constitution. Each branch is intended to operate independently and should be careful not to intrude into the jurisdiction or powers of the other branches of government. Federal judges have no business acting as the executive or legislating. The role of the courts is to follow and apply the U.S. Constitution and federal statutes as enacted by Congress.

AC-10 (iv)  
Rev. 8/98**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) Barbier, Carl J.		2. Court or Organization U.S. District Court, E.D. La.		3. Date of Report 05/21/1998	
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge-Nominee		5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date 05/19/1998 ____ Initial ____ Annual ____ Final		6. Reporting Period 01/01/1997 to 04/30/1998	
7. Chambers or Office Address 858 Camp Street New Orleans, LA. 70130		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____			
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.					

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Member, Board of Governors	Louisiana Trial Lawyers Association
2	
3	

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 05/21/98	Carl J. Barbier & Kelly E. Barbier (see Part VIII.)
2	
3	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1996	Legal Services (Business Income) (gross income)	\$ 460,903.00
2 1997	Legal Services (Business Income) (gross income)	\$ 318,799.00
3 1998	Legal Services (Business Income) (gross income)	\$ 305,408.00
4 1996	Bookkeeping Services (business income) (\$)	
5 1997	Bookkeeping Services (business income) (\$)	

## FINANCIAL DISCLOSURE REPORT

 PARTIAL OF FINANCIAL REPORTING  
 Barbier, Carl J.

 Date of Report  
 05/21/1998

## IV. REIMBURSEMENTS and GIFTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children, use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

<div></div>	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

## V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

<div><div></div></div>	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts)		
1	EXEMPT		
2			
3			
4			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	English Turn Ltd. Partnership	Mortgage on residential lot	
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001 to \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

05/21/1998

## VII. Page 1 INVESTMENTS and TRUSTS

—income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(Q)" after each asset exempt from prior disclosure.		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)						EXEMPT				
1 Union Bank of Calif. (CD) (J)	C	Interest	K	T						
2 Firststar Bank Iowa (CD) (J)	A	Interest	J	T						
3 U.S.Treasury Zero Strips (J)				K	T					
4 Pacific Northwest Bell Tel. Co. (Bond) (J)	A	Interest	J	T						
5 Southern Bell Tel & Teleg (Bond) (J)	A	Interest	J	T						
6 Northwestern Bell Tel Co. (Bond) (J)	A	Interest	J	T						
7 Northwestern Bell Tel Co. (Bond) (J)	A	Interest	J	T						
8 Chesapeake & Potomac Tel (Bond) (J)	C	Interest	K	T						
9 N.Y. Telephone Co. Refund. Mortg. (Bond) (J)	A	Interest	J	T						
10 M.Y.Telephone Co. Refund. Mortg. (Bond) (J)	A	Interest	J	T						
11 Northern Sts Pwr Co Minn (Bond) (J)	A	Interest	J	T						
12 Northern Sts Pwr Co. Minn (Bond) (J)	A	Interest	J	T						
13 Potomac Electric Power (Bond) (J)	C	Interest	K	T						
14 Potomac Electric Power (Bond) (J)	A	Interest	J	T						
15 Florida Power Corp. (Bond) (J)	B	Interest	J	T						
16 Mountain States Tel & Teleg. (Bond) (J)	A	Interest	J	T						
17 Cincinnati Bell Inc. (Bond) (J)	A	Interest	J	T						
1 Incl/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 I2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				



## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

Date of report

05/21/1998

## VII. Page 2 INVESTMENTS and TRUSTS

— Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)					EXEMPT				
18 Niagara Mohawk Power Co. (Bond) (J)	A	Interest	J	T					
19 Bell Telephone Co of Pa (Bond) (J)	B	Interest	J	T					
20 Bell Telephone Co of Pa (Bond) (J)	A	Interest	J	T					
21 Northern Sta Pwr Co Minn (Bond) (J)	B	Interest							
22 Texas Utilities Company (Bond) (J)	C	Interest	K	T					
23 Southwestern Bell Tel Co (Bond) (J)	A	Interest	J	T					
24 Southwestern Bell Tel Co (Bond) (J)	A	Interest	J	T					
25 Illinois Bell Tel Co (Bond) (J)	A	Interest	J	T					
26 Illinois Bell Tel Co (Bond) (J)	A	Interest	J	T					
27 Illinois Bell Tel Co (Bond) (J)	A	Interest	J	T					
28 Pacific Tel & Teleg Co (Bond) (J)	A	Interest	J	T					
29 Florida Power & Light (Bond) (J)	A	Interest	J	T					
30 Southern Bell Tel & Tel Co (Bond) (J)	B	Interest	J	T					
31 Michigan Bell Telephone (Bond) (J)	B	Interest	J	T					
32 Mountain States Tel & Telegraph (Bonds) (J)	C	Interest	K	T					
33 Exxon Capital Corp. (Bond) (J)	B	Dividend	J	T					
4 New England Tel & Teleg (Bonds) (J)	B	Interest	J	T					
Loss/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 (Col. C1, D3) O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market (Col. C2) U=Book Value V=Other W=Estimated									

– Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" or ownership by dependent child.	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)
Please "XO" after each asset exempt from prior disclosure.	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure: (2) Date: Month- Day
	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income/assets, or transactions)			EXEMPT
5 Indiana Bell Tel Inc. (Bonds) (J)	A	Interest	J T
6 Kansas Gas & Electric Co (Bond) (J)	A	Interest	J T
7 New York Tel Co Refunding Mortg.(Bonds) (J)	A	Interest	J T
8 Southwestern Bell Tel Co (Bonds) (J)	C	Interest	K T
9 New England Tel & Teleg (Bonds) (J)	A	Interest	J T
0 New Jersey Bell Tel Co	B	Interest	J T
1 N Y Telephone Company (Bond) (J)	B	Interest	
2 Northwestern Bell Tel Co (Bonds) (J)	C	Interest	K T
3 Ches & Potomac Tel Co Va (Bonds) (J)	C	Interest	K T
4 Ohio Bell Telephone Co (Bonds) (J)	D	Interest	L T
5 Indiana Bell Tel Inc. (Bonds) (J)	C	Interest	K T
6 Bell Telephone Co of Pa (Bond) (J)	B	Interest	J T
7 Mountain States Tel & Teleg (Bonds) (J)	C	Interest	K T
8 GTE South Debenture (Bond) (J)	A	Interest	J T
9 Florida Power Company (Bonds) (J)	B	Interest	J T
0 Duke Energy Corp (Bonds) (J)	C	Interest	K T
1 New Jersey Bell Telephone Co (Bonds) (J)	C	Interest	K T
Int/Own Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 Col. Bl, D4 F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 Col. Cl, D3 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more Val Meth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market Col. C2 U=Book Value V=Other W=Estimated X=X			

## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

05/21/1998

**VII. Page 4 INVESTMENTS and TRUSTS**

-- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "DQ" after each asset exempt from prior disclosure.		(1) Aml. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure				
							(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
NONE (no reportable income, assets, or transactions)						EXEMPT					
52 Bell Telephone Co of Pa (Bonds) (J)		B	Interest	J	T						
53 Chesapeake & Potomac Tel Va. (Bonds) (J)		A	Interest	J	T						
54 Southwestern Bell Tel Co (Bonds) (J)		C	Interest	K	T						
55 Ohio Bell Telephone Co (Bond) (J)		A	Interest	J	T						
56 New England Tel & Teleg (Bond) (J)		A	Interest	J	T						
57 Chesapeake & Potomac Tel Md. (Bond) (J)		A	Interest	J	T						
58 Potomac Electric Power Co (Bonds) (J)		C	Interest	K	T						
59 Chesapeake & Potomac Tel W.Va. (Bond) (J)		A	Interest	J	T						
60 Southwestern Bell Tel Co (Bond) (J)		A	Interest	J	T						
61 Southwestern Bell Tel Co (Bond) (J)		A	Interest	J	T						
62 General Foods Corp (Bond) (J)		C	Interest	K	T						
63 NM Pepsico (Bond) (J)		A	Interest	J	T						
64 NM Walt Disney Co (Bond) (J)		B	Interest	J	T						
65 Kerr McGee Corporation (Bond) (J)		B	Interest	J	T						
66 United Airlines Inc. Deben. (Bond) (J)		A	Interest	J	T						
57 NM Ford Motor Cdt Co. BE (Bond) (J)		A	Interest	J	T						
58 Commonwealth Edison Co (Bond) (J)		A	Interest	J	T						
1 In/Out Code: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000			
2 Val Code: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000		K=\$15,001-\$50,000		L=\$50,001-\$100,000		M=\$100,001-\$250,000		N=\$250,001-\$500,000			
3 Val Mth Code: Q=Appraisal (Col. C2) U=Book Value		R=Cost (real estate only) V=Other		S=Amortment W=Estimated		T=Cash/Market					

## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

Date of report  
05/21/1998

## VII. Page 5 INVESTMENTS and TRUSTS

— Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(D)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (no reportable income, assets, or transactions)					EXEMPT				
9 FPL Group Capital Inc. (Bond) (J)	B	Interest	J	T					
10 Wisconsin Electric Pwr Co (Bond) (J)	A	Interest	J	T					
11 Philadelphia Electric Co. (Bond) (J)	A	Interest	J	T					
12 Wisconsin Public Service First Mort. (Bond) (J)	A	Interest	J	T					
13 Virginia Elec & Pwr Co. First Mort. (Bond) (J)	A	Interest	J	T					
14 Cent. Ill. Public Svc Co. (Pfd. Stock) (J)	A	Dividend	J	T					
15 Louisville Gas & Elec Co. (Pfd. Stock) (J)	A	Dividend	J	T					
16 Union Electric Co. (Pfd. Stock) (J)	A	Dividend	J	T					
17 Merrill Lynch Basic Value Fund-Cl B (J)	A	Dividend	J	T					
18 Merrill Lynch GMA Tax-Exempt Fund (J)	C	Dividend	K	T					
9 St Mary Parish La Hosp Svc Dist (Mun) (J)	B	Interest	K	T					
10 Jeff Parish La Sch Bd Svc (Mun. Bond) (J)		None	J	T					
11 Orleans Par La Sch Bnd	A	Interest	J	T					
12 New Orleans La EHA HTL (muni) (J)		None	J	T					
13 La St Gas & Fuels Tax Rev (muni) (J)		None	K	T					
4 East Baton Rouge Par La Hsp Svc Dt (muni) (J)	B	Interest	J	T					
5 DeSoto Prah La Plit Ctl RV Intl Paper Co (J)	B	Interest	J	T					
Val Codes: A=\$1,000 or less    B=\$1,001-\$2,500    C=\$2,501-\$5,000    D=\$5,001-\$15,000    E=\$15,001-\$50,000 (Col. B1, D4)    F=\$50,001-\$100,000    G=\$100,001-\$1,000,000    H1=\$1,000,001-\$5,000,000    H2=\$5,000,001 or more Val Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000 (Col. C1, D3)    O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more Val Mth Codes: Q=Appraisal    R=Cost (real estate only)    S=Assessment    T=Cash/Market (Col. C2)    U=Book Value    V=Other    W=Estimated									

## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

05/21/1998

## II. Page 6 INVESTMENTS and TRUSTS

- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical (J)* for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" or ownership by dependent child.</i>  <i>Place "(O)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period  <i>EXEMPT</i>
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W) (1) Type (e.g., buy, sell, merger, redemption) (2) Date: Month Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			<i>EXEMPT</i>
6 E. Baton Rge. La. New Pub Hsg Auth (muni) (J)	B	Interest	J T
7 Louisiana St Ser A Ref (municipal bond) (J)	B	Interest	E T
8 La. Pub Fac AT HSP (municipal bond) (J)	C	Interest	K T
9 New Orleans La (municipal bond) (J)	A	Interest	J T
0 La. Pub Facs AT RV Alton Ochsner (muni) (J)	B	Interest	K T
1 La Pub Facs Auth Hosp Rev Rfdg	A	Interest	J T
2 Jeff Par La Rd Dt 1 Sub Rd Diet 1 (muni) (J)	A	Interest	
3 La Pub Fac AT RV Tulane U Rf (muni) (J)	B	Interest	J T
4 Jeff Parish La Ser A Rfdg	B	Interest	J T
5 La Pub Facs Auth Hsp Rv	A	Interest	J T
6 La Pub Facs Auth Hsp Rv Unref (muni) (J)	B	Interest	K T
7 Matchitoches La Utilis Rv (muni) (J)	B	Interest	J T
8 Jeff Par La Rd Diet #1 Sub Rd Dt #1 (muni) (J)	A	Interest	J T
9 St Tammany Par La Sch Brd Sls-Use (muni) (J)	B	Interest	J T
0 Baton Rouge La Sls & Use Tx (muni) (J)	B	Interest	J T
1 Greater N.O. Expw Comm. (Muni) (J)	B	Interest	J T
2 Jeff Par La Sch Brd Sales Use Tx (muni) (J)	A	Interest	J T
Use/Own Codes: A=\$1,000 or less    B=\$1,001-\$2,500    C=\$2,501-\$5,000    D=\$5,001-\$15,000    E=\$15,001-\$50,000 Col. B1, D4) F=\$50,001-\$100,000    G=\$100,001-\$1,000,000    H1=\$1,000,001-\$5,000,000    H2=\$5,000,001 or more			
Val Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000 Col. C1, D3) O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more			
Val Mth Codes: Q=Appraisal    R=Cost (real estate only)    S=Assessment    T=Cash/Market Col. C2) U=Book Value    V=Other    W=Estimated			



FINANCIAL DISCLOSURE REPORT | Barbier, Carl J.

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## /II. Page 7 INVESTMENTS and TRUSTS

— Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" or ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.		(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
NONE (no reportable income, assets, or transactions)						EXEMPT				
3 E. Baton Rouge Par La Sales & Use (muni) (J)	A		Interest	J	T					
4 Shreveport LA Rfdg (muni) (J)	B		Interest	J	T					
5 East B.R. Prsh La. Sales Use Tx (muni) (J)	A		Interest	J	T					
6 St Tammany Par wide SchDist No.12(muni) (J)	A		Interest	J	T					
7 La Pub Facs AT RV Tulane (muni) (J)	B		Interest	J	T					
8 Baton Rouge La Sales-Use Tx (muni) (J)	B		Interest	J	T					
9 La St Ser A Rfdg (muni) (J)	B		Interest	J	T					
0 E.Baton Rouge Prsh La. New Publ.Hag. (muni) (J)	B		Interest	K	T					
1 La Pub Facs Auth Hosp Rev (muni) (J)	B		Interest	J	T					
2 Reg Tran Auth La Sales Tx (muni) (J)	B		Interest	J	T					
3 E Baton Rouge Par La Sales Use (muni) (J)	A		Interest	J	T					
4 W Baton Rouge Par La Sch Dist 3 (muni) (J)	B		Interest	J	T					
5 La. Stad-Expo Dist Htl Occ Tx (muni) (J)	B		Interest	J	T					
6 Baton Rouge La Sales-Use Tx Pub Impt (muni) (J)	B		Interest	K	T					
7 E Baton Rouge Par La Pub Hag (muni) (J)	A		Interest	J	T					
8 La Pub Fac AT REV Ref-Loyola (Muni) (J)	C		Interest	K	T					
9 La Pub Facs Auth Hap Ry Womens Hp (muni) (J)	B		Interest	J	T					
Loss/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000		Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more								
Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000										
Col. C1, D3) O=\$500,001-\$1,000,000 P1=\$1,000,001-\$3,000,000 P2=\$3,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more										
Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market										
Col. C2) U=Book Value V=Other W=Estimated										

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05/21/1998

## VII. Page 8 INVESTMENTS AND TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.	(1) Amt. Code (A-H) (2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption) If not exempt from disclosure: (2) Date: Month-Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)			EXEMPT
0 E Baton Rouge Par La Sales-Use (muni) (J)	C Interest	K T	
1 Ascension Par La Par Wide Sch Dist Ser B (muni) (J)	A Interest	J T	
2 Alexandria La Utils Rev Ser B (muni) (J)	A Interest	J T	
3 Channelview Tex Indpt Sch Dist (muni) (J)	B Interest	J T	
4 Orleans Par La Phwide Sch Dist (muni) (J)	A Interest	J T	
5 Shreveport La Wtr & Svr (muni) (J)	C Interest	K T	
6 New Orleans La EHA HTL Rv (muni) (J)	None	J T	
7 E Baton Rouge Par La Sales Use Tx (muni) (J)	B Interest	K T	
8 St Tammany Par Wide Sch Dist No 12 (muni) (J)	B Interest	K T	
9 La. Pub Facs AT RV A-Ochsner (muni) (J)	B Interest	K T	
0 Baton Rouge La Sales-Use (muni) (J)	B Interest	J T	
1 Ascension Par La Pwde Sch Dist (muni) (J)	A Interest	J T	
2 Texas A&M Univ Revs Fing Sys (muni) (J)	A Interest	J T	
3 Guadalupe Blance Riv AT TEX RV Hydroel (muni) (J)	A Interest	J T	
4 Baton Rouge La Sales-Use (muni) (J)	C Interest	K T	
5 Louisiana St Ser B	A Interest	J T	
6 Orleans Par La Sch Brd	A Interest	J T	
Insr/Gain Codes: A=\$1,000 or less    B=\$1,001-\$2,500    C=\$2,501-\$5,000    D=\$5,001-\$15,000    E=\$15,001-\$50,000 Col. B1, D4) F=\$50,001-\$100,000    G=\$100,001-\$1,000,000    H1=\$1,000,001-\$5,000,000    H2=\$5,000,001 or more	Val Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000 (Col. C1, D3) O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more		
Val Mth Codes: Q=Appraisal    R=Cost (real estate only)    S=Assessment    T=Cash/Market Col. C2) U=Book Value    V=Other    W=Estimated			

## FINANCIAL DISCLOSURE REPORT

Barbier, Carl J.

05/21/1998

## /II. Page 9 INVESTMENTS AND TRUSTS

-- Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" or ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
					(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
NONE (no reportable income, assets, or transactions)					EXEMPT				
7 La Pub Facs AT RV Gen Hlth Inc (muni) (J)	B	Interest	J	T					
8 Lafayette La Pub Pwr AT Elec Rev (muni) (J)	A	Interest	J	T					
9 E Baton Rouge Par La Sales Use (muni) (J)	B	Interest	J	T					
0 New Orleans La Audubon Pk Comm (muni) (J)	B	Interest	K	T					
1 Shreveport La Mtr-Swr Rv (muni) (J)	A	Interest	J	T					
2 E Baton Rouge Par La Sales & Use (muni) (J)	B	Interest	J	T					
3 La St Univ.-Agric Mchnl Clg Univ (muni) (J)	A	Interest	J	T					
4 La Pub Fac AT HSP Rev Ser A (muni) (J)	B	Interest	J	T					
5 La Pub Fac AT HSP Rev Ser B (muni) (J)	A	Interest	J	T					
6 La Pub Facs Auth Rev Gen Hlth (muni) (J)	B	Interest	J	T					
7 Terrebonne Par La Hsp Svc Dt 1 (muni) (J)	B	Interest	J	T					
8 Lafayette La Pub Impt Sales Tx (muni) (J)	A	Interest	J	T					
9 New Orleans La Home Mtg (muni) (J)	B	Interest	J	T					
0 La Pub Facs AT RV Ser D BIGI (muni) (J)	B	Interest	K	T					
1 Jeff Par La Hosp Svc Dt 2 Rv (muni) (J)	A	Interest	J	T					
2 Greater N. O. Expw Com La Expwy (muni) (J)	A	Interest	J	T					
3 Edinburg Tex Cons Indpnt Sch Dist (muni) (J)	B	Interest	K	T					
Inc/Gain Codes: A=\$1,000 or less Col. B1, D4) F=\$50,001-\$100,000 Val Codes: J=\$15,000 or less Col. C1, D3) Q=\$500,001-\$1,000,000 Val Mth Codes: Q=Appraisal Col. C2) U=Book Value	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000 K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000 R=Cost (real estate only) V=Other	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000 L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000 S=Assessment W=Estimated	D=\$5,001-\$15,000 H2=\$5,000,001 or more M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000 T=Cash/Market	E=\$15,001-\$50,000 N=\$250,001-\$500,000 P4=\$50,000,001 or more					

— Income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical (J)* for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W) (1) Type (e.g., buy, sell, merger, redemption) If not exempt from disclosure (2) Date: Month-Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
Placed "00" after each asset exempt from prior disclosure.			EXEMPT
NONE (no reportable income, assets, or transactions)			EXEMPT
4 La Pub Facs AT RV A.Ochane B (muni) (J)	C	Interest	K T
5 La. Pub Fac AT RV A.Ochane C	B	Interest	J T
5 E Baton Rouge Par La Sla-Use Tx (muni) (J)	B	Interest	J T
7 La Pub Facs AT RV A-1 (muni) (J)	C	Interest	K T
8 St Charles Par La Env Impt Rev La Pwr-Lt (muni) (J)	A	Interest	J T
9 lat T I HS CHB 63LA T 1 M (Muni Bond Mutual Fund) (J)	B	Interest	J T
10 Southern Bell Tel & Teleg (Bond) (J)	A	Interest	J T
11 Southern New Eng Tel Co (Bond) (J)	A	Interest	J T
12 Carolina Power & Light Co (Bond) (J)	B	Interest	J T
13 Mountain States Tel & Teleg (Bond) (J)	A	Interest	J T
14 GTE South Debenture (Bond) (J)	A	Interest	J T
15 NM McDonalds Corp (Bond) (J)	A	Interest	J T
16 Duke Energy Corp (Bond) (J)	A	Interest	J T
17 Transamerica Finl Corp (Bond) (J)	A	Interest	J T
18 Merrill Lynch Basic Value Fd Cl B (stock mutual fund) (J)	A	Dividend	K T
19 Am Cent-20th Cent Ultra (stock mutual fund) (J)	D	Dividend	K T
20 Brandywine Fund (stock mutual fund) (J)	E	Dividend	L T
Inc/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000 Col. B1, D4 F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more Val Codes: J=\$15,000 or less K=\$15,001-\$30,000 L=\$30,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 Col. C1, D3 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market Col. C2 U=Book Value V=Other W=Estimated			

– income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

[illegible]



FIDUCIARY DISCLOSURE REPORT	Name of person reporting	Date of Report
	Barbier, Carl J.	05/21/1998

## II. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☐ NONE (No additional information or explanations.)

## Part II. AGREEMENTS

have no written agreements at this time with anyone. However, it is my intention to allow my daughter, Kelly Barbier, to continue the firm and to continue the representation of our clients' case pending at the time of my appointment. Depending on the type of case and the client's preference, it is likely that Kelly would associate with other attorneys on certain cases. No such agreements or arrangements have been made as of this date.

cause of the nature of my practice, all of my fees are contingent based upon successful completion of each client's case. For those cases that are pending at the time of my appointment, I anticipate that at the conclusion of the case I will be reimbursed for any case related expenses and advances made on behalf of the client while I handled the case. I estimate that amount, for all cases, to be approximately \$200,000.00 as of the present time.

a part of my practice, it is occasionally necessary for a client to borrow money in order to obtain medical treatment. On those occasions, if the client has no other source of funds, I will arrange with my bank to loan such funds to the client. To meet these needs, I have had a long standing line of credit with Hibernia National Bank in New Orleans. In order to make these loans, the bank requires that I co-sign the loan. While the case is pending, I advance on a periodic basis the sums of money necessary to pay the interest on the loan. Upon successful completion of the case, the client reimburses my office for the advanced interest payments and pays off the principal loan amount to the bank. At the present time the total amount of outstanding loans against the line of credit is approximately \$86,000.00. If any of these clients' cases are pending at the time of my appointment, I anticipate that the loans will be paid out at the time of successful completion of each case. Although I would remain personally liable for repayment of the loans as a co-signer, I do not anticipate having to pay the loans personally in view of my past experience which has always resulted in the client paying off the loan upon conclusion of the case. I anticipate that the attorney who assumes responsibility for handling the case after my appointment would also assume responsibility for advancing the periodic interest payments.

anticipate that I will be entitled to receive a share of the attorneys fees earned in the cases that are pending at the time of my appointment. I understand that such shares must fairly represent the proportion of the work I have done on each case prior to my appointment. I will not share in any part of the fees which represent work performed after my appointment by the attorney who handles the cases to conclusion. Because all of my cases involve individual clients and contingent fee arrangements, it is not possible at this time to provide either a specific dollar amount or a specific percentage for future fee income. Ethical rules require that at the time of my appointment, I will have to give written notice to the client in each pending case of their right to either allow my daughter, Kelly Barbier, to continue with their representation, or if they prefer, to select new counsel. My entitlement to any specific percentage of a legal fee which may be earned in the future will have to be determined on a case-by-case basis at that time. The assigned percentage for each case will fairly represent the work performed by me prior to my appointment.

FINANCIAL DISCLOSURE REPORT	PERSON OR PERSONS REPORTING Barbier, Carl J.	DATE OF REPORT 05/21/1998
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SECTION HEADING. (Indicate part of report.)

SECTION 3. NON-INVESTMENT INCOME (cont'd.)

i. Date	Parties and Terms	Gross Income
6 1998	Bookkeeping Services (business income) (S)	\$ 0.00

<b>FINANCIAL DISCLOSURE REPORT</b>	<b>Name of person reporting</b> Barbier, Carl J.	<b>Date of report</b> 05/21/1998
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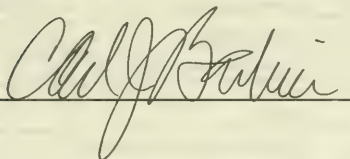
**CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

5/21/98

**Note:** Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## FINANCIAL STATEMENT

## NET WORTH

AS OF—APRIL 30, 1998

Name: CARL JOSEPH BARBIER

Social Security No. 438-62-0536

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	20	000		Notes payable to banks—secured			
U.S. Government securities—add schedule				Notes payable to banks—unsecured			
Listed securities—add schedule	1,358	037		Notes payable to relatives			
Unlisted securities—add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due	5,000		
Due from relatives and friends	27	000		Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule			
Real estate owned—add schedule	770	000		Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts—itemize:			
Autos and other personal property	75	000		Reserve for taxes	30,000		
Cash value—life insurance							
Other assets—itemize:							
Retirement Accounts	954	900					
Law Firm Capital	448	806					
				Total Liabilities	35,000		
				Net Worth	3618,743		
Total Assets	3,653	743		Total Liabilities and net worth	3653,743		
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor	151	000		Are any assets pledged? (Add schedule.)		NO	
Loans for law firm clients				Are you defendant in any suits or legal actions?		NO	
On leases or contracts				Have you ever taken bankruptcy?		NO	
Legal Claims							
Provision for Federal Income Tax							
Other special debt							

CARL JOSEPH BARBIER

Social Security No.438-62-0536

## FINANCIAL NET WORTH STATEMENT- Schedules

## Listed Securities:

Merrill Lynch Cash Management Account	\$1,037,396.
Strong Short Term Bond Fund	26,159.
Common stock/mutual funds	254,406.
Strong Money Market Fund	40,076.
Total	<u>\$1,358,037.</u>

## Real Estate Owned:

57 Grand Canyon Drive, New Orleans	\$ 275,000.
858 Camp Street, New Orleans	250,000.
103 Peninsula Dr., Carriere, Ms.	65,000.
14 Rosedown Court, New Orleans	<u>180,000.</u>
Total	<u>\$ 770,000.</u>



**UNITED STATES SENATE  
QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**I. BIOGRAPHICAL INFORMATION (PUBLIC)**

1. **Full name (include any former names used).** 

Gerald Bruce Lee

2. **Address:** List current place of residence and office address(es)

Residence: Springfield, Virginia

Office: Fairfax Circuit Court, 19th Judicial Circuit  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

3. **Date and Place of Birth:**

February 9, 1952, Washington, D.C.

4. **Marital Status** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es)

Married to Edna Ruth Vincent, Attorney at Law  
Employer and Business Address: Surovell Jackson Colten & Dugan, P.C., 4010  
University Drive, Fairfax, Virginia 22030

5. **Education:** List each college and law school you have attended, including the dates of attendance, degrees received, and dates degrees were granted.

College: The American University, 1969-1973, Bachelor of Arts in  
Communications, May, 1973.

Law School: The American University, Washington College of Law, 1973-1976,  
Juris Doctorate, May, 1976.

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6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

9/67-5/73	Youth Pride, Inc.
72-73	Director, Public Relations
71-72	Co-Director, Pride/American University Program
70-71	Counselor, Higher Education
68-70	Supervisor, Area 36B
67-68	Team Counselor
	1536 U Street, N.W.
	Washington, D.C. 20036
5/74-9/74	United States Equal Employment Opportunity Commission-
	Decisions Division
	Law Clerk
	Washington, D.C.
1/74-1/75	Gwendolyn Jo Carlberg, Esquire
	Law Clerk
	420 South Washington Street
	Alexandria, Virginia 22314
1/75-8/75	Gates & Richburg (George Gates and Zollie Richburg)
	Law Clerk
	1709 N Street, N.W.
	Washington, D.C.

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9/74-5/78	The American University College of Continuing Education Adjunct Professorial Lecturer Washington, D.C. 20016
9/76- 10/77	Wiggs & Holland Associate Attorney 515 Wythe Street Alexandria, Virginia 22314
1977-1978	Wiggs & Lee Attorney/Partner 515 Wythe Street Alexandria, Virginia 22314
1978-1980	Wiggs Lee & McClerklin Attorney/Partner 515 Wythe Street Alexandria, Virginia 22314
1980-1983	Law Offices of Gerald Bruce Lee Attorney/Owner 117 North Fairfax Street (10/80-1/81) Alexandria, Virginia and 1001 Duke Street (1/81-8/83) Alexandria, Virginia 22314
1983- 1985	Lee & Finch Attorney/Partner 807 Franklin Street Alexandria, Virginia 22314
1985- 11/86	Law Offices of Gerald Bruce Lee & Associates 807 Franklin Street Alexandria, Virginia 22314

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- |                  |  |
|------------------|--|
| 11/86- 5/92      | Cohen Dunn & Sinclair, P.C. (currently operating as Cohen, Dunn, Keating and Rorhstaff)<br>Attorney/Principal<br>221 South Alfred Street<br>Alexandria, Virginia 22314 |
| 11/90 - 4/30/92  | Metropolitan Washington Airports Authority<br>Board of Directors for Washington National and Dulles International Airports<br>Virginia Appointee                       |
| 5/1/92 - present | Fairfax Circuit Court, 19th Judicial Circuit of Virginia<br>Circuit Court Judge<br>4110 Chain Bridge Road, Fifth Floor<br>Fairfax, Virginia 22030                      |

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

*The North Star Award*, The American University, Washington College of Law, for service to students and alumni in employment, March 28, 1998.

*The Asian American Bar Association Award* for service, October 1997.

*President's Award for Outstanding Service*, the Fairfax Bar Association, 1995-96.

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*The American University, Washington College of Law, Alumnus Award*, for working to advance law students into judicial clerkships and with minority law students on careers and placements, 1995.

*The Fairfax County Human Rights Commission Award*, for mentoring youths and working with the judicial system in leading the Fairfax County Community Town Meetings Project on the Fairness of the Criminal Justice System, 1994-95.

*The National Association of Counties Award*, for working on the Fairfax County Community Town Meeting Project, which entailed a series of meetings where judges, prosecutors, defense attorneys, police officers and court staff listened to community concerns and developed a plan to respond to them, June 1995.

*The Distinguished Service Award*, The Virginia Commission on Women and Minorities in the Legal System, for encouraging and assisting women and minorities in entering the legal profession and judiciary, June 1994.

*The Distinguished Service Award*, The Old Dominion Bar Association, for forging a relationship of mutual cooperation and respect between the Old Dominion Bar and the Virginia State Bar, Summer 1992.

*The Lodestar Award*, The American University, presented at the University President's Investiture, for distinguished achievement in career and service to university and community, May 1992.

9. **Bar Associations:** List all bar associations, legal or judicial related committees or conferences of which you are or have been a member, give the titles and dates of any offices which you have held in such groups.

Judicial Conference of Virginia:

Chairman, Judicial Education Committee, (1997-present);  
 Member, (1992-present)c. Fairfax Circuit Court Committees;  
 Chairman, Magistrates Committee (1993-95); Chairman, Courts Internet Committee (1997- present).



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Virginia Circuit Court Judges' Benchbook Committee:  
 Member, (1995-present).

Fourth Circuit Judicial Conference, Permanent Member, (1991 to present)

George Mason Inn: American Inn of Court:  
 President (1996-97); Master Solicitor (1989-present).

**Virginia State Bar:**

Elected Member, Virginia State Bar Council, (1985-91); Board of Governors, General Practice of Law Section, (1986-91); Member, Litigation, General Practice and Criminal Law Sections, and Chairman, Judiciary Committee, (1987-88); Chairman, General Practice of Law Section, (1986-87); Chairman, Publications Committee, General Practice Plus Newsletter, (1988-89).

Member, Professionalism Committee (1988-91); Unauthorized Practice of Law (1988-90); Special Committee on Study of Rules Regarding: In-Person Solicitation of Personal Injury Cases (1989-91).

Member, Board of Governors General Practice of Law Section (1986-present).

**Virginia Law Foundation:**

Chairman, Grants Committee (1991-92); Board of Directors, (1990-92).

**American Bar Association:**

Chairman, Judiciary Committee, General Practice of Law Section, (1996-97); Vice Chairman, Judiciary Committee, General Practice of Law Section, (1995-97);

General Practice Section, Vice Chair, Commercial Law Committee, (1988-1992); Vice Chair, Torts and Insurance Committee, (1988-91); Member, Litigation Section; Member, General Practice, Solo and Small Firm Section.

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National Bar Association, Judicial Division.

Fairfax Bar Association:

Co-Chair, Diversity Task Force (1996-97);  
 Continuing Legal Education Committee (1990-91); Judicial Member.

Northern Virginia Black Attorneys Association:

Board of Directors, (1990-92); President (1983-85).

Old Dominion Bar Association:

Conference Planning Committee, 51st Annual Conference (1991);  
 Programs Committee (1988); Co-Chairman, 46th Annual  
 Conference (1986); Co-Chairman, President's Reception (1986);  
 Judicial Member.

Virginia Trial Lawyers Association, Member.

Alexandria Bar Association:

Chairman, Judicial Selection Committee, (1983-87);  
 Law Day Committee; Judicial Member.

Alexandria Circuit Court:

Special Commissioner in Chancery, (1977-1992).

District of Columbia Bar, Member, (1976-95).

Virginia Supreme Court Professionalism Course Faculty (1990-1992)

The American University - Washington College of Law, Dean's Advisory Council  
 (1996 to present)

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

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**Organizations that are active in lobbying before public bodies:** None.

**Other Organizations to which I belong:**

Kappa Alpha Psi Fraternity, Inc. (Life member)

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Virginia, 1976  
 United States District Court for the Eastern District of Virginia, 1976  
 United States Bankruptcy Court for the Eastern District of Virginia, 1977  
 United States District Court for the District of Columbia, 1977  
 United States Court of Appeals for the District of Columbia Circuit, 1977  
 United States Court of Appeals for the Fourth Circuit, 1978  
 United States Court of Appeals for the Federal Circuit, 1982

District of Columbia Court of Appeals, 1977-1996:

*Explanation of lapse in membership:* Judicial office in Virginia does not require maintenance of out of state bar memberships. Therefore, I attempted to terminate my judicial membership in 1996 by not continuing to pay dues. I have just learned that allowing my membership to lapse in this manner is considered a suspension for nonpayment of dues. To correct this status, I have paid all past dues through June 30, 1999, and have been reinstated in good standing.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply three copies of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there are press reports about the speech, and they are readily available to you, please supply them.

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"A Road Map of Effective Trial Tactics," Practical Litigator, American Bar Association-American Law Institute (September 1995).

"How to Deal with S.O.B. Lawyers and Difficult Judges? Revisited." 41, No.3, Virginia Lawyer, (September 1992).

"A Busy Lawyer's Guide to Ways to Manage Stress and Increase Office Efficiency," Vol. 39, No. 1, Virginia Lawyer (July, 1990) and New York State Bar Journal, Vol. 63, No.7 (Nov. 1991), Reprinted 1997, General Practice Plus, and Pennsylvania Bar Association General Practice Section Newsletter;

"Lawyer as Counselor for the Small and Minority Business," Vol. 7, No. 3, The Compleat Lawyer (American Bar Association) (Summer, 1990);

Book Review: "When Hell Froze Over: The Untold Story of Doug Wilder, A Black Politician's Rise to Power in the South," George Mason University Law School Civil Rights Law Journal, Vol. 1, No.1, (Spring, 1990); Reprinted in Virginia Lawyer, Vol. 39, No. 1 (July 1990);

"The Black Lawyer in Virginia-Reflections Upon a Journey, 1938-1988," Vol. 37, No. 4, Virginia Lawyer (October, 1988); Reprinted in National Bar Association Magazine, Vol. 3, No. 3 (March, 1989);

Book Review: How to Get and Keep Good Clients, by Jay Foonberg, Vol. 35, No. 10, Virginia Bar News, (April, 1987);

"Conflict In the Attorney-Client Relationship: Multiple Representation and Federal Rule of Criminal Procedure 44 (c)," Vol.1, No. 15, Drug Law Report, (May-June, 1985), Clark Boardman, N.Y.;

"A Message From the Chairman"; "Management of Time and Stress"; "Tips on Handling Paper"; and "An Idea For Profit," General Practice Plus Newsletter (Fall/Winter 1986)

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"The Admissibility of Evidence Involving Advanced Technologies," Technology in the Courtroom, The Courthouse and The Law Office, The Fairfax Bar Association, (November 19, 1997);

"Examination of Specific Witnesses," 5th Annual Arlington County Bar Association Criminal Law Seminar, (June 24, 1989);

"Suppression of Tangible Evidence," 4th Annual Arlington County Bar Association Criminal Law Seminar, (June 25, 1988);

"First Day in Practice" Seminar, "Criminal Law Practice Materials," (October 10, 1986);

"Developing A Plan and Directing Your Future," Virginia Women Attorneys Association, "You Be the Judge" Seminar, (October 16, 1992);

"Backwards Never, Forward Forever: The Power of Dreams," Mount Vernon High School Class of 1996 Commencement Notes (Notes for speech, not verbatim text of speech; Unpublished);

"Who Will Defend the Poor in Criminal Cases? Court Appointed Counsel in Virginia," Vol. 34, No. 6; Virginia Bar News (December, 1985);

"Winning Contract Cases," Vol. V, No. 3, Lex Claudia (June, 1986), Virginia Women Attorneys Association;

Small Business Representation, American Bar Association-American Law Institute (1989) (Manual, attached). (I believe there was a video component to this seminar; however, I have been unsuccessful in my efforts to locate the video.);

"General Practitioner-The Citizen's Champion," Virginia Bar News (June, 1986) (I have been unsuccessful in my efforts to find a copy of this article. I have contacted the Virginia State Bar office in this regard, but they have been unable to locate a copy of the article.)

See Articles attached hereto as Exhibit 1.



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13. **Health:** What is the present state of your health? List the date of your last physical examination.

My health is good to excellent. My last physical examination was April 20, 1998.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I am a Judge on the Fairfax Circuit Court, 19th Judicial Circuit of Virginia. I was elected to this judicial office by the General Assembly of Virginia.

The Circuit Court is a court of general jurisdiction with legal and equitable jurisdiction over civil cases and criminal felony trials. The Circuit Court has original jurisdiction over all cases in chancery and civil cases at law. The Circuit Court has appellate jurisdiction to hear appeals *de novo* from all cases from the Juvenile Domestic Relations and General District Courts and certain administrative bodies. We hear jury and non-jury trials, jury and non-jury trials.

15. **Citations:** If you are or have been a judge provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions were not officially reported, please provide copies of the opinions.

- (1) Citations for the ten most significant opinions you have written:

Bushlow v. INOVA Health Systems Hospital, 40 Va. Cir. 121 (1996)

Smith v. Markham, 41 Va. Cir. 166 (1996)

Wheeler v. Gabay, 40 Va. Cir. 551 (1994)

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Papile v. Batman Development Co., 38 Va. Cir. 127 (1995)

Bernstein Brothers Management vs. Miller, 42 Va. Cir. 114 (1997)

Little Professor Book Co. v. Reston North Point, et. al., 41 Va. Cir. 73 (1996)

Winchester Homes, Inc. v. Hoover Universal, Inc., 30 Va. Cir. 22 (1992)

Cocoli v. Children's World Learning Centers, 41 Va. Cir. 589 (1994)

Perkins v. Stewart Title Guaranty Co., 38 Va. Cir. 71 (1995)

Commonwealth v. Wotherspoon, 36 Va. Cir. 112 (1995)

- (2) **Short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;**

1. Henderson v. Henderson, Record No. 970503 (Jan. 9, 1998).

This action was brought by a grandfather against his granddaughter. The grandfather sought rescission of a deed of gift on the grounds of undue influence and constructive fraud. The trial court ruled that the grandfather met his burden of proof on the constructive fraud claim and ordered the granddaughter to convey the property back to her grandfather. The Supreme Court of Virginia reversed the trial court decision by holding that the grandfather failed to meet his burden of proof. Specifically, the Court held that regardless of the weakness of the grandfather's mind, the grandfather failed to prove the material misrepresentation alleged in the Bill of Complaint. The Court ruled that there was no issue of adequacy of consideration since the property was conveyed by deed of gift.

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2. Matrix Mechanical Corp. v. Harrison, et al., 97 Vap UNP 2068964 (Mar. 25, 1997).

The underlying action involved a request for a return of real estate. The trial court ordered Matrix and Mitchell to convey property back to the Harrisons. The trial court concluded that Matrix and Mitchell's failure to deliver the deeds constituted contempt of court. The Virginia Court of Appeals reversed the trial court and held that Matrix and Mitchell were not in contempt for failure to comply with the Order. The Court of Appeals found that the trial court's order specifically required Matrix and Mitchell to execute the deeds within five days from the order, not deliver the deeds. As such, Matrix and Mitchell were not in contempt of court.

3. Street v. Street, 24 Va. App. 14 (1997).

This action was a domestic civil contempt case. The trial court incarcerated the husband for failure to pay spousal and child support. The Virginia Court of Appeals found that the trial court erred when it refused to allow the husband to call witnesses to prove that he was unable to pay his court-ordered support obligations.

4. NAJLA Associates v. William L. Griffith & Co. of Virginia, Inc., 253 Va. 83 (1997).

A contractor initiated this action by filing a motion for judgment seeking recovery of damages against a developer. The contractor alleged damages because of the developer's breach of an escrow agreement, as distinguished from damages for breach of a construction contract. At trial, Plaintiff moved to strike Defendant's evidence asserting that its purported damages were not reasonably contemplated at the time the parties executed the escrow agreement. The trial court denied the motion and submitted the case to the jury.

The Supreme Court of Virginia reversed the judgment. The Supreme Court held that since the plaintiff's purported damages in a breach of contract case are consequential, the plaintiff was required to prove that they were contemplated by the parties at the time of the execution of the agreement. Since the plaintiff presented no evidence, the judgment of the trial court was reversed.

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5. USAA Casualty Insur. Co. v. Hensley, et al., Record No. 950729 (Jan. 12, 1996).

This appeal arises out of a declaratory judgment action in which the trial court made a declaration about coverage under a USAA family automobile liability policy. Examining the language of the policy, the Supreme Court of Virginia held that the trial court erred in concluding that the liable driver was a "relative" under the policy, and thus covered for his liability. The Court found that given the facts and circumstances, reasonable persons could not differ in concluding that the liable driver was not a "relative" under the policy, and hence not covered for the accident.

6. Dodson v. Commonwealth of Virginia, 95 Vap UNP 2261944 (Nov. 28, 1995).

This action arises out of Defendant's convictions for robbery. The trial court allowed the Commonwealth to introduce an accomplice's statement after determining that the statement was a declaration against penal interest. The Virginia Court of Appeals held that the accomplice's statement was not against his penal interest when made because portions of the statement relating to events both during and after the offense did not subject the accomplice to criminal liability. Unable to find the error harmless, the Virginia Court of Appeals reversed the convictions.

7. Sullivan v. Commonwealth of Virginia, 17 Va. App. 376 (1993).

In this action, Defendant was convicted of driving under the influence of alcohol after the trial court found that the Commonwealth had complied with the implied consent law. The Virginia Court of Appeals reversed the conviction upon finding that the Commonwealth violated the implied consent law by failing to offer a blood test. The Commonwealth failed to establish that a blood test was unavailable at the time of Defendant's arrest. As such, the conviction was reversed.

*Affirmed In Part and Reversed In Part*

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8. Nguyen v. Dang, Record No. 0572-93-4 (Mar. 15, 1994).

In this case, the trial court amended nunc pro tunc the parties' final decree of divorce by incorporation of a property settlement agreement. The Virginia Court of Appeals affirmed the validity and incorporation of the property settlement agreement, but reversed the trial court's determination that the incorporation should be made nunc pro tunc. The Court of Appeals found that the incorporation was proper as the parties entered into a valid and binding final agreement. However, the Court of Appeals held that the power to amend nunc pro tunc is restricted to placing upon the record evidence of judicial action which has already been taken, but was omitted or misstated in the record. As such, the Court reversed the portion of the court's incorporation order making it effective nunc pro tunc.

*Affirmed, but with criticism*

9. Mathy, et al. v. Commonwealth of Virginia Department of Taxation, 483 S.E.2d 802 (Apr. 18, 1996).

This action was filed by taxpayers who were seeking relief from erroneous Virginia income tax assessments. The trial court granted the Department's motion for summary judgment after finding that the taxpayers were not entitled to the credit under Va. Code § 58.1-332(A). The court found the tax to be an unincorporated business tax on income which is imposed for the privilege of conducting business in the District of Columbia. The Virginia Supreme Court held that the trial court reached the correct result, but for the wrong reason. The Virginia Supreme Court held that the tax imposed on the plaintiffs was illegal and unauthorized under the Home Rule Act for the purposes of qualifying for a credit. Therefore, the Virginia Supreme Court held that the Plaintiffs were not entitled to a credit based on the plain language of the second paragraph of Code § 58.1-332(A).

See Unpublished Opinions attached hereto as Exhibit 2.



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- (3) Citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

None.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Metropolitan Washington Airports Authority, Board of Directors, (the managers of Washington National and Dulles International Airports), Virginia Appointee, November, 1990-April 30, 1992. I served on the Airports Operations Committee and worked with the Authority during part of its massive Capital Development Plan to improve both airports.

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No, I was not a judicial law clerk.

2. Whether you practiced alone, if so, the addresses and dates;

From October 1980 -1983, I was a sole practitioner in Alexandria, Virginia. My office address was 117 North Fairfax Street, Alexandria, from October 1980 to January 1981; 1001 Duke Street, Alexandria, Virginia, from January 1981 to September 1983; and 807 Franklin Street, Alexandria, Virginia, from January 1985 to November 1986.

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3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

9/76- 10/77 Wiggs & Holland  
Attorney/Associate  
515 Wythe Street  
Alexandria, Virginia 22314

1977-1978 Wiggs & Lee  
Attorney/Partner  
515 Wythe Street  
Alexandria, Virginia 22314

1978-1980 Wiggs Lee & McClerklin  
Attorney/Partner  
515 Wythe Street  
Alexandria, Virginia 22314

1980-1983 Law Offices of Gerald Bruce Lee  
Attorney/Owner  
117 North Fairfax Street (10/80-1/81)  
Alexandria, Virginia and  
1001 Duke Street (1/81-8/83)  
Alexandria, Virginia

1983- 1985 Lee & Finch  
Attorney/Partner  
807 Franklin Street  
Alexandria, Virginia 22314

1985- 11/86 Gerald Bruce Lee & Associates  
807 Franklin Street  
Alexandria, Virginia 22314

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11/86- 5/92 Cohen Dunn & Sinclair, P.C.  
 Attorney/Principal  
 221 South Alfred Street  
 Alexandria, Virginia 22314

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its general character has changed over the years?**

I was a trial lawyer for 15 years engaged in civil and criminal litigation practice in state and federal courts. I served as sole counsel in more than 300 trials. As a trial lawyer, I tried a wide variety of cases involving criminal law, personal injury, commercial law, business torts, contracts, civil rights, uniform commercial code and domestic relations. I tried cases in Circuit and General District Courts throughout the state. I represented individuals before the United States Civil Service Commission, and the United States Merit Systems Protection Board.

My representation of individuals in criminal matters in federal court spanned a wide variety of matters. I tried cases in all three districts of the Eastern District of Virginia and represented witnesses before federal grand juries in Virginia, Maryland, and Pennsylvania. I also represented individuals in federal criminal multi-defendant trials. I negotiated pleas in felony and misdemeanor cases.

- 2. Describe your typical former clients, and mention the areas, if any, in which you specialized.**

My typical former clients fell into three categories: individuals, small businesses, and medium-sized corporations.

Individuals: I represented individuals in connection with plaintiffs' personal injury claims and in the prosecution and defense of civil claims. I represented individuals in criminal matters from minor traffic infractions through felony trials in state and federal courts.

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Small businesses: I represented small businesses in incorporations and contract litigation.

Medium-sized corporations: I represented medium-sized corporations in commercial and defense litigation.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appeared in court on an average of 2 times a week throughout my 15 year career as a trial lawyer.

2. **What percentage of these appearances [during the last five years of law practice] was in:**

- |     |                               |   |
|-----|-------------------------------|---|
| (a) | <b>federal courts</b>         | 25%                                       |
| (b) | <b>state courts of record</b> | 65%                                       |
| (c) | <b>other courts</b>           | 10% General District Court<br>civil cases |

3. **What percentage of your litigation was:**

- |     |                 |     |
|-----|-----------------|-----|
| (a) | <b>civil</b>    | 60% |
| (b) | <b>criminal</b> | 40% |

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

I was sole counsel in at least 300 cases tried to verdict or judgment during the 15 years of private practice.

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5. What percentage of these trials was:

(a) Jury 20%

(b) Non-jury 80%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give citations, if the cases were reported, and the docket number and date, if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in full detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and the telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) **Case:** William and Anita Ginn vs. Brian Seeber, Trustee in Bankruptcy for the Estate of Cobb Island Cable Company, et al. (Wayne Price and Virginia Price)

**Court:** U.S. Court for the Eastern District of Virginia (Alex. Div.)

**Docket No.:** CA. 85-1327

**Dates of Representation:** 11/27/85 to 12/1/87

**Party I Represented:** Defendants Wayne and Virginia Price

**Judge:** Hon. Richard Williams, Judge

**Jury or Non-jury:** Non-jury

**Opposing Counsel:** K. Stewart Evans, Esquire

Pepper Hamilton, LLP.

1300 - 19th Street, N.W.

Washington, D.C. 20036-1685

(202) 828-1230



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**Summary:** I defended shareholder-promoters in a claim of securities fraud. The suit involved the promoter and an investor in a cable television company. I represented Virginia Price, an investor, and Wayne Price, the person primarily accused of fraud. We litigated issues involving disqualification of plaintiff's counsel for ethical conflict of interest, Fifth Amendment in a civil case, damages and Uniform Commercial Code secured transactions. (I defended Wayne Price in adversary litigation stemming from this suit in United States Bankruptcy Court for the District of Maryland in Rockville simultaneously with this suit as well.)

**Disposition:** The disposition was that Wayne Price was held liable and Virginia Price was absolved from responsibility.

(2) **Case:** Robert and June Hayles v. Berryland Development Company

**Court:** Fairfax Circuit Court

**Docket No.:** L-59817

**Party I Represented:** Plaintiffs

**Dates of Representation:** 1984

**Judge:** Hon. Thomas A. Middleton

**Jury or Non-jury:** Jury

**Opposing Counsel:** Douglas J. Sanderson, Esquire  
 McClandish & Lilliard, P.C.  
 11350 Random Hills Road, Suite 500  
 Fairfax, Virginia 22030-7429  
 (703) 273-2288

**Summary:** I represented the plaintiffs, prospective home buyers, in litigation against a builder-developer for return of a deposit on a residential real estate contract. The case involved issues of contract formation, offer, acceptance, mirror acceptance rule, and the mail box acceptance rule. We successfully presented the case to a jury and attained our clients' objectives.

**Disposition:** Verdict for plaintiffs on all issues.

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- (3) **Case:** Commonwealth of Virginia vs. Joann Paige  
**Court:** Alexandria Circuit Court  
**Docket No.:** CF-3574  
**Dates of Representation:** 1978  
**Party I Represented:** Defendant  
**Judge:** Hon. Donald H. Kent  
**Jury or non-jury:** Non-jury  
**Opposing Counsel:** John E. Greenbacker, Jr.  
     (Formerly) Assistant Commonwealth's Attorney-Alexandria  
     (Currently) Commonwealth's Attorney Halifax County  
                 Halifax County  
                 P.O. Bo 550  
                 Halifax, Virginia 24558  
                 (804) 476-2139

**Summary:** This was a case in which I defended a 32 year old woman charged with the murder of her former lover, who was shot once in the chest and twice in the back. The background investigation of the decedent and defendant's relationship revealed a history of domestic violence and abuse. I hired a psychologist and presented self defense "Battered Woman" evidence to the court. This case was one of the first cases in Northern Virginia where the "Battered Woman" defense was presented in defense to a murder charge. The court rejected the Battered Woman defense and considered evidence of self defense

**Disposition:** The defendant was acquitted.

- (4) **Case:** Commonwealth of Virginia vs. Carolyn Bothwell  
**Court:** Fairfax Circuit Court  
**Docket No.:** K-83090; 91-193685A  
**Dates of Representation:** 1990  
**Party I Represented:** Defendant  
**Judge:** Hon. Richard J. Jamborsky

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**Jury or Non-jury:** Jury requested

**Opposing Counsel:** Brett Kassabian, Esquire

(Assistant Commonwealth's Attorney Fairfax County)  
 Kassabian & Kassabian, PLC  
 4201 Annandale Road  
 Annandale, Virginia  
 (703) 750-3622

**Summary:** This was a criminal case involving malicious wounding. I represented a 34 year old woman charged with shooting her child's father in the chest with a .357 magnum. ( The complainant survived the wound.) The defendant and complainant had a quasi-matrimonial relationship for about five years. Our investigation revealed that over the course of five years, the complainant engaged in a pattern of drinking and physical abuse of the defendant. We located witnesses to brutality inflicted upon the defendant. Physical abuse was also substantiated by medical reports, police reports, and an ex-wife of the complainant. We were prepared to present evidence at trial of the "Battered Woman" defense with expert psychologist testimony. On the morning of the scheduled jury trial, the prosecutor offered a unique plea bargain, which resulted in a recommendation of probation.

**Disposition:** The defendant was sentenced to serve 60 days of home electronic incarceration and probation.

- (5) **Case:** United States vs. Donald David Haynie, Lynn Edward Fletcher, et al.  
**Court:** U.S. District Court for the Eastern District of Virginia (Alex. Div.)  
**Docket No.:** 79-5052; 79-5053; 79-5068; 79-5069; 79-5070  
**Dates of Representation:** 1978-1980  
**Party I Represented:** Defendant Lynn Edward Fletcher  
**Judge:** Hon. Albert V. Bryan, Jr.  
**Jury or non-jury:** Jury

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**Opposing Counsel:** Justin W. Williams, Assistant United States Attorney  
Eastern District of Virginia  
2100 Jamieson Avenue  
Alexandria, Virginia 22314  
(703) 299-3700

**Co-Counsel for Prosecution:**

Henry E. Hudson, Esquire (Former Assistant United  
States Attorney; currently in private practice)  
Reed Smith Shaw & McClay  
8251 Greensboro Drive, Suite 1100  
McLean, Virginia 22102-3844  
(703) 734-4600

Robert F. McDermott, Jr., Esquire (Former Assistant  
United States Attorney; currently in private practice)  
Jones Day Reavis & Pogue  
1450 G Street, N.W.  
Washington, D.C. 20005  
(202) 879-3875

**Summary:** This was a high-level marijuana smuggling and conspiracy case. The case involved multi-defendants, allegations of importation of drugs, and multi-jurisdictional activities in Florida, Virginia and Massachusetts. I defended an individual defendant's case at the trial level and was co-counsel in appeals. I attained my client's objective and was adopted to file an appeal to the Fourth Circuit in the case as co-counsel.

**Disposition:** My client was acquitted of the main count of conspiracy to import and possess with the intent to distribute drugs. He was found guilty of one count of distribution and possession with the intent to distribute marijuana and sentenced to serve six months.

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- (6) **Case:** United States v. Barry Toombs, et al. (Kenneth O'Day)  
**Court:** U.S. District Court of the Eastern District of Virginia (Alex. Div.)  
**Docket No.:** CR 82-151-A  
**Dates of Representation:** 1982  
**Party I Represented:** Defendants Kenneth O'Day and Charles M. Crocker  
**Judge:** Hon. Richard Williams  
**Jury or Non-jury:** Non-jury, plea  
**Opposing Counsel:** Karen Tandy, Esquire (202) 514-1286  
 U.S. Dept. of Justice  
 Bureau of Narcotics and Dangerous Drugs  
 Washington, D.C.

**Summary:** This was a large scale multi-defendant criminal drug conspiracy case. The case stemmed from a state criminal case in Charles County, Maryland, Circuit Court involving the stop of a sailboat laden with marijuana. The individuals involved in this case were high level drug traffickers. I represented two truck drivers. The significance of the case was its complexity and scope. I litigated issues involving federal grand jury, bail, material witness arrest, wiretap, disqualification, suppression and related issues. In the end, we received a favorable plea bargain to settle the case. I withdrew from the Crocker case to avoid a conflict of interest. Crocker later pled guilty.

**Disposition:** Plea bargain. Defendant O'Day pled guilty and sentenced to prison.

**Appeal Grand Jury:** United States v. Kenneth O'Day, Jr. No. 81-2042  
 667 F.2d 430 (4th Cir. 1981)

- (7) **Case:** Commonwealth of Virginia vs. Insencio Delacruz  
**Court:** Fairfax Circuit Court  
**Docket No.:** K60313  
**Dates of Representation:** 1989-90  
**Party I Represented:** Defendant



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**Judge:** Hon. Thomas A. Fortkort

**Jury or Non-jury:** jury

**Opposing Counsel:** Raymond Brownelle, Esquire  
Assistant Commonwealth's Attorney  
4110 Chain Bridge Road  
Fairfax, Virginia 22030  
(703) 246-2776

**Summary:** This was a weapons offense case in which I represented a 53 year old Hispanic immigrant shot by the police in an incident where the police killed his wife. The Fairfax County Police were looking for a murder suspect and conducted a search of the defendant's home. The defendant claimed that he was unaware the police were inside his home conducting a search and that thought the commotion he heard outside his bedroom door were burglars. He armed himself with a revolver for protection and his wife hid behind the bedroom door. When the police crashed through the bedroom door, the defendant did not respond to their direction to drop his weapon. The police shot him and his wife; his wife was killed. The police charged the defendant with brandishing a firearm. The case was tried twice, once without a jury in Fairfax General District Court and second with a jury in Fairfax Circuit Court. We finally won the case on appeal to the Court of Appeals of Virginia.

**Disposition:** The trial court refused to instruct the jury on self-defense and the defendant was convicted. His conviction was reversed on appeal and the charges against him were later dropped.

**Appeal:** Delacruz v. Commonwealth, 11 Va. App. 335 (1990) (the Court of Appeals reversed the trial court for failing to instruct the jury on self-defense.)

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- (8) **Case:** S. Dianne Thompson v. MCI Communications Corporation  
**Court:** U.S. District Court for the Eastern District of Virginia (Alex. Div.)  
**Docket No.:** CA. 90-563-A  
**Dates of Representation:** 5/21/90 - 11/21/90  
**Party I Represented:** Defendant, as Second Chair Associate Counsel  
**Judge:** Hon. T.S. Ellis, III  
**Jury or Non-jury:** jury  
**Lead Defense Co-Counsel:** Gloria Lett-Ferguson, Esquire  
(former in-house counsel for MCI)  
433 Canon House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515  
(202) 225-7096
- Opposing Counsel:** Jack Gould, Esquire  
10615 Judicial Drive, Suite 102  
Fairfax, Virginia 22030-5165  
(703) 273-6007

**Summary:** This was an employment case in which I served as defense co-counsel for MCI Communications Corporation in an action brought by an employee for breach of contract, wrongful discharge and intentional infliction of emotional distress under California law. Co-counsel and I tried the case before a jury for five days and argued issues involving of at-will employment and punitive damages. The case was tried under very liberal California law principles in federal court in Virginia. Our defense strategy was to focus the jury on the variety of problems the plaintiff was suffering in her own life that were not work related. The jury accepted a key component of our strategy and rendered a minimal verdict under the circumstances of the case.

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**Disposition:** The jury returned a verdict for MCI Communications on all counts except one. The jury verdict for the plaintiff was less than the authorized settlement amount and therefore a defense victory.

(9) **Case:** In Re: Paris Davis; Deborah Leiba v. Paris Davis  
**Court:** United States Bankruptcy Court, Eastern District of Virginia  
**Docket No.** 89-00266, 89-0560, 89-0123  
**Dates of Representation:** 1990  
**Party I Represented:** Debtor Paris Davis  
**Judge:** Hon. Douglas Tice  
**Jury or non-jury:** non-jury  
**Co-Counsel:** Kermit Rosenberg, Esquire  
Holmes Rosenberg & Doherty P.C.  
2020 North 14th Street, Suite 410  
Arlington, Virginia 22201  
(703) 526-0300

**Opposing Counsel:** Mitchell Singer, Esquire  
(Currently General Counsel)  
FC Business Systems  
5205 Leesburg Pike, Suite 700  
Falls Church, Virginia 22041  
(703) 931-7800

**Summary:** This case involved bankruptcy adversary litigation. I defended the debtor in post-judgment proceedings in Bankruptcy Court. The suit originated as an intentional tort suit in Alexandria Circuit Court, where a substantial default judgment was taken against the debtor. The judgment creditor was involved in extensive collection procedure and the debtor went into bankruptcy. I and co-counsel defended an adversary proceeding alleging bankruptcy fraud and non-dischargeability of the judgment debt. We successfully

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defended against a motion for summary judgment on the grounds of res judicata and collateral estoppel.

**Disposition:** The adversary proceeding based upon the non-dischargeability was dropped by the creditor. The court heard the case and dismissed the claim of bankruptcy fraud. The client received his discharge in bankruptcy.

(10) **Case:** United States v. William Roberts, et al.

**Court:** U.S. District Court for the Eastern District of Virginia (Rich. Div.)

**Docket No.:** 3:87CR113-02

**Dates of Representation:** 1988-89

**Party I represented:** Defendant William Roberts

**Judge:** Hon. James Randolph Spencer

**Jury or Non-jury:** jury

**Opposing Counsel:** N. George Metcalfe, Esquire

Assistant United States Attorney  
 for the Eastern District of Virginia  
 Richmond Division  
 600 East Main Street, Suite 800  
 Richmond, Virginia 23219  
 (804) 771-2186

**Summary:** This was a relatively high profile multi-defendant drug conspiracy case involving a reverse sting sale of a large quantity of marijuana by the government. The bail issues and motions were litigated before the United States Magistrate David Lowe and in the District Court for trial. On appeal to the Fourth Circuit, the convictions were upheld. The case was significant in that it elaborated on the law regarding the weight of the controlled substance as a factor in the calculation of Federal Sentencing Guidelines.

**Disposition:** Defendant Roberts was convicted of conspiracy to distribute drugs and sentenced to prison. The case was appealed to the

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U.S. Court of Appeals for the Fourth Circuit, Case No. 95-6666 United States v. William Ellwood Roberts, Jr., 881 F.2d 95 (4th Cir. 1989); judgment was affirmed.

**d. LITIGATION REFERENCES**

**As many of the cases described above are more than five years old, I am providing the names, addresses and telephone numbers of twelve members of the legal community who have had recent contact with me as a judge and/or as a lawyer:**

Hon. Johanna L. Fitzpatrick  
 Chief Judge  
 Court of Appeals of Virginia  
 10201 Main Street, Suite 200  
 (703) 359-1158

John D. McGavin, Esquire  
 Trichilo Bancroft McGavin Horvath & Judkins, P.C.  
 4117 Chain Bridge Road Suite 400  
 Fairfax, Virginia 22030-0022  
 (703) 385-1000

Edwin C. Brown, Jr., Esquire  
 Brown Brown & Brown  
 6220 Old Franconia Road  
 Alexandria, Virginia 22310  
 (703) 924-0223

James C. Clark, Esquire  
 Land Clark Carroll & Mendelson, P.C.  
 112 South Alfred Street, Suite 300  
 Alexandria, Virginia 22314  
 (703) 836-1000



**Hon. Gerald Bruce Lee**  
**United States Senate Questionnaire**  
**for Judicial Nominees - PARTS I, II & III**  
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Hon. John Kloch  
Circuit Court Judge  
(former Alexandria Commonwealth's Attorney)  
Alexandria Circuit Court  
520 King Street, 3rd Floor  
Alexandria, Virginia 22314  
(703) 838-4123

Carol Stone, Esquire  
Jordan Coyne & Savits  
10486 Armstrong Street  
Fairfax, Virginia 22030-3616  
(703) 246-0900

Rod Leffler, Esq.  
Leffler Hyland Henshaw & Thompson  
11320 Random Hills Road, Suite 540  
Fairfax, Virginia 22030  
(703) 293-9300

Carolyn C. Eaglin, Esquire  
Eaglin & Associates  
431 North Lee Street, Courtyard Square  
Alexandria, Virginia 22314  
(703) 549-9041

Peter Greenspun, Esquire  
Greenspun & Associates, P.C.  
10605 Judicial Drive, Suite A-5  
Fairfax, Virginia 22030-5167  
(703) 352-0100

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Brenda Rodriguez, Esquire  
 Allstate Insurance Co.  
 Staff Counsel  
 3141 Fairview Park Drive, Suite 175  
 Falls Church, Virginia 22042  
 (703) 207-3558

Mark Simmons, Esquire  
 Assistant Commonwealths Attorney  
 Fairfax County  
 4110 Chain Bridge Road  
 Fairfax, Virginia 22030  
 (703) 246-2776

Hon. Thomas A. Fortkort (Retired)  
 Circuit Court Judge  
 Fairfax Circuit Court  
 10210 Tamarack Drive  
 Vienna, Virginia 22180  
 (703) 281-3104

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters which did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

- a. Judicial Conference of Virginia  
 Chairman, Judicial Education Committee (1997-1998)  
 Member (1992-present)

As Chairman of the Judicial Education Committee, I, along with the Director of Judicial Education at the Supreme Court of Virginia, am responsible for directing the ongoing continuing educational programs for trial judges in Virginia. We design courses and course objectives, identify faculty, and design

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appropriate study materials for two major two-day training courses. As a member of the Committee, prior to becoming Chairman, I assisted the Committee in revamping judicial education so that judges would have a choice about elective specialty courses ( The Tract System). The Director of Judicial Education and I facilitated innovative "interactive" judicial educational programs. We conducted the first interactive conference in 1997 wherein Supreme Court Justices, Court of Appeals judges and trial judges interacted and focused on decision-making and values that go into decision-making. We are presenting a new "Evidence In Action" course for the May, 1998 judicial conference involving video and interactive education.

b. Virginia Circuit Court Judges' Benchbook Committee (1995 to Present)

As a member of the Benchbook Committee, I am responsible for contributing to the annual revising and updating of the Virginia trial judge's in-courtroom handbook, commonly referred to as the "Benchbook." The Benchbook is a two volume set which covers all major substantive and procedural areas handled by a Virginia Circuit Court Judge.

c. Fairfax Circuit Court Committees

(1) Chairman, Magistrates Committee (1993-95)

The Chief Judge removed supervision of our 29 magistrates from the General District Court and assigned the responsibility to the Magistrates' Committee. As Chairman of the Magistrate's Committee, I assisted in merit selection of magistrates, recruiting magistrate candidates from the community, and designing in-house local training programs. The Committee and I assisted the Chief Magistrate, Chief of Police, and the courts in the implementation of Video Conferencing by Computer Link of the Mason District Magistrates Office with the Mount Vernon Magistrates Office. This computer link saves taxpayers money by reducing the time police officers spend out of service processing routine arrests and allows one magistrate's office to serve two locations simultaneously.

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(2) Chairman, Courts Internet Committee (1997- present)

I led the Fairfax Courts and the Sheriff in the design and creation of a Home page on the Worldwide Web. I coordinated the effort so that Fairfax Circuit Court, General District Court and Juvenile and Domestic Relations District Court could present to the public comprehensive information about our courts and provide access to basic public information about the courts. Through our work, Fairfax was the first court system in Virginia to have a comprehensive presence on the Internet.

d. Virginia State Bar

First Chairman, General Practice of Law Section

I was one of the founders of the General Practice of Law Section of the Virginia State Bar. I was elected Chairman in 1986. As Chairman, I initiated the "First Day In Practice Course for Newly Admitted Lawyers" program in 1986. I contributed outlines and checklists on Criminal Law Practice to the First Day in Practice Manual. This course is one of the most popular courses in Virginia for new lawyers. Each year more than 200 new lawyers take the "First Day in Practice," which is in its 11th year of running. I continue to serve on the Board of the Section and contribute to publications and continuing education seminars.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangement, stock, options, uncompleted contracts and future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I have a vested interest in 401 (k) plans, an Individual Retirement Account and a Profit Sharing Plan with my former law firm(s). The total value of these funds is

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approximately \$109,492.91. I have not contributed any additional funds to these plans since my election to the bench in 1992.

Virginia Retirement System - As a member of the Virginia judiciary, I have earned 21 years toward a state retirement pension. (Earned at the rate of 3.5 years for each year of Judicial Service.) As of May 1, 1998, I will have served six years in the judiciary. At age 60, I will be eligible to receive benefits up to 75% of my last three years of salary.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.**

I will continue to follow the Code of Judicial Conduct and the Canons of Judicial Conduct for the State of Virginia. I do not hear cases which involve any financial interests I may hold.

If I perceive any conflict of interest, real or apparent, in any matter before the court, I will recuse myself. I would recuse myself from any matter involving my actions as a state trial judge which may be brought in federal court on a petition for writ of habeas corpus or other proceedings.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. **List all sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and**



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**other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics In Government Act of 1978, may be substituted here.)**

See Exhibit 3, Financial Disclosure Report, attached to Part IV.

- 5. Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See Exhibit 4, Financial Networth Statement, attached to Part IV.

- 6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of campaign, your title and responsibilities.**

From 1988 to 1992, I was the Local Eighth Congressional District Counsel to the Democratic Party of Virginia and represented the Congressional District in election law matters. I sued entities and individuals engaged in violations of the Virginia Fair Election Campaign Act. In 1988, I secured injunctive relief in Prince William County Circuit Court for illegal election day practices.

As counsel to the local party, in 1989, I represented the party and a candidate, Linda Puller, in an action for injunction before the Fairfax Circuit Court to enjoin unlawful election day practices.

### **III. GENERAL (PUBLIC)**

- 1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

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As a judge, I continue to participate in community programs, forums and speak to community groups and churches. I give about 6-8 motivational speeches to groups annually. In addition, I participate in the following programs:

Kamp Kappa Street Law Program (1994- present)  
 Kappa Alpha Psi, Fraternity, Inc., Alexandria-Fairfax Chapter  
 (20 hours)

I work with at risk youths at summer Kamp Kappa for one week during the summers. We teach young men ages 10-17 some basic legal principles and advocacy skills, as well as life skills. The class culminates with a mock trial at the Fairfax Circuit Court in my courtroom and includes a tour of the Fairfax Jail.

George Mason University Early Identification Program (1994- present)  
 Shadowing Experience Host Judge (5 hours)

Annually, I host high school students from disadvantaged families who are interested in pursuing a career in the law. The students spend a day in court and in chambers with me.

Court Appointed Counsel to the Indigent (1976-1992)

I served as court appointed counsel to the indigent in criminal cases in state courts for ten years and in federal courts for 15 years. I defended the indigent in matters as simple as traffic offenses and in at least two murder cases.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

No.

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3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

Yes. I was recommended to Senators Charles Robb and John Warner by Senator Robb's Judicial Selection Advisory Committee. I was personally interviewed by the committee on Saturday March 28, 1998. I was personally interviewed by Senator Charles Robb on Monday March 30, 1998. Senator Robb recommended my nomination to the President of the United States on March 31, 1998. I was also personally interviewed by Senator John Warner on April 23, 1998.

I initiated my consideration for nomination in December, 1997. Following the public announcement that Judge James C. Cacheris would take senior status in December 1997, I wrote to Virginia's senators to request consideration for nomination. Thereafter, the statewide bar association and local bar associations were notified of my interest in consideration for endorsement and interviews. I submitted extensive information to each association about my legal and judicial career. I completed bar association judicial questionnaire(s) as requested. I submitted my confidential Fairfax Bar Association Attorney Judicial Performance Evaluations to some of the associations for consideration.

I was endorsed by every statewide and local bar association in Virginia that participated in the process and received each of the 12 bar associations' endorsements.

My credentials and qualifications were evaluated by the following bar associations and rated as stated below:

Statewide Bar Associations:

Virginia Bar Association: "Highly Qualified," Highest Rating

Virginia State Bar: "Recommended," Highest Rating (personal interview)

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Old Dominion Bar Association: Only "Endorsed" Candidate, Highest Rating (personal interview)

Virginia Association of Defense Attorneys: "Recommended," Highest Rating

Virginia Trial Lawyers Association: "Highly Qualified," Highest Rating

Asian American Bar Association: Only "Endorsed" Candidate, Highest Rating (personal interview)

Virginia Association of Black Women Attorneys : Only "Endorsed" Candidate, Highest Rating

Virginia Women Attorneys Association: "Highly Recommended," Highest Rating (personal interview)

Local Bar Associations:

Alexandria Bar Association: "Highly Qualified," Highest Rating (personal interview)

Fairfax Bar Association: "Recommended," Highest Rating (personal interview)

Northern Virginia Black Attorneys Association: Only "Endorsed" Candidate, Highest Rating (personal interview)

Hispanic Bar Association of the Commonwealth of Virginia: Only "Endorsed" Candidate, Highest Rating (personal interview)

Other Significant Evaluations/Investigations:

The American Bar Association evaluated my credentials and gave me its rating of "Qualified";

The Federal Bureau of Investigation and the Department of Justice have completed evaluations/investigations of my credentials;

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On May 22, 1998, the President of the United States nominated me to serve as a United States District Court Judge for the Eastern District of Virginia.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.**

**Some of the characteristics of this "judicial activism" have even said to include:**

- a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**



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- e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

Judges should follow the law, adhere to settled precedents and avoid creating new or novel causes of action in the law. Judicial decision making must be guided by discipline and restraint within the law. Judicial decision-making that does not recognize and give credence to the separateness and distinctness of the role of the judiciary from that of the other branches of government lends itself to criticism for judicial activism. The Constitution of the United States expressly established three branches of government, each possessing separate and distinct powers from the other. The judiciary branch's role is to interpret and apply the law as settled to cases and controversies that are ripe, justiciable and otherwise properly before it. The judiciary's role is not to create law or to engage in judicial decision-making that usurps the prerogatives of the legislative and executive branches.

It is inappropriate for a judge to reach beyond the law, the facts and the legal issues in the cases before him or her in effort to create broad or sweeping remedies to further a personal agenda. A judge should make certain that each litigant is afforded the remedies provided by law. However, in doing so, the judge should avoid any tendency or temptation to use individual litigants or cases as a vehicle for imposing far-reaching mandates to broad classes of individuals. At all times, the judge's rulings should be sound, well reasoned, fully supported by legal precedents and applicable to the parties and issues properly before him or her.

AO-10 (w)  
Rev. 1/98**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial) Lee, Gerald B.	<b>2. Court or Organization</b> U.S. District Court E.D. Va.	<b>3. Date of Report</b> 04/30/1998
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Nominee: U.S. District Court	<b>5. Report Type (check type)</b> X Nomination, Date 05/22/1998 ____ Initial ____ Annual ____ Final	<b>6. Reporting Period</b> 01/01/1998 to 05/01/1998
<b>7. Chambers or Office Address</b> 19th Judicial Circuit Court 4110 Chain Bridge Road, 5th Fl Fairfax, VA 22030	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)

<input checked="" type="checkbox"/> NONE (No reportable positions.)	POSITION	NAME OF ORGANIZATION / ENTITY
1		
2		
3		

**II. AGREEMENTS** (Reporting individual only; see pp. 14-16 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 11/01/86	Cohen & Associates Pension and Profit Sharing Plan 401(k), with former law firm, no control
2 12-01-84	Lee & Finch Retirement Plan 401(K) Del. Charter Guarantee Trustee for
3 05/01/92	Virginia Retirement System, government pension, vested, 20 years as of 5/1/98

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME (your, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 01-01-97	Salary, Circuit Court Judge, Virginia	\$ 104,000.00
2 01-01-97	Surovell Jackson Colten & Dugan, P.C. (S)	
3 01/01/96	Salary, Fairfax Circuit Court	\$ 101,000.00
4 01/01/98	Salary, Fairfax Circuit Court Judge	\$ 108,000.00

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting

Lee, Gerald B.

Date of Report

04/30/1998

**SECTION HEADING.** (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

**PART 3. NON-INVESTMENT INCOME (cont'd.)**

Line	Date	Source and Type	Gross Income
5	01/01/96	Survoll Jackson Colten & Dugan, P.C., (S) \$	0.00
6	01/01/98	Surovell Jackson Colten & Dugan, P.C. (S) \$	0.00

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Lee, Gerald B.

Date of Report

04/30/1998

## IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input type="checkbox"/>	NONE	
1	None. Exempt.	
2		
3		
4		
5		
6		
7		

## V. GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE		
1	None. Exempt.		
2			
3			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE		
1			
2			
3			
4			
5			
6			

\* VAL CODES: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001 to \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
cc ora d B

Date of Report  
04/30/98

**VII. Page 1 INVESTMENTS and TRUSTS— income, value, transactions**

(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets	B Income during reporting period	C Gross value at end of reporting period	D Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(EX)" for ownership by dependent child	(1) Amount Code (A-I)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W) (1) Type (e.g., buy, sell, partial sale, merger, redemption) If not exempt from disclosure (2) Date: Month- (3) Value: Code (4) Gain: Code (5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure.			
NONE (No reportable income, assets, or transactions.)			
1 Cohen Associates Money Purchase Pension Plan 401(c) (e) Finch 401(c)	C	Dividend	T
3 AT T (Lee Finch 401)	A	Dividend	J T
4 BET Holdings Inc. (Lee Finch 401(K))	D		J T
5 Lucent Technologies (Lee Finch 401(K))			J T
NCR Corp Com (Lee Finch 401(K))			J T
Wal Mart stores, Inc (Lee Finch 401(K))			J T
Fidelity elect Regional Banks Fund	B	Dividend	J T
Fidelity Growth Income Fund IRA	C	Dividend	J T
10 Fidelity elect Regional Banks Fund IRA	C	Dividend	J T
11 T. Rowe Price Century Plan (c)	A	Dividend	J T
12 The American Funds Group (c)	D	Dividend	J T
13 Spartan Equity Index Fund (Hart Thomas 401(c)(1))	B	Dividend	J T
14 Asset Manager Growth Fund (Hart Thomas 401(K)(1))	B	Dividend	J T
15 Fidelity Magellan Fund (Hart Thomas 401(K)(1))	C	Dividend	T
1 Rental Property 1 Alexandria, VA (c)	A	Rent	W
1 Opp Quest for Opt A Fund (J)	A	Dividend	J T
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$5,001-\$100,000 L=\$50,001-\$100,000	D=\$5,001-\$15,000 M=\$15,001-\$250,000 N=\$250,001-\$500,000 P=\$500,001-\$1,000,000
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$50,001-\$100,000 P3=\$100,001-\$250,000 P4=\$250,001-\$500,000 P5=\$500,001-\$1,000,000	M=\$100,001-\$250,000 N=\$250,001-\$500,000 P=\$500,001-\$1,000,000 P2=\$1,000,001-\$5,000,000 P3=\$5,000,001-\$10,000,000 P4=\$10,000,001-\$25,000,000 P5=\$25,000,001-\$50,000,000 P6=\$50,000,001-\$100,000,000 P7=\$100,000,001-\$250,000,000 P8=\$250,000,001-\$500,000,000 P9=\$500,000,001-\$1,000,000,000 P10=\$1,000,000,001-\$5,000,000,000 P11=\$5,000,000,001-\$10,000,000,000 P12=\$10,000,000,001-\$25,000,000,000 P13=\$25,000,000,001-\$50,000,000,000 P14=\$50,000,000,001-\$100,000,000,000 P15=\$100,000,000,001-\$250,000,000,000 P16=\$250,000,000,001-\$500,000,000,000 P17=\$500,000,000,001-\$1,000,000,000,000 P18=\$1,000,000,000,001-\$5,000,000,000,000 P19=\$5,000,000,000,001-\$10,000,000,000,000 P20=\$10,000,000,000,001-\$25,000,000,000,000 P21=\$25,000,000,000,001-\$50,000,000,000,000 P22=\$50,000,000,000,001-\$100,000,000,000,000 P23=\$100,000,000,000,001-\$250,000,000,000,000 P24=\$250,000,000,000,001-\$500,000,000,000,000 P25=\$500,000,000,000,001-\$1,000,000,000,000,000 P26=\$1,000,000,000,000,001-\$5,000,000,000,000,000 P27=\$5,000,000,000,000,001-\$10,000,000,000,000,000 P28=\$10,000,000,000,000,001-\$25,000,000,000,000,000 P29=\$25,000,000,000,000,001-\$50,000,000,000,000,000 P30=\$50,000,000,000,000,001-\$100,000,000,000,000,000 P31=\$100,000,000,000,000,001-\$250,000,000,000,000,000 P32=\$250,000,000,000,000,001-\$500,000,000,000,000,000 P33=\$500,000,000,000,000,001-\$1,000,000,000,000,000,000 P34=\$1,000,000,000,000,000,001-\$5,000,000,000,000,000,000 P35=\$5,000,000,000,000,000,001-\$10,000,000,000,000,000,000 P36=\$10,000,000,000,000,000,001-\$25,000,000,000,000,000,000 P37=\$25,000,000,000,000,000,001-\$50,000,000,000,000,000,000 P38=\$50,000,000,000,000,000,001-\$100,000,000,000,000,000,000 P39=\$100,000,000,000,000,000,001-\$250,000,000,000,000,000,000 P40=\$250,000,000,000,000,000,001-\$500,000,000,000,000,000,000 P41=\$500,000,000,000,000,000,001-\$1,000,000,000,000,000,000,000 P42=\$1,000,000,000,000,000,000,001-\$5,000,000,000,000,000,000,000 P43=\$5,000,000,000,000,000,000,001-\$10,000,000,000,000,000,000,000 P44=\$10,000,000,000,000,000,000,001-\$25,000,000,000,000,000,000,000 P45=\$25,000,000,000,000,000,000,001-\$50,000,000,000,000,000,000,000 P46=\$50,000,000,000,000,000,000,001-\$100,000,000,000,000,000,000,000 P47=\$100,000,000,000,000,000,000,001-\$250,000,000,000,000,000,000,000 P48=\$250,000,000,000,000,000,000,001-\$500,000,000,000,000,000,000,000 P49=\$500,000,000,000,000,000,000,001-\$1,000,000,000,000,000,000,000,000 P50=\$1,000,000,000,000,000,000,000,001-\$5,000,000,000,000,000,000,000,000 P51=\$5,000,000,000,000,000,000,000,001-\$10,000,000,000,000,000,000,000,000 P52=\$10,000,000,000,000,000,000,000,001-\$25,000,000,000,000,000,000,000,000 P53=\$25,000,000,000,000,000,000,000,001-\$50,000,000,000,000,000,000,000,000 P54=\$50,000,000,000,000,000,000,000,001-\$100,000,000,000,000,0



**FINANCIAL DISCLOSURE REPORT**  
 Name of Person Reporting  
 Lee, Gerald B.

 Date of Report  
 01 / 30 / 98

*(Includes those of spouse and dependent children See pp. 16-14 of Instructions.)*
**VII. Page 2 INVESTMENTS and TRUSTS— income, value, transactions**

A	B		C		D				
Description of Assets	Income during reporting period		Gross value at end of reporting period		Transactions during reporting period				
<i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amount	Type	Value	Value	Type	(2)	(3)	(4)	(5)
	Code (A-H)	(e.g., dividend, rent or interest)	Code (J-P)	Code (Q-W)	(e.g., buy, sell, partial sale, merger, redemption)	Date	Value	Gain	Identity of buyer/seller (if private transaction)
<i>Place "(X)" after each asset exempt from prior disclosure.</i>						Month- Day	Code (J-P)	Code (A-H)	

Place "(X)" after each asset exempt from prior disclosure.

NONE (No reportable income, assets, or transactions.)

1	Alger Capital Appr Fund	A	Dividend	J	T				
1	AJM Constellation Fund	A	Dividend	J	T				
20	Johnson Controls	A	Dividend	J	T				
21	U.S. West Media Group (Lee Finch 401K)	A	div.	J	T				

22

23

24

25

2

2

2

2

31

32

33

34

1	Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4)	F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000
2	Val Codes: J=\$15,000 or less (Col. C1, D3)	O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more
3	Val Meth Codes: Q=Appraisal (Col. C2)	U=Book Value	R=Cost (real estate only) V=Other	S=Amortment W=Estimated	T=Cash/Market	

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Lee, Gerald B.	Date of Report 04/30/1998
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.***(Indicate part of report.)*

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Lee, Gerald B.	Date of Report 04/30/1998
--	------------------------------

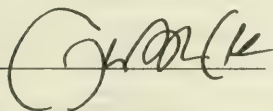
**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

5-26-98

**Note:**

Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

SUBMITTED TO: **BURKE & HERBERT BANK & TRUST CO.**

Cash Income & Expenditures Statement For Year Ended _____		(Omit cents)	
ANNUAL INCOME	AMOUNT (\$)	ANNUAL EXPENDITURES	AMOUNT (\$)
Salary (applicant)	\$ 108,174.	Federal Income and Other Taxes	\$
Salary (co-applicant)	66,000.	State Income and Other Taxes	
Bonuses & Commissions (applicant)		Rental Payments, Co-op, or Condo Maintenance	
Bonuses & Commissions (co-applicant)		Mortgage Payments	Residential Investment
Rental Income		Property Taxes	Residential Investment
Interest Income		Interest & Principal Payments on Loans	
Dividend Income		Insurance	
Capital Gains		Investments (including tax shelters)	
Partnership Income		Alimony/Child Support	
Other Investment Income		Tuition	
Other Income (List)**		Other Living Expense	
		Medical Expenses	
		Other Expense (List)	
<b>TOTAL INCOME ►</b>	<b>\$ 174,174.</b>	<b>TOTAL EXPENDITURES ►</b>	<b>\$</b>

Any significant changes expected in the next 12 months? ☐ Yes ☐ No (If yes, attach information).

\*\* Income from alimony, child support, or separate maintenance income need not be revealed if the applicant or co-applicant does not wish to have it considered as a basis for repaying this obligation.

Balance Sheet as of 4-18-98

<b>ASSETS</b>	<b>AMOUNT (\$)</b>	<b>LIABILITIES</b>	<b>AMOUNT (\$)</b>
Cash in this Bank (including money market accounts, CDs)	\$ 4900.	Notes Payable to this Bank Secured (gbl car)	X X X \$0,000.
in Other Financial Institutions (List including money market accounts, CDs)		Unsecured	
		Notes Payable to Others (Schedule E)	X X X
		Secured	
		Unsecured	
		Accounts Payable (including credit cards)	19,297.
		Margin Accounts	
Readily Marketable Securities (Schedule A)	12,045.	Notes Due: Partnership (Schedule D)	
Non-Readily Marketable Securities (Schedule A)		Taxes Payable	
Accounts and Notes Receivable		Mortgage Debt (Schedule C)	237,228.
Net Cash Surrender Value of Life Insurance (Schedule B)		Life Insurance Loans (Schedule B)	
Residential Real Estate (Schedule C)	335,000.	Other Liabilities (List):	
Real Estate Investments (Schedule C)			
Partnerships / PC Interests (Schedule D)			
IRA, Keogh, Profit-Sharing & Other Vested Retirement Accts.	149,290.		
Deferred Income (number of years deferred _____ )			
Personal Property (including automobiles)	15,000.		
Other Assets (List):			
		<b>TOTAL LIABILITIES</b>	273,526.
		<b>NET WORTH</b>	242,709.
	<b>\$516,235.</b>		<b>\$</b>

CONTINGENT LIABILITIES	YES	NO	AMOUNT
Are you a guarantor, co-maker, or endorser for any debt of an individual, corporation, or partnership?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	\$ _____
Do you have any outstanding letters of credit or surety bonds?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____
Are there any suits or legal actions pending against you?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____
Are you contingently liable on any lease or contract?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____
Are any of your tax obligations past due?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____
What would be your total estimated tax liability if you were to sell your major assets?			_____
If yes for any of the above, give details:			

Schedule A - All Securities (including non-money market mutual funds)							
No. of Shares (Units) or Face Value (Dollars)	DESCRIPTION	OWNER(S)	WHERE HELD	DATE	CURRENT MARKET VALUE	PLEGGED	
						YES	NO
READILY MARKETABLE SECURITIES (including U.S. Government and Municipalities)							
144	Opp.Quest Opp A	joint ten.	self	42.420	5786.63	<input type="checkbox"/>	<input checked="" type="checkbox"/>
106	Alger Cap. Appr.	joint ten.	self	27.250	2903.35	<input type="checkbox"/>	<input checked="" type="checkbox"/>
102	ATM Constellation	" "	" "	29.350	3001.30	<input type="checkbox"/>	<input checked="" type="checkbox"/>
06	Johnson Controls	" "	" "	59.000	354.00	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ONLY MARKETABLE SECURITIES (closely held, thinly traded, or restricted stock)							
						<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>

\* If not enough space, attach a separate schedule or brokerage statement and enter totals only.



**Life Insurance** (use additional sheet if necessary)

**Life Insurance** (use additional sheet if necessary)

Insurance Company	Face Amount of Policy	Type of Policy	Beneficiary	Cash Surrender Value	Amount Borrowed	Ownership
Life of Va. Inc	216k	term	wife	0	0	self
New Eng. Life	150k	whole	wife	2879	0	self
Primerica	170k	term	son, others	0	0	self

Disability Insurance	Applicant	Co-Applicant
Monthly Distribution if Disabled	2500	1200
Number of Years Covered	15 yr.	2 yr.

**Schedule C - Personal Residence & Real Estate Investments, Mortgage Debt (majority ownership only)**

[illegible]

## Schedule D - Partnerships (less than majority ownership for real estate partnerships)\*

[illegible]

\* **Note:** For investments which represent a material portion of your total assets, please include the relevant financial statements or tax returns, or in the case of partnership investments or S-corporations, schedule K-1s.

**Schedule E - Notes Payable**

Schedule C - Notes Payable								
Due to	Type of Facility	Amount of Line	Secured		Collateral	Interest Rate	Maturity	Unpaid Balance
			Yes	No				
			<input type="checkbox"/>	<input type="checkbox"/>				
			<input type="checkbox"/>	<input type="checkbox"/>				
			<input type="checkbox"/>	<input type="checkbox"/>				
			<input type="checkbox"/>	<input type="checkbox"/>				
			<input type="checkbox"/>	<input type="checkbox"/>				

**Please Answer The Following Questions:**

1. Income tax returns filed through (date) 1997 Are any returns currently being audited or contested? ☐ Yes ☒ No  
yes, what year(s)? \_\_\_\_\_
2. Have (either of) you or any firm in which you were a major owner ever declared bankruptcy? ☐ Yes ☒ No  
If yes, please provide details: \_\_\_\_\_
3. Have you drawn a will? ☐ Yes ☒ No  
If yes, please furnish the name of the executor(s) and year will was drawn: \_\_\_\_\_
4. Number of dependents (excluding self) and relationship to applicant: 0
5. Have you ever had a financial plan prepared for you? ☐ Yes ☒ No
6. Did you include two years federal and state tax returns? ☒ Yes ☐ No
7. Do (either of) you have a line of credit or unused credit facility at any other institution(s)? ☐ Yes ☒ No  
If so, please indicate where, how much, and name of banker: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
8. Do you anticipate any substantial inheritances? ☐ Yes ☒ No  
If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_

**Representations and Warranties**

The information contained in this statement is provided to induce you to extend or to continue the extension of credit to the undersigned or to others upon the guarantee of the undersigned. The undersigned acknowledge and understand that you are relying on the information provided herein in deciding to grant or continue credit or to accept a guarantee thereof. Each of the undersigned represents, warrants and certifies that the information provided herein is true, correct and complete. Each of the undersigned agrees to notify you immediately and in writing of any change in name, address, or employment and of any material adverse change (1) in any of the information contained in this statement or (2) in the financial condition of any of the undersigned or (3) in the ability of any of the undersigned to perform its (or their) obligations to you. In the absence of such notice or a new and full written statement, this should be considered as a continuing statement and substantially correct. If the undersigned fail to notify you as required above, or if any of the information herein should prove to be inaccurate or incomplete in any material respect, you may declare the indebtedness of the undersigned or the indebtedness guaranteed by the undersigned, as the case may be, immediately due and payable. You are authorized to make all inquiries you deem necessary to verify the accuracy of the information contained herein and to determine the credit-worthiness of the undersigned. The undersigned authorize any person or consumer reporting agency to give you any information it may have on the undersigned. Each of the undersigned authorizes you to answer questions about your credit experience with the undersigned. As long as any obligation or guarantee of the undersigned to you is outstanding, the undersigned shall supply annually an updated financial statement. This personal financial statement and any other financial or other information that the undersigned give you shall be your property.

Date

May 27, 1998

Your Signature



Date

Co-Applicant's Signature (if you are requesting  
the financial accommodation jointly)

**GERALD BRUCE LEE DEBT SCHEDULE**

MBNA Platinum Card	1625.41
Corestates Bank	258.00
Discover	33.57
Nationsbank Visa	100.00
Citibank Visa	1177.96
Burke & Herbert Bank (auto)	10,000.00

**EDNA RUTH VINCENT DEBT SCHEDULE**

Choice Visa	3814.28
First Virginia Bank (auto)	7000.00
SallieMae (student loans)	12,288.28

**Nora M. Manella**

- Nora Margaret Manella

- (Office) United States Courthouse  
312 N. Spring Street  
Los Angeles, California 90012

- January 22, 1951  
Los Angeles, California

- Single, never married

- 1972-1975 University of Southern California Law Center  
Degree: J.D., Order of the Coif, 1975

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1972 (Summer):      Irell & Manella  
                              1800 Avenue of the Stars, Suite 900  
                              Los Angeles, CA 90067  
                              Law Librarian

1974 (Summer):      O'Melveny & Myers  
                              400 South Hope Street (present address)  
                              Los Angeles, CA 90067  
                              Summer Law Clerk

1975-1976:            Hon. John Minor Wisdom  
                              United States Court of Appeals, Fifth Circuit  
                              Wisdom Federal Courthouse  
                              600 Camp Street, Room 200  
                              New Orleans, LA 70130  
                              Appellate Law Clerk

1976-1978:            U. S. Senate Judiciary Subcommittee on  
                              the Constitution  
                              Russell Senate Office Building  
                              Washington, D. C.  
                              Legal Counsel

1978-1979:            O'Melveny & Myers  
                              555 13th Street, N.W. (present address)  
                              Washington, D. C. 20004  
                              Associate

1979-1982:            O'Melveny & Myers  
                              400 S. Hope Street (present address)  
                              Los Angeles, CA 90071  
                              Associate



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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Employment Record - Continued:

1982-1990: United States Attorney's Office  
 312 N. Spring Street  
 Los Angeles, CA 90012  
 Assistant United States Attorney  
 Criminal Division  
 (1982-'86 - Major Crimes Unit  
 1986-'87 - Deputy Chief, Criminal Complaints  
 1988-'90 - Chief, Criminal Appeals)

1990-1992: Judge, Los Angeles Municipal Court  
 110 N. Grand Avenue  
 Los Angeles, CA 90012

1992-1993: Judge, Los Angeles Superior Court  
 111 N. Hill Street  
 Los Angeles, CA 90012

1994-Present: United States Attorney  
 Central District of California  
 United States Courthouse  
 312 N. Spring Street  
 Los Angeles, CA 90012

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Wellesley College:

Phi Beta Kappa  
 Highest Honors in Major (Italian)  
 Durant Scholar  
 Pendleton Scholar  
 Honors Vocal Candidate  
 Nominee, Henry Luce Fellowship (declined)

University of Southern California Law School:

Order of the Coif  
 Notes & Articles Editor, Law Review  
 AmJur Awards: Contracts, Evidence

Elected to membership in American Law Institute, 1991

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Executive Committee, Ninth Circuit Judicial Conference (1996-present)  
 American Law Institute (1991-present)  
 California Judges Association (1990-present)  
 Board of Councilors, University of Southern California Law School  
 (1995-present)  
 Board of Directors, Association of Business Trial Lawyers (1994-present)  
 National Association of Women Judges (1990-present)  
 Editorial Board, State Bar Criminal Law Newsletter (1991-'92)  
 Federal Bar Association (1980's-present)  
 Women Lawyers of Los Angeles (1980's-present)  
 Los Angeles Superior Court: Psychiatric Experts Committee (1993)  
 Los Angeles Municipal Court: Legislation, Education and Delay  
 Reduction Committees (1991-'92)  
 Attorney General's Advisory Committee (1994-'95)

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The other organizations to which I belong are civic and cultural in nature. I am not aware of any lobbying activities by these organizations.

Metropolitan Opera Guild (1970's-present)  
 Los Angeles Opera League (1980's-present)  
 Los Angeles County Museum of Art (1980's-present)  
 KUSC (classical music radio station for Southern California)  
 (1980's-present)  
 KCET (local public television station) (1980's-present)  
 Chancery Club (local lawyers luncheon club) [no by-laws]

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

California Supreme Court, 1/28/76  
 U. S. Court of Appeals, Fifth Circuit, 6/5/76  
 District of Columbia Court of Appeals, 9/8/78  
 U. S. District Court, District of Columbia, 10/2/78  
 United States Court of Appeals, Ninth Circuit, 5/16/78  
 United States District Courts (California): Central,  
 Southern, Northern, Eastern Districts, 1980-'81

From 1979 to 1994, I maintained an "inactive" membership in the District of Columbia Bar. When I did not renew my inactive status in 1994, I was placed on "suspended" status. In 1998, I reinstated my inactive membership and resigned from the D.C. Bar.

As required by law, I terminated my membership in the State Bar of California in 1990 when I became a state court judge. I rejoined the State Bar when I became United States Attorney in 1994.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

While sitting by designation on the California Court of Appeal in 1992, I authored numerous opinions in civil and criminal cases, three of which were published. The published opinions were:

People v. Doss (1992) 4 Cal. App. 4th 1585 (copy attached)

Montrose Chemical Corp. v. Superior Court (1992) (copy attached)  
 8 Cal. App. 4th 260 (decision upheld by California  
 Supreme Court at 6 Cal. 4th 287 (1993))

Godwin v. City of Bellflower (1992) 5 Cal. App. 4th 1625 (copy attached)

I authored one article and co-authored another in the 1992 California State Bar Criminal Law Newsletter:

Judicial Insights, or What's Bugging the Judge Today? (copy attached)

Overhauling the State Criminal Law on Victim Restitution (copy attached)  
 (co-authored with attorney Brian Hennigan)

An Op-Ed piece I authored entitled "Attacking Crack Where It Lives" was published in the Los Angeles Times in 1995. (copy attached)

Also attached are copies of speeches, notes of speeches, and press reports of remarks delivered to bar associations, law enforcement groups, civic organizations and law school students.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. 1998

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed to the Los Angeles Municipal Court by Governor George Deukmejian in 1990. The jurisdiction of the court includes misdemeanors, small claims cases, and felony preliminary hearings.

From February to May 1992, I served by designation of the Chief Justice of the California Supreme Court as a justice pro tem on the State Court of Appeal. That court hears appeals of civil and criminal matters from the Superior Court.

I was appointed to the Los Angeles Superior Court by Governor Pete Wilson in late 1992. The jurisdiction of the court includes both civil disputes and criminal felonies. I handled an exclusively criminal calendar.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

While sitting by designation on the State Court of Appeal, I authored several opinions, three of which were published, and one of which was unanimously upheld in a separate opinion by the California Supreme Court. Copies of ten opinions are attached.

People v. Doss (1992) 4 Cal. App. 4th 1585

Montrose Chemical Corp. v. Superior Court, (1992) 8 Cal. App. 4th 260, aff'd at 6 Cal. 4th 287 (1993)

Godwin v. City of Bellflower (1992) 5 Cal. App. 4th 1625

People v. Rosales, et al., No. B042318

People v. Arnold, No. B056537



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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People v. Robinson, No. B050529

LaMirada Centers v. The Southland Corp., No. B047876

Rardin v. Griesbach, No. B052920

Young v. Board of Pension Commissioners, No. B056168

Ajrab, dba All Cities Construction, v. Shields, No. B058945

I issued no published or unpublished opinions as a Superior Court or Municipal Court judge. To the best of my knowledge, there were no reversals of convictions in cases over which I presided as a trial judge, and I know of no criticisms of substantive or procedural rulings made while I was a trial judge or while sitting by designation on the Court of Appeal.

In the two most significant cases over which I presided as a Superior Court judge, challenges to the convictions and sentences were rejected and the judgments affirmed in full. In People v. Andres Osorio (BA054158), I sentenced a defendant to 100 years in prison following his conviction for multiple counts of rape, kidnapping, robbery and forcible sodomy. The conviction and sentence were upheld on appeal in an unpublished opinion, a copy of which is attached (B075065). In People v. Vernon Robinson (BA030830), the defendant was convicted of a murder committed 30 years earlier. I denied a motion to dismiss for a violation of due process based on the delay between the murder and the defendant's arrest, and later denied the defendant's motion for a new trial. I sentenced the defendant to life imprisonment. The conviction and sentence were affirmed in full in an unpublished opinion, a copy of which is attached (B081403).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I currently serve as United States Attorney for the Central District of California. I was nominated and confirmed in 1993. I took office January 3, 1994.

I have never run for elective office.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

From 1975 to 1976, following graduation from law school, I clerked for the Honorable John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana.

Address: Hon. John Minor Wisdom  
 Wisdom Federal Courthouse  
 600 Camp Street  
 New Orleans, LA 70118  
 (504) 589-2733

2. Whether you practiced alone, and if so, the addresses and dates:

I have never practiced alone.

3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

From 1976 to 1978, I served as legal counsel to the U.S. Senate Judiciary Subcommittee on the Constitution in Washington, D.C.

Address: Russell Senate Office Building  
 Washington, D.C.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

From 1978 to 1982, I practiced corporate civil litigation with O'Melveny & Myers in the firm's Washington and Los Angeles offices.

Addresses: O'Melveny & Myers  
 555 13th Street, N.W.  
 Washington, D.C. 20004  
 (202) 383-5300

O'Melveny & Myers  
 400 South Hope Street  
 Los Angeles, California 90071  
 (213) 669-6000

From 1982 to 1990, I served as an Assistant United States Attorney, Criminal Division, for the Central District of California. During the last two years, I served as Chief of Appeals, supervising all criminal appellate litigation from the 100-attorney office to the Ninth Circuit Court of Appeals.

Address: Office of the U.S. Attorney  
 U. S. Courthouse  
 312 North Spring Street  
 Los Angeles, California 90012  
 (213) 894-2434

In 1990, I was appointed by Governor George Deukmejian to the Los Angeles Municipal Court. In 1991, I served by designation of the Chief Justice on the State Court of Appeal. In 1992, I was elevated by Governor Pete Wilson to the Los Angeles Superior Court.

Addresses: Los Angeles Municipal Court  
 110 N. Grand Avenue  
 Los Angeles, California 90012  
 (213) 974-6171

California Court of Appeal  
 300 S. Spring Street  
 Los Angeles, California 90013  
 (213) 346-3002

Los Angeles Superior Court  
 111 N. Hill Street  
 Los Angeles, California 90012  
 (213) 974-5554

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

Since January 1994, I have been the United States Attorney for the Central District of California (U. S. Courthouse, 312 North Spring Street, Los Angeles, California 90012). For the past four and a half years, I have been the chief federal law enforcement officer for the largest judicial district in the nation, encompassing 40,000 square miles with a population of 16 million. I administer an office of over 450 employees, including 235 federal prosecutors and civil litigators representing the United States and its agencies from offices in Los Angeles and Orange County.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

As noted above, I have been a civil litigator, federal prosecutor, state court trial judge, briefly a court of appeal justice, and the United States Attorney. The bulk of my career as a practicing lawyer has been in federal court.

As counsel to the Senate Judiciary Subcommittee on the Constitution, I worked primarily on the first drafts of what would become the Civil Rights of Institutionalized Persons Act, a law designed to give the Justice Department standing to bring civil actions against institutions for the mentally ill, the incarcerated and the elderly, which were engaged in systematic deprivations of their residents' constitutional and federal statutory rights. I provided legal advice to the Chairman (Senator Birch Bayh), organized hearings, and drafted the Subcommittee Report on the bill, which was voted out of committee, subsequently passed, and signed into law.

As an associate at O'Melveny & Myers, I represented clients in depositions, handled discovery and prepared pretrial and trial motions in a variety of civil matters involving issues of contract, tort, antitrust and First Amendment law. While in the Washington, D.C. office (1978-'79), I worked on regulatory, administrative and legislative matters. While in the Los Angeles office (1979-'82), I participated in two antitrust trials, representing the National Football League and Host International.

As an Assistant U.S. Attorney, for eight years I served as a trial attorney in the Criminal Division, as Deputy Chief of Complaints, and as Chief of Appeals. As a federal prosecutor in the Major Crimes section, I supervised the investigation of, and subsequently tried, federal felony cases, including mail and wire fraud, commodities fraud, narcotics trafficking, bank robbery, murder, embezzlement, and sabotage. In addition to investigating and presenting the evidence to the grand jury for indictment, I tried the cases, handled pretrial and post-trial motions, wrote the appellate briefs, and argued the appeals before the Ninth Circuit.



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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As Deputy Chief of Complaints (1986-'88), I supervised the work of Assistant U.S. Attorneys in the criminal intake unit of the office. I approved arrests and indictments, and oversaw the operation of fifteen federal grand juries.

As Chief of Appeals (1988-'90), I supervised the submission of 250-300 briefs filed annually in the Ninth Circuit Court of Appeals. In addition to overseeing the work of all prosecutors in the office, I personally briefed and argued cases before the circuit. I kept abreast of significant developments in federal law and coordinated with the Justice Department to select cases for rehearing before the circuit and the U.S. Supreme Court.

In 1990, Governor George Deukmejian appointed me to the Los Angeles Municipal Court. For the next two years, I handled primarily criminal and some civil matters in individual and master calendar courts, and conducted felony preliminary hearings in several branches of the court, from downtown Los Angeles to the San Fernando Valley.

In the first half of 1992, I served by designation of California Chief Justice Malcolm Lucas as a justice pro tem on the State Court of Appeal. In that capacity, I authored numerous opinions in civil and criminal cases, three of which were published, and one of which was unanimously upheld by the California Supreme Court.

In late 1992, I was appointed by Governor Pete Wilson to the Los Angeles Superior Court. I sat in the Criminal Courts Building in downtown Los Angeles, presiding over a docket of approximately 111 felony cases. Typical charges included kidnapping, murder, rape, narcotics trafficking and sexual abuse of minors. As an individual calendar judge, I handled every aspect of my cases from the time of arraignment, including pretrial motions, trials, post-conviction motions, probation revocation hearings, and habeas corpus petitions.

For over four years I have been the U. S. Attorney for the largest district in the nation, serving a district of 16 million people with 235 criminal prosecutors and civil litigators. (The next largest district contains less than half the population of the Central District.) As United States Attorney, I have overall management responsibility for the office. I set prosecutive priorities and office policies and oversee the implementation of those policies through directives to my Chief Assistant, Executive Assistant, Chiefs of Criminal and Civil Divisions, and individual Section Chiefs. I exercise final prosecutive authority over the major cases in the office, and review and approve all recommendations for or against appeal of adverse decisions from the district court and



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

Court of Appeals. I exercise approval authority over all civil settlements of up to one million dollars, and make recommendations in cases where the likely settlement exceeds that amount. In conjunction with my death penalty committee, I make the final recommendation to the Attorney General whether to seek the death penalty in death penalty eligible cases.

I interface with the Appellate Section of the Department of Justice's Criminal Division and the Solicitor General's office in determining whether to seek Supreme Court review of cases from the Ninth Circuit. I was personally involved in the Solicitor General's decision to seek certiorari in United States v. Armstrong, 517 U.S. 456 (1996), which led to the 8-1 reversal of a decision by an en banc panel of the Ninth Circuit, and held that a defendant seeking discovery on a claim that he was singled out for prosecution on the basis of race must make a threshold showing that the government had declined to prosecute similarly situated suspects of other races. I also lobbied the Department of Justice and the Solicitor General to seek certiorari in United States v. Ursery and United States v. \$405,089.23, 518 U.S. 267 (1996), which overturned, 8-1, a decision by the Ninth Circuit and held that civil in rem forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause.

I am the chief liaison between this office and federal law enforcement in Southern California, including the FBI, IRS, Secret Service, Customs, INS, Postal Inspection Service, and numerous other agencies. I am also the principal liaison between this office and the local law enforcement community, including the major police departments, such as the Los Angeles Police and Los Angeles Sheriff's Departments, as well as scores of local police departments throughout the district. I oversee this office's coordination with federal, state, and local law enforcement on initiatives of high priority, including violent crime, health care fraud, and sexual exploitation of children.

Successful prosecutions during my tenure have included: the convictions of nearly two dozen members of the Mexican Mafia in the first RICO prosecution against a violent criminal enterprise ever brought in this district; the conviction of a U.S. Congressman for corruption; the conviction of a Governor of a neighboring state for bank fraud; the conviction of a former City Councilwoman for corruption; the conviction of a U.S. Congressman for campaign finance fraud; the corporate conviction and record \$6.5 million criminal fine in a hazardous waste environmental case; and the corporate conviction and record \$18.5 million fine against a contractor for falsification of test records of military parts. This office was also key to the success of "Zorro II," a nationwide initiative that led to the arrests of 150 defendants and the seizure of six tons of cocaine. This office's Civil Division has vigorously pursued affirmative civil remedies in the areas of environmental dumping, health care fraud, and qui tam litigation, securing settlements of up to \$82 million.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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The convictions secured by my office withstand appeal. In 1996, the office prevailed in over 95.5% of the cases appealed, and fewer than 1% of the over 500 decisions of the Ninth Circuit in cases from this office resulted in reversals on all counts of conviction. In ten out of twelve cases this office appealed, the government prevailed.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

There have been no "typical clients." At O'Melveny & Myers, I represented corporate clients in commercial litigation. As an Assistant United States Attorney, my "client" was the United States. As U.S. Attorney, I head an office that represents the United States and federal agencies in actions ranging from Federal Tort Claims litigation to Title VII cases. My Civil Division also represents individual federal agents in Bivens actions.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

As United States Attorney (1994-present), I generally appear in court only in an advisory capacity or when specifically requested by the district judge. In this district it is unusual for the U.S. Attorney to try cases, and difficult to reconcile with the substantive, administrative, and civic responsibilities of running a 450-person, two-branch office in a district of 16 million.

In December 1997, I argued United States v. Giancarlo Parretti before an 11-judge en banc panel of the Ninth Circuit. Because of the significance of the case, I argued the appeal. (See answer to question 18, infra),

As a Superior and Municipal Court judge (1990-1994), I appeared in court daily. While serving as a justice pro tem on the State Court of Appeal (1992), I heard oral argument monthly.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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As an Assistant United States Attorney (1982-1990), I appeared regularly in the federal trial courts of the Central District of California, as well as before the Ninth Circuit Court of Appeals. I appeared at least weekly in federal district court before assuming supervisory positions as Deputy Chief of Complaints and Chief of Appeals. In the latter capacity, I continued to appear in the Ninth Circuit, arguing appeals of my own cases or those handled at trial by other Assistant U. S. Attorneys.

As a civil litigator with O'Melveny & Myers (1978-1982), I appeared occasionally in court and appeared daily in the two federal antitrust trials noted above.

2. What percentage of these appearances was in:
  - (a) federal courts;
  - (b) state courts of record;
  - (c) other courts.

As a federal prosecutor and as U.S. Attorney, all of my appearances have been in federal court. As a judge, I sat in state court. As a civil litigator, approximately 85% of my appearances were in federal court, the remaining 15% in state court.

3. What percentage of your litigation was:
  - (a) civil;
  - (b) criminal.

As United States Attorney, approximately three-quarters of my time is devoted to criminal litigation, the remaining one-quarter to civil.

As a Superior Court judge, I presided over a felony criminal calendar. As a Municipal Court judge, approximately 85% of my calendar was criminal, the remaining 15% civil.

As a federal prosecutor, 100% of my litigation was criminal.

As a private practitioner, 100% of my litigation was civil.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

As a federal prosecutor, I litigated dozens of cases to completion, often with contested pretrial motions that disposed of the case prior to trial. I tried to verdict approximately a dozen cases before assuming supervisory positions. In all of the cases I handled as a federal prosecutor, I was the sole attorney.

As a civil litigator, I participated in two federal antitrust trials as associate counsel.

5. What percentage of these trials was:
- (a) jury;
  - (b) non-jury.

Over 90% of the cases I tried as a federal prosecutor were jury trials. The two civil trials in which I participated were jury trials. Over 90% of the trials over which I presided as a judge were jury trials, although I occasionally sat as the trier of fact, following a waiver of jury trial.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
- (1) United States v. Giancarlo Parretti, No. 95-56585  
 Original panel opinion reported at 122 F.3d 758 (9th Cir. 1997),  
 rehearing en banc granted, 10/3/97

Judges: En banc panel, Ninth Circuit Court of Appeals: Reinhardt, Hug, Tashima, T.G. Nelson, O'Scannlain, Thomas, Pregerson, Schroeder, Brunetti, Thompson, Hawkins

Defense Counsel: William Genego, 100 Wilshire Blvd., Suite 1000,  
 Santa Monica, CA 90401-1198, (310) 394-5802



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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In December 1997, I argued this appeal before an 11-judge en banc panel of the Ninth Circuit after rehearing of the original panel decision had been granted. The case involved the attempted extradition of international financier/fugitive Giancarlo Parretti, wanted for fraud in France (and elsewhere). The panel had released Mr. Parretti following his provisional arrest and later ruled that the provisional arrest provisions of the United States' 100-year old extradition treaty with France (and, by implication many other treaties) were unconstitutional. The panel also invalidated Title 18 U.S.C. section 3184, providing for provisional arrest of fugitives charged with extraditable offenses.

The case received international attention, as its holding cast doubt on the ability of this country to meet its treaty obligations with foreign governments and, hence, its ability to secure the return of fugitives wanted for crimes committed in this country. Court TV filmed the hour-long argument. It is likely the issues raised in the case will be resolved in the Supreme Court. Because of the significance of the panel's holding and its potential impact on the apprehension and extradition of international fugitives found within the Ninth Circuit, I believed it appropriate that I argue the case personally. No decision has been rendered.

The following are cases I prosecuted as an Assistant United States Attorney or in which I represented a corporate client while at O'Melveny & Myers. Unless otherwise indicated, I was the sole attorney at trial and on appeal.

- (2) United States v. Susan Komisaruk, CR 87-514, 874 F.2d 686 (1989),  
 amended opinion 885 F.2d 490 (1989)

Trial Judge: Hon. William J. Rea (Central Dist. CA)

Defense Counsel: Leonard Weinglass, 6 West 20th Street, New York,  
 New York, (212) 807-8646

This was a highly publicized 1987 criminal trial of a self-styled peace activist charged with destroying a million dollar Air Force computer on Vandenberg Air Force Base. The trial was preceded by six months of pretrial proceedings over defendant's use of necessity, justification, and international law defenses, and attempts to subpoena classified military information. Defendant appeared regularly on radio and television, staged press conferences, and rallied supporters to demonstrate inside and outside the courtroom. Defendant was convicted and sentenced to five years in federal prison. The verdict and sentence were upheld on appeal in published decisions. I tried the case, wrote the appellate briefs, and argued the case on appeal before Judges Alarcon, Hall and Fletcher.



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

- (3) United States v. Kevin L. Jackson, 756 F.2d 703 (9th Cir. 1985)  
United States v. Augustus Evans, CR 84-009  
United States v. Norman Ward, CR 84-009  
United States v. Gregory Lewis, 787 F.2d 1318 (9th Cir. 1986)

Trial Judge: Hon. Harry L. Hupp (Central Dist. CA),

Defense Counsel: Terry Amdur (Jackson), 1939 Rose Villa St.  
 Pasadena, CA 91107, (818) 449-9254

Samuel Jackson (Lewis), 11400 W. Olympic Blvd., #600,  
 Los Angeles, CA 90065, (310) 473-3100

Michael Treman (Evans), 1428 Chapala St., Suite 300,  
 Santa Barbara, CA 93101, (805) 962-6544

Randy Pollock (Ward), 120 Montgomery St., #1800,  
 San Francisco, CA 94101, (510) 763-9967

Four defendants were convicted in two separate trials in 1984 and 1985, of executing the largest armed bank robbery in California history. The robbery netted the perpetrators over a quarter of a million dollars and resulted in the death of an innocent victim. Defendants Evans and Ward pled guilty. Defendant Jackson went to trial. Jackson's appeal of his subsequent jury conviction for conspiracy and armed robbery set national precedent in establishing federal liability of a bank robber for a murder committed prior to the completed robbery. One year later, Gregory Lewis was convicted after a jury trial of conspiracy, bank robbery, murder and firearms charges. The murder conviction was reversed on appeal for failure to sever the firearms counts; the remaining verdicts were upheld. The trials involved approximately 70 witnesses and the introduction of 200 physical and documentary exhibits. I tried both cases, wrote the appellate briefs, and argued the Jackson case on appeal.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

- (4) United States v. George Simmons and Deborah Totten. CR 84-924

Trial Judge: Hon. William Matthew Byrne, Jr. (Central Dist. CA)

Defense Counsel: Hector Perez (Simmons), 12417 Ryan Lane,  
 Cerritos, CA 90703, (310) 402-1802

Robert Ramsey (Totten), Ramsey & Price,  
 727 W. 7th St., #624, Los Angeles, CA 90017  
 (213) 612-0020

Allan Ides (Totten, §2255 challenge),  
 Professor, Loyola Law School  
 1441 West Olympic Blvd.  
 Los Angeles, CA 90025, (213) 736-1001

This husband and wife team were charged with 14 counts of mail fraud stemming from a fraudulent billing scheme targeting businesses in this country and abroad. Adopting names similar to those of existing legitimate publications, defendants solicited money for non-existent advertising in fictitious publications. The government presented approximately 30 witnesses and over 150 exhibits. The jury convicted both defendants on all counts. Defendant Simmons' conviction was affirmed by the Ninth Circuit in a memorandum decision May 5, 1986. Defendant Totten challenged her conviction collaterally in a Section 2255 motion, which was denied after an evidentiary hearing. I tried the case in 1985, wrote the appellate briefs, and handled Totten's §2255 challenge.

- (5) United States v. Gary Miske and Walter Coven, CR 83-213

Trial Judge: Hon. Manuel Real (Chief Judge, Central Dist. CA)

Defense Counsel: Stephen D. Miller (Coven), 1210 N. Doheny Drive,  
 Los Angeles, CA 90069, (310) 271-9415

Yolanda Orozco (Miske), O'Neill, Lysaght & Sun,  
 100 Wilshire Blvd., #700, Santa Monica, CA 90401,  
 (310) 451-5700

Defendants were indicted for conspiracy and possession with intent to distribute multiple kilograms of cocaine. Defendant Miske was convicted after a jury trial in 1983 and sentenced to eight years in prison. Defendant Coven pled guilty. I tried the case. There was no appeal.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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- (6) United States v. Ronald Graczyk, CR 82-749, CV 84-4276

Trial Judge: Hon. A. Wallace Tashima (formerly Central Dist. CA; now 9th Circuit)

Defense Counsel: Elliot Stanford, 15332 Antioch St., #526,  
 Pacific Palisades, CA 90272, (310) 473-4017

Defendant was convicted after a jury trial in 1983 of numerous firearms offenses, including unlawful dealing, falsification of firearms transfer forms, and being a felon in possession of firearms. His convictions were affirmed on appeal. His subsequent collateral attack against his convictions was denied by the district court. The denial was affirmed by the Ninth Circuit in a memorandum decision, September 23, 1986. I tried the case, wrote the appellate briefs, argued the appeal, and handled the collateral challenge to the conviction.

- (7) United States v. Kenneth C. Troise, Pedro Iguaron, James Jeppensen, and Tracy Maudlin, 760 F.2d 310 (9th Cir. 1986)

Trial Judge: Hon. Robert M. Takasugi (Central Dist. CA)

Defense Counsel: Terry Amdur (Iguaron), 1939 Rose Villa St.,  
 Pasadena, CA 91107, (818) 449-9254

Phillip Deitch (Troise), 4929 Wilshire Blvd., Suite 310  
 Los Angeles, CA 90010 (213) 938-3306

Meir Westreich (Jeppesen) (unlisted)

John Lindgren (Maudlin) (unlisted)

This was a court trial in 1984 of multiple defendants charged with importing 20,000 pounds of marijuana valued at \$5,000,000. A two-week contested suppression hearing resulted in the trial court's denying defendants' motions and subsequently convicting all defendants on all counts. The convictions and sentences were upheld on appeal in 1986 in a published decision. I litigated the pretrial motion, tried the case, wrote the appellate briefs, and argued the case on appeal.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

- (8) United States v. Pedro Tabares and Carlos Quesada,  
 CA 85-5210

Trial Judge: Hon. Pamela A. Rymer (formerly Central Dist. CA;  
 now 9th Circuit)

Defense Counsel: Peter Brown (Tabares) (address unknown - since  
 disbarred)

Michael Osman (Quesada) [Miami]  
 (address unknown)

In 1986 I handled the appeal of this narcotics case raising, *inter alia*, claims of prosecutorial misconduct by the prosecutor who tried the case. Defendants were convicted of possession with intent to distribute 20 kilograms of cocaine. The 50-page appellate brief before Judges Reinhardt, Wright, and Carroll raised issues of search and seizure, prosecutorial misconduct, perjury, grand jury abuse, and witness intimidation. The Ninth Circuit Court of Appeals affirmed in an 18-page memorandum decision, April 28, 1987. I handled the appeal only, writing the briefs and arguing the case before the circuit.

- (9) United States v. Peter Sharma, CR 85-259

Trial Judge: (pretrial): Hon. Alicemarie H. Stotler  
 (Central Dist. CA)

Trial Judge (conviction): Hon. Terry J. Hatter  
 (Central Dist. CA)

Defense Counsel: Carlton Gunn, Deputy Federal Public  
 Defender, 312 N. Spring St.,  
 15th Floor, Los Angeles, CA 90012  
 (213) 894-2231

Defendant was charged in 1985 with 15 counts of tax fraud arising from his promotion of fraudulent tax shelters through sales of commodities futures. Defendant's promotion of Treasury Bill "straddles" and preparation of forged broker monthly commodity statements submitted by unknowing investors resulted in lost tax revenues of hundreds of thousands of dollars. On the day of trial, defendant fled to Cannes, France.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

He was subsequently apprehended and entered a plea of guilty. Released on bail over the government's objection, he fled again and remained a fugitive until late 1996, when he was again apprehended. He pled guilty to additional charges and was sentenced to prison in 1997. I handled all proceedings up to Mr. Sharma's second flight, and, a decade later, advised the Assistant U.S. Attorney in my office who handled the sentencing.

- (10) L.A. Memorial Coliseum Commission v. National Football League, (first trial; subsequent trials reported at 726 F.2d 1381 (9th Cir. 1984) and 791 F.2d 1356 (9th Cir. 1986)

Trial Judge: Hon. Harry L. Pregerson (formerly Central Dist. CA; now 9th Cir., senior)

Defense Counsel: Maxwell Blecher (L.A. Coliseum)  
 Blecher & Collins  
 611 W. 6th St., #2000, Los Angeles, CA 90017  
 (213) 622-4222

Howard F. Daniels (L.A. Coliseum)  
 312 S. Spring St., Los Angeles, CA 90012  
 (213) 894-4858

Joseph L. Alioto (Oakland Raiders) (deceased)

Co-Counsel: Patrick Lynch (N.F.L.), O'Melveny & Myers,  
 400 S. Hope St.,  
 15th Floor, Los Angeles, CA 90071,  
 (213) 669-6000

L. Jeffrey Pash (N.F.L.)  
 Executive Vice President  
 National Football League  
 280 Park Avenue, New York, New York 10017,  
 (212) 450-2000

Joseph W. Cotchett, Jr., Cotchett & Pitre (L.A. Rams)  
 840 Malcolm Road, Suite 200  
 Burlingame, CA 94010  
 (415) 697-6000



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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I participated in the first of three trials of an antitrust suit brought by the L.A. Coliseum and (then) Oakland Raiders owner Al Davis against the National Football League and the (then) L.A. Rams to prevent the League from barring the Raiders' move to Los Angeles. I was one of several O'Melveny attorneys representing the NFL in the first trial (1980-'81), which ended in a hung jury and a mistrial. I wrote numerous pretrial motions and conducted depositions, prepared witnesses for examination, and prepared cross-examination of defense witnesses. By the time of the subsequent trials, I had become an Assistant United States Attorney.

Below are the names, addresses and phone numbers of several individuals familiar with my work as a judge and as United States Attorney:

Honorable Arthur L. Alarcon  
 United States Circuit Judge  
 U.S. Courthouse, 16th Floor  
 312 North Spring Street  
 Los Angeles, CA 90012  
 (213) 894-6730

Honorable Alex Kozinski  
 United States Circuit Judge  
 U. S. Court of Appeals  
 125 S. Grand Avenue  
 Pasadena, CA 91109  
 (626) 583-7014

Honorable Stephen Trott  
 United States Circuit Judge  
 U.S. Courthouse, Room 666  
 550 West Fort Street  
 Boise, Idaho 83724  
 (208) 334-1612

Laurie Levenson, Associate Dean  
 Loyola Law School  
 1441 West Olympic Blvd.  
 Los Angeles, CA 90015  
 (213) 736-1149

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

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Honorable Sherman Block  
Los Angeles Sheriff  
4700 Ramona Boulevard  
Monterey Park, CA 91754  
(213) 526-5000

Charlie Parsons  
(Former Special Agent in Charge, FBI, Los Angeles)  
Executive Director, D.A.R.E.  
P. O. Box 2090  
Los Angeles, CA 90051-0090  
(213) 215-0575

Honorable Harry L. Hupp  
United States District Judge  
U.S. Courthouse  
312 North Spring Street  
Los Angeles, CA 90012  
(213) 894-6730

Honorable Wm. Matthew Byrne, Jr.  
United States District Judge  
(Chief Judge - 1994-1998)  
U.S. Courthouse  
312 North Spring Street  
Los Angeles, CA 90012  
(213) 894-3280

Honorable Daniel E. Lungren  
Attorney General  
1300 I Street, Suite 1740  
Sacramento, CA 95814  
(916) 324-5437

Honorable J. Stephen Czuleger  
Los Angeles Superior Court  
210 West Temple Street  
Los Angeles, CA 90012  
(213) 974-6901

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Biographical Information (Public) - Continued**

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Virtually all of my career has been spent as a civil litigator, federal prosecutor, appellate specialist, trial judge, or court of appeal justice. The most significant cases have progressed to trial, and the overwhelming majority have involved litigation.

## U.S. SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

Nora M. Manella

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Since January 1994, I have participated in the federal government's Thrift Savings Plan. In addition, I have four IRA accounts consisting of benefits from previous retirement plans of which I am no longer a member, e.g., state judicial retirement plans. I will receive benefits from these accounts after I retire.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interests during your initial service in the position to which you have been nominated.

Having served as either a state court judge or federal prosecutor for the past 15 years, I anticipate few, if any financial conflicts. As United States Attorney, I presently recuse myself from any matters in which my late father's law firm, Irell & Manella LLP, represents a party and would continue to do so. In addition, like other U.S. Attorneys who have gone on the federal bench, I would recuse myself from matters opened in the U.S. Attorney's Office during my service.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated?

No.

**Nora M. Manella - U. S. Senate Judiciary Questionnaire**  
**Part II - Financial Data and Conflict of Interest (Public) - Continued**

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A completed copy of the Public Financial Disclosure Report, A0-10, is attached.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

A net worth statement, with schedules, is attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.



AO-10 (Rev. 8-96)

# FINANCIAL DISCLOSURE REPORT

## Nomination Report

Report Required by the Ethics Reform Act of 1989, Pub. L. No. 101-194, November 30, 1989 (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Manella, Nora M.	U.S. District Court, C.D., CA	03/27/1998
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check type)	6. Reporting Period
U.S. District Judge (Nominee)	<input checked="" type="checkbox"/> Nomination, Date <u>3/14/98</u>	01/01/1997 to 03/15/1998
7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.	
U.S. Courthouse 312 N. Spring Street Los Angeles, CA 90012-4701	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

### I. POSITIONS (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input checked="" type="checkbox"/> NONE (No reportable positions)	
1	
2	
3	

### II. AGREEMENTS (Reporting individual only; see pp. 14-17 of Instructions)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements)	
1	
2	
3	

### III. NON-INVESTMENT INCOME (Reporting individual and spouse; see pp. 18-25 of Instructions)

DATE	PARTIES AND TERMS	GROSS INCOME (Yours, not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income)		
1	U.S. Attorney, Central District, CA - Salary	
2		
3		
4		
5		



**FINANCIAL DISCLOSURE REPORT** Name of Person Reporting **Manella, Nora M.** Date of Report **03/27/1998**

**VII. Page 1 INVESTMENTS and TRUSTS** — income, value, transactions (includes those of spouse and dependent children See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rental or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)

NONE (no reportable income, assets, or transactions)

1 SEI Calif. Tax Exempt Fund (Money Market)	Interest	L	T	Close	5/97				
2 City National Bank - Century City Branch - Los Angeles, CA	None		J	T					
3 Dreyfus - General Gov't Security Money Market Fund	Interest	O	T						
4 Glendale Federal Bank - Los Angeles, CA	Interest	L	T						
5 Vanguard CA Tax Free Fund Insured Long-Term Portfolio	Excepted Fd		N	T					
6 IRA - Fidelity Trust Co. (Fidelity Investments) Mutual	Excepted Fd		K						
7 IRA - Fidelity Trust Co. (Fidelity Investments) Mutual	Excepted Fd		L						
8 IRA - Fidelity Trust Co. (Fidelity Investments) Mutual	Excepted Fd		L						
9 IRA - Fidelity Trust Co. (Fidelity Investments) Mutual	Excepted Fd		M						
10 Municipal Bond - CA ST PUB WKS BRD LSE REV ST PRISON-CORCORA	Interest	K	T	Redeem	2/98	X			
11 Municipal Bond - CA ST PUB WKS BRD LEAS CORRECTN ST PRN DEL	Interest	K	T	Redeem	2/98				
12 Municipal Bond - Mendocino Cnty CA Certs of Part RFDG	Interest	L	T						
13 Municipal Bond-L.A. CA DWP ELEC PLT XOVER RFDG 12/15/99	Interest	K	T						
14 Municipal Bond-L.A. CA DWP ELEC PLT XOVER RFDG 12/15/00	Interest	L	T						
15 Municipal Bond - Clovis CA Unif'd Sch Dist RFDG DTD 8/1/92	Interest	K	T	Matured	8/97				
16 Municipal Bond - CA State G/O VAR PURP	Interest	K	T	Matured	10/97				
17 Municipal Bond - Porterville CA CTPS PARTN RFDG SWR SYS	Interest	K	T	Matured	10/97				
1 Inc Gain Codes A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000 or more	E=\$15,001-\$50,000 J=\$50,001-\$100,000	F=\$100,001-\$1,000,000 G=\$1,000,001-\$5,000,000	H=\$5,000,001 or more I=\$5,000,001-\$10,000,000	J=\$10,000,001 or more K=\$10,000,001-\$25,000,000	L=\$25,000,001 or more M=\$25,000,001-\$50,000,000	N=\$50,000,001 or more O=\$50,000,001-\$100,000,000
2 Val Codes J=\$15,000 or less (Col C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 Q=\$50,001-\$100,000	M=\$100,001-\$250,000 R=\$250,001-\$500,000	N=\$250,001-\$500,000 O=\$500,001-\$1,000,000	P=\$1,000,001-\$5,000,000 Q=\$5,000,001-\$10,000,000	R=\$10,000,001-\$25,000,000 S=\$25,000,001-\$50,000,000	S=\$50,000,001-\$100,000,000 T=\$100,000,001-\$250,000,000	T=\$250,000,001-\$500,000,000 U=\$500,000,001-\$1,000,000,000	U=\$1,000,000,001 or more V=\$1,000,000,001 or more
3 Val Mth Codes Q=Appraisal (Col C2) L=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash Market						

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting <b>Manella, Nora M.</b>	Date of Report <b>03/27/1998</b>
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**VII. Page 2 INVESTMENTS and TRUSTS** -- income, value, transactions (includes those of spouse and dependent children. See pp 37-54 of Instructions.)

A. Description of Assets	B Income during reporting period	C Gross value at end of reporting period	D Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "X" after each asset exempt from prior disclosure.	(1) Amt Code (A-H) (2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)  If not exempt from disclosure: (2) Date Month-Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)

NONE (no reportable income, assets, or transactions)

18 Municipal Bond - California State G/O VAR PURP	C	Interest	L T	Matured 3/98
19 Municipal Bond - San Fran CA Bay Trans Rapid Dist Sales tax	B	Interest	K T	
20 Municipal Bond - RIM WORLD CA UNI SCH DIST CTFS PARTN	B	Interest	K T	
21 Municipal Bond - L A. UNFD SCHOOL DIST	B	Interest	K T	
22 Municipal Bond - Petaluma CA Cmnty Dev Comm. Tax Alloc	C	Interest	K T	
23 Municipal Bond - Sylvan CA Union SCH DIST G/O SER B	C	Interest	K T	
24 Municipal Bond - Sacramento MUD CA ELEC REV	B	Interest	K T	
25 Municipal Bond - California State GO UNLTD	B	Interest	K T	
26 Municipal Bond - California State G O UNLTD	B	Interest	K T	
27 Municipal Bond - CONTRA COSTA CALIF WTR DIST WTR REV	B	Interest	K T	
28 Municipal Bond - SONOMA CALIF CTFS PARTN HONOR FARM DET RFDG	C	Interest	K T	
29 Municipal Bond - Los Angeles CA DWAP ELEC REV	D	Interest	L T	
30 Municipal Bond - CARLSBAD CALIF USD PHASE III	B	Interest	K T	
31 Municipal Bond - MOUNTAIN VIEW CA CAP IMPTS FING AUTH REV	C	Interest	K T	
32 Municipal Bond - UNIVERSITY CALIF REV'S RFDG MULTI-PURP PJ A	D	Interest	L T	
33 Municipal Bond - RICHMOND CALIF CT PWR FING AU REV SEP B REV	D	Interest	M T	
34 Mutual Shares Fund	E	Investmt	O T	

1 Inc Gain Codes A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001 or more
2 Val Codes J=\$15,000 or less (Col C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001 or more P4=\$50,000,001 or more
3 Val Mth Codes Q=Appraisal (Col C2) L=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash Market	

Name of Person Reporting Date of Report  
**FINANCIAL DISCLOSURE REPORT** Manella, Nora M. 03/27/1998

**VII. Page 3 INVESTMENTS and TRUSTS**

- income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) Amt. Code (A-H) (2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption) If not exempt from disclosure (2) Date: Month- Day (3) Value Code (J-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure.			

NONE (no reportable income, assets, or transactions)

35 Municipal Bond - CALIF ST PUB WKS A BRD LSE REV DEPT CORRECT	Interest	K	T				
36 Fidelity Copernicus Fund - 4.16% Ltd Prtn Int (Pvt. mutual)	Distributi on	K	W	Close	1/98		
37 American Telephone & Telegraph - Common	Dividend	K	T				
38 AirTouch Com. - Common	None	J	T				
39 Ameritech - Common	None	J	T				
40 Bell Atlantic Corp. - Common	Dividend	J	T				
41 Bell South Corp. - Common	Dividend	J	T				
42 Lucent Technologies, Inc. - Common (Spin Off from AT&T)	Dividend	J	T				
43 Exxon Corp. - Common	Dividend	M	T				
44 Fiserv Inc. - Common	None	K	T				
45 Nynex Corp. - Common	None	J	T	Merger	8/97		Acquired by Bell Atlantic
46 Pacific Telesis Group - Common	None	J	T	Merger	4/97		Acquired by SBC Communications Inc.
47 Edison International - Common	Dividend	K	T				
48 SBC Communications Inc.	Dividend	J	T				
49 U.S. West Communication Group - Common	Dividend	J	T				
50 U.S. Media Group	None	J	T				
51 Spartan Assoc., Denver, CO - 18.75% Ltd Prtn Int. Bldg.	Royalty	K	W				
1 Inc Gain Codes A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000	E=\$15,001-\$50,000 J=\$50,001-\$100,000	F=\$100,001-\$250,000 G=\$250,001-\$500,000	H=\$500,001-\$1,000,000 I=\$1,000,001-\$5,000,000	J=\$5,000,001-\$10,000,000 K=\$10,000,001-\$50,000,000
2 Val Codes J=\$15,000 or less (Col C1, D2) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 Q=\$100,001-\$250,000	M=\$250,001-\$500,000 R=\$500,001-\$1,000,000	N=\$1,000,001-\$5,000,000 S=\$5,000,001-\$10,000,000	O=\$10,000,001-\$50,000,000 P=\$50,000,001-\$100,000,000	Q=\$100,000,001-\$500,000,000 R=\$500,000,001-\$1,000,000,000	S=\$1,000,000,001-\$5,000,000,000 T=\$5,000,000,001-\$10,000,000,000
3 Val Mth Codes Q=Appraisal (Col C2) L=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash Market				



FINANCIAL DISCLOSURE REPORT Name of Person Reporting Manella, Nora M. Date of Report 03/27/1998

VII. Page 4 INVESTMENTS and TRUSTS

-- income, value, transactions (includes those of spouse and dependent children. See pp 37-54 of Instructions)

A. Description of Assets	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child	(1) Amt. Code (2) Type (e.g., dividend, rent or interest)	(1) Value Code (2) Value Method (J-P) (Q-W)	(1) Type (e.g., buy, sell, merger, redemption) If not exempt from disclosure (2) Date: Month-Day (3) Value (4) Gain Code (5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure			

NONE (no reportable income, assets, or transactions)

52 I&M Green II Security Investmt Prtn - 2.5% Ltd. Prtn. Int.	D	Distributi on	K	W
53 RITE AID CORP. - Common (Formerly Thrifty Payless Holdings)	A	Dividend	K	T
54 Thrift Savings Plan (TSP-8-A) (Federal Retirement Plan)	B		L	
55 Municipal Bond - CA ST PUB WKS BRD LSE Rev Corcoran II	-	Interest	L	
56 Municipal Bond - San Diego CNTY CA CTF PARTN RFDG	B	Interest	L	
57 CALIF SCH FIN AUTH INSD Leased Rev Pooled FACS PROG-A	A	Interest	K	

1 Inc Gain Codes A=\$1,000 or less (Col B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001 or more N=\$250,001-\$500,000
2 Val Codes J=\$15,000 or less (Col C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more
3 Val Mth Codes Q=Appraisal (Col C2) L=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash Market	

Name of Person Reporting		Date of Report
FINANCIAL DISCLOSURE REPORT	Manella, Nora M.	03/27/1998

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. (Indicate part of report.)

☐ NONE (No additional information or explanations.)

SECTION 3: Parties and Terms, continued ...

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## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Manella, Nora M.

Date of Report

03/27/1998

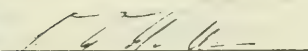
## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

4/1/98

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

**FINANCIAL STATEMENT**  
**NET WORTH**  
**Nora M. Manella**  
**As of December 31, 1997**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	\$ 450,841	Notes payable to banks - secured	-0-
U.S. Government securities		Notes payable to banks - unsecured	-0-
Listed Securities (See Schedule 1)	2,764,283	Notes payable to relatives (See Schedule 2)	\$ 282,092
Unlisted Securities	-0-	Notes payable to others	-0-
Accounts and Notes Receivable	-0-	Accounts and bills due	-0-
Due from relatives and friends	-0-	Unpaid income tax	-0-
Due from others	-0-	Other unpaid tax and interest	-0-
Doubtful	-0-	Real estate mortgages payable (See Schedule 3)	
Real estate owned (See Schedule 3)	776,000	Chattel mortgages and other liens payable	-0-
Autos and other personal property	197,000	Other debts - itemize	-0-
Cash value - life insurance	-0-		
Other assets - itemize (See Schedule 4)	408,155		
		Total Liabilities	282,092
		Net Worth	4,314,187
Total Assets	\$4,596,279	Total Liabilities and Net Worth	\$4,596,279
CONTINGENT LIABILITIES	-0-	GENERAL INFORMATION	
As endorser, comaker or guarantor	-0-	Are any assets pledged? (Add schedule) NO	
On leases or contracts	-0-	Are you defendant in any suits or legal actions? NO	
Legal Claims	-0-	Have you ever taken bankruptcy? NO	
Provision for Federal Income Tax	-0-		
Other special debt	-0-		

## ADDENDUM TO FINANCIAL STATEMENT

Nora M. Manella - Net Worth

As of December 31, 1997

## Schedule 1

## Listed Securities:

Tax Exempt Municipal Bonds:	
California State G/O VAR PURP dated 03/01/94	\$ 100,000.00
San Francisco Calif Bay Tran Rapid Dist Sales Tax RV-SUB NT	25,000.00
California State Pub Wks Brd Lse Rev Dept of Crrctns SER A Corcoran	50,000.00
California ST Pub Wks Brd Lse Rev Secretary State-A	25,000.00
Los Angeles Calif Uni. Sch Dist Cops Computers & Air SYS-A	25,000.00
California State G/O VAR PURP dated 03/01/94	50,000.00
California State G/O VAR PURP dated 10/01/92	30,000.00
Carlsbad Calif Uni. Sch Dist CTFPS Partn Phase III	25,000.00
Mendocino CNTY Calif CTF Partn	95,000.00
California Pub Wks Brd Lse Rev Dept Correctn State PRSN-A-Del Norte	25,000.00
Rim World Calif Uni. Sch Dist CTFPS Partn Measure V Cap	25,000.00
Los Angeles CA Dept WTR & PWR Elec Plant Rev 2nd Issue	50,000.00
Sonoma CNTY Calif CTFPS Partn Honor Farm Detention Refing	50,000.00
Mountain VW CA CAP IMPTS FING AU RV City Hall/CMNTY Theatre	50,000.00
California ST Pub Wks Brd Lse Rev Dept of Correction-A Corcoran II	75,000.00
Petaluma Calif Cmnty Dev Commn Tax Alloc Cmnty Dev Proj SER A	50,000.00
Sylvan CA Union Sch Dist G/O Ser B Bank Qualified	50,000.00
Richmond Calif JT PWRS Fing Auth Rev Ser B	200,000.00
Sacramento MUD CA Elec Rev Ser W	15,000.00
University California Revs RFDG MLT Purp Projs Ser A	100,000.00
Contra Costa Calif WTR Dist WTR Rev	50,000.00
Los Angeles CA DWAP Elec Rev	100,000.00
Los Angeles Calif Dept WTR & PWR Plt Rev Second Issue Xover Rfdg	100,000.00

Total Tax Exempt Municipal Bonds

\$1,365,000.00



**Addendum to Net Work Statement - Nora M. Manella - as of December 31, 1997**  
**Schedule 1 - Continued**

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Vanguard California Tax Exempt Municipal Fund Insured Long-Term      448,766.52  
 Mutual Shares - Class Z (Franklin Mutual Series)      787,781.86

**Sub-Total - Listed Securities/Mutual Funds**

**\$2,601,548.38**

**Listed Securities (Stocks):**

Airtouch Communications Inc.	\$ 1,662.00
Ameritech Corp New	4,830.00
AT&T Corp	19,968.00
Bell Atlantic Corp	6,370.00
BellSouth Corp	5,068.00
Edison International	21,750.00
Exxon Corp	97,899.00
Fiserv Inc.	63,420.00
Lucent Technologies Inc.	8,387.00
NCR Corp New	556.00
SBC Communications Inc.	9,449.00
U S West Media Group	1,155.00
U S West Communications Group	1,805.00
Rite Aid Corporation	415.62

**Total Value Stocks**

**242,734.62**

**Total Market Value Securities**

**\$2,844,283.00**

**Less: Reserve/Deferred Tax Liabilities (Estimated)**

**- 80,000.00**

**TOTAL**

**\$2,764,283.00**

# ADDENDUM TO FINANCIAL STATEMENT

Nora M. Manella - Net Worth  
As of December 31, 1997

## Schedule 2

### Real Estate Owned:

Single story family home - Los Angeles County, California (Estimated Value) Used as personal residence	\$776,000.00
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### Real Estate Mortgages Payable:

Single story family home - Los Angeles County,  
California - Portion secured by Deed of Trust  
to order of: Arthur Manella and Nancy Holme  
Manella, Co-Trustees The Manella Family Trust  
dated September 19, 1988

Promissory Note Secured by Deed of Trust dated May 8, 1996 in amount of	\$300,000.00
Less Principal Payments through 12/31/97	<u>17,908.25</u>
<b>Total Balance</b>	<b>\$282,091.75</b>

**ADDENDUM TO FINANCIAL STATEMENT**

**Nora M. Manella - Net Worth  
As of December 31, 1997**

**Schedule 3****Other Assets:****IRA Accounts:**

Fidelity Investments Asset Manager Mutual Fund	\$138,904.22
Fidelity Investments Asset Manager Mutual Fund	38,193.63
Fidelity Investments Asset Manager Mutual Fund	53,462.80
Fidelity Investments Asset Manager Mutual Fund	70,096.06
Thrift Savings Plan (TSP-S-A)	<u>59,834.33</u>

Total Fair Market Value IRA Portfolio	\$360,491.04
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Less: Deferred Tax Liabilities	<u>126,171.86</u>
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<b>TOTAL</b>	<b>\$234,319.18</b>
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**Partnership Interests:**

Spartan Associates	\$ 40,819.00
Fidelity Copernicus	55,000.00
Warner Investment Group	5,000.00
I&M Green II	50,000.00
PWT 1989 Britannia	11,372.00
Intimbers Associates	<u>11,645.00</u>

<b>Total</b>	<b>\$173,836.00</b>
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**TOTAL****\$408,155.18**

## U. S. SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

Nora M. Manella

## PART III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Most of my extra-judicial and extra-professional activities have focused on education. I have served as a judge in moot court competitions sponsored by local law schools and bar organizations, and have been a volunteer mentor in a program sponsored by the Women's Lawyers of Los Angeles. While on the bench, I served as a volunteer lecturer, speaking to bar associations on attorney ethics and to civic organizations on developments in the law. I have given presentations to high school students on the criminal justice system, and served on the Advisory Council of the James Monroe High School Law and Government Magnet School in the San Fernando Valley.

For several years I counseled undergraduate women from my alma mater, Wellesley College, inviting them to spend a day with me and advising them on career opportunities in the law. At the request of the Dean of the state's Center for Judicial Education and Research, I served for two years as an instructor at the California Judicial College held every summer for state court judges. In April 1993, at the request of the Center for the Study and Development of Legal Systems, I traveled with a delegation of lawyers and judges to Egypt in a United States Information Agency sponsored program to familiarize that country's prosecutors and judges with the American legal system.

As United States Attorney, I have appeared on public interest television and radio programs, including Life & Times (KCET) and Which Way, L.A.? (KCRW), to explain to the public issues of federal criminal and civil law.

In approximately 1993, at the request of the Los Angeles Times, I served with nine other civic leaders as a volunteer judge in evaluating more than 200 community service programs for receipt of 10 financial grants from the Times as part of that organization's Community Partnership Awards.

**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Part III - Continued**

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2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes. Senator Feinstein has a selection committee to interview and recommend candidates for various federal appointments, including the district court bench. I was interviewed by the committee in late 1997.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question?

No.

5. Please discuss your views on the following criticism involving "judicial activism."

"The role of the federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government."

The role of a judge is to decide the case before that judge, and no other. While a judge must consider the ramifications of any decision, it is the job of other judges, in future cases, to take the principles enunciated in the original decision and apply them to the unique facts of each subsequent case. Judges are ill equipped to fashion broad solutions to complex societal problems.



**Nora M. Manella - U. S. Senate Judiciary Committee Questionnaire**  
**Part III - Continued**

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Our tri-partite system of government relies on the legislative branch to balance the interests of groups with competing values and goals. The judiciary may not shirk its duty to evaluate the legality and constitutionality of laws enacted by the legislature or by initiative when they are challenged and the challenge cannot be disposed of on other grounds; but judicially imposed "solutions" that run counter to the balance struck by lawmakers can threaten the system's equilibrium and generate the kind of criticism alluded to in this question.

With judicial independence comes the obligation to understand and give deference to the respective roles of the other branches of government. A judiciary that imposes itself upon other institutions in the manner of an administrator risks undermining its constitutional role.

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

## 1. Full name (include any former names used.)

PATRICIA ANN SEITZ

## 2. Address: List current place of residence and office address(es).

Same address for both:

224 Ridgewood Road  
Coral Gables, FL 33133

## 3. Date and place of birth.

September 2, 1946, Washington, D.C.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Alan Graham Greer on August 14, 1981

Occupation: Attorney

Employer's Name and Address:

Richman, Greer, Weil, Brumbaugh, Mirabito, & Christensen, P.A.  
Suite 1000, Miami Center  
201 S. Biscayne Blvd.  
Miami, FL 33131

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Kansas State University, Manhattan, KS

September, 1964 through June, 1968

B.A. degree, cum laude, History, June 1968

Georgetown University Law Center, Washington, D. C.

September, 1970 through June 3, 1973

J.D. degree, June 3, 1973

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firm, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

October 19, 1968 to  
January 19, 1969

American Society of Landscape Architects  
Editorial Assistant.

February 1969 to  
January 1970

Department of Labor, Manpower  
Administration, U.S. Training and Employment  
Services: Legislative Liaison to House  
Subcommittee on Education and Labor for  
approximately three or four months, then  
became a program analyst with Minority  
Outreach Programs.

January 1970 to  
September 1970

Department of Labor, Office of Assistant  
Secretary for Management Interns:  
Management Intern, worked on National Pilot  
Project for Summer Employment of  
Disadvantaged Youth.

February 1971 to June 1973  
(part-time)

Dallas Times Herald, Washington Bureau  
Legal Reporter/Assistant to Bureau Chief.

Summer 1971 (part-time)

Congressman William R. Roy, M.D. (D-KS)  
legislative assistant for non-medical related  
issues and constituent matters.

September 1971 to  
June 1972

Georgetown University Law Center, Teaching  
Fellow (Legal Research and Writing)

Summer 1972 (part-time)

Urbina & Libby, Washington, D.C., Law Clerk.

August 1973 to  
September 1974

The Honorable Charles R. Richey, U.S. District  
Court for the District of Columbia; Judicial Law  
Clerk.

November 7, 1974 to  
April 30, 1996

Steel Hector & Davis LLP, Miami, Florida;

November 7, 1974  
through 1979

Associate, Steel Hector & Davis

January 1980 to  
April 30, 1996

Partner in Steel Hector & Davis in the  
corporate form of Patricia A. Seitz, P.A.

1984-88 (part-time)

University of Miami Adjunct Professor of Trial  
Advocacy Program.

May 1, 1996 to  
October 10, 1997

Office of National Drug Control Policy,  
Executive Office of the President, Director,  
Office of Legal Counsel.

#### Non-employment Boards and Officer Positions

1979-82	Board of Governors, The Florida Bar Young Lawyers Division.
1983	Dade-Monroe Mental Health Board, Member.
1986-91	Miami City Ballet, Board of Directors.
1986-92	The Florida Bar, Board of Governors.
1992-93	The Florida Bar, President - Elect.
1992-95	The Florida Bar Foundation, Board of Directors.
1993-94	The Florida Bar, President.

1994-to present	Greater Miami Chamber of Commerce, Board of Directors.
1995-97	American Arbitration Association, Board of Directors.
December 1997 to present	International Women's Forum, Board of Directors.
February 1998 to present	Miami Coalition for a Safe and Drug Free Community, Executive Committee.

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- International Society of Barristers, elected to membership 1988
- American Board of Trial Advocates, elected to membership 1995
- Tradition of Excellence Award, Florida Bar General Practice Section, 1994
- Catholic Lawyers Guild Distinguished Public Service Award, 1993
- American Bar Association Foundation Fellow, elected 1982
- Florida Bar YLS-Bd of Governors, "Most Productive Member" Award, 1982
- Florida Bar Public Interest Law Section Award for Advocacy on behalf of Equal Rights and Responsibilities, 1993
- Dade County Bar Association's Public Interest Distinguished Service Award for Pro Bono Representation of Haitians
- Hillsborough Association for Women Lawyers Achievement Award, 1994
- Judge Mattie Belle Davis Award of the Florida Association for Women Lawyers, 1994
- Women's Park Founder's Committee, 1998 Honoree (Miami-Dade County)
- Zonta of Greater Miami, Woman of the Year Award, 1992
- "Fifty Lawyers Under Fifty," National Law Journal 1989
- Who's Who in America



- Judge Peter T. Fay Inn of American Inns of Court, Master, 1988-92
- Outstanding Service Award for Establishing The Florida Bar's International Law Section and the State Bar of São Paulo, Brazil Protocol, 1996
- Phi Kappa Phi
- Phi Alpha Theta (History Honorary)
- Law Journal: *Law & Policy in International Business*, Staff, 1972; Editor, 1972-73

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- The Florida Bar,  
President (1993-94)  
President-elect (1992-93)  
Board of Governors (1986-92)  
    Budget Committee (1981-84)  
    Disciplinary Review Committee (1986-89)  
    Legislation Committee (1989-92)  
    Special Committee on Ideals and Goals of Professionalism, Chair  
    Liaison to Judicial Administration, Selection and Tenure Committee (1987-88)  
    Liaison to Code and Rules of Evidence Committee (1988-89)  
Program Evaluation Committee; (1983-84); Chair, Review of Florida Lawyers Assistance Inc., (1986-87)  
Committee on Professionalism (1990-92)  
Long Range Planning Commission (Gilbert Commission 1982-84);  
    Chair, Subcommittee on Lawyer Competency and Continuing Legal Education (1982-84)  
Sections: Trial Lawyers(since 1970's); International (mid-90's to date); Business Law (mid 90's to date); Health Law (mid 80's to early 90's); Government Lawyers (late 80's to early 90's)
- The Florida Bar Young Lawyers Section/Division:  
    Board of Governors (1979-82)  
    Continuing Legal Education Committee, Chair (1981-82)  
    Bridge-the-Gap Committee, Chair (1980-81)  
    Convention Seminars, Chair (1979-80)  
    Committee on Women in the Law, Chair (1979)
- International Society of Barristers (elected to membership 1988)
- American Board of Trial Advocates (elected to membership 1995)

- The Florida Bar Foundation  
Board of Directors (1992-95)
- American Bar Association  
Delegate to House of Delegates (1993-96)  
Sections: Litigation; International; Forum on Franchising  
Young Lawyers Division  
Associate Training Committee, Chair (1982)  
Devitt Proposals Review Committee, Co-Chair (1979-80)  
Federal Practice Committee, Vice-Chair (1979)
- U.S. District Court for the Southern District of Florida  
Federal Court Admission Standards Committee, Co-Chair (1981-86)  
Examination Committee, Chair (1981-85)
- U.S. 11th Circuit Judicial Advisory Committee (appointed 1986-88)
- National Conference of Bar Presidents (1992-95) -- numerous panel presentations
- Southern Conference of Bar Presidents (1992-present)
- Florida Association of Women Lawyers (State and Dade Chapter) (1980 to present)
- Association of Trial Lawyers of America (1986-94)
- Florida Academy of Trial Lawyers (1987-94)
- Dade County Bar Association (1974-1995)
- Dade County Trial Lawyers Association (1990-94)
- Dade County Black Lawyers Association (1992-95)
- Cuban American Bar Association (1992-95)
- Palm Beach County Bar Association (1992-95)
- American Judicature Society (mid 1980's to mid 1990's)
- National Institute of Trial Advocacy (1982 to present)
- Judge Peter T. Fay Inn of the American Inns of Court, Master (1988-92),

**10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

**A. Lobbying**

The Florida Bar Sections: Trial Lawyers, Business Law, International Law  
American Bar Association  
Greater Miami Chamber of Commerce  
Miami Coalition for a Safe and Drug Free Community

B. Other Organizations

- St. Hugh Catholic Church, Lector;
- International Women's Forum, Board of Directors
- Miami City Club
- International Society of Barristers
- American Board of Trial Advocates

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All courts in the State of Florida, December 10, 1973 (county, circuit, district and Supreme Court)

District of Columbia Court of Appeals, March 17, 1975

United States District Court for the Southern District of Florida,

General Bar, February 21, 1974

Trial Bar, December 8, 1982

United States Supreme Court, June 23, 1980

United States District Court for the Northern District of Florida, July 15, 1981

United States District Court for the Middle District of Florida, June 27, 1988

United States Court of Appeals for the Fifth Circuit, October 1, 1981

United States Court of Appeals for the Eleventh Circuit, October 1, 1981

United States Court of Military Appeals, January, 1994

Florida Public Service Commission, June 22, 1981

Florida Supreme Court, Certified Circuit Court Mediator (No. 06253R), October 27, 1995

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published Writings:

"International Franchising," The Florida Bar, Business Law Section Seminar, December, 1995.

"Zen and the Art of Herding Cats," Intl. Soc. of Barristers Quarterly, Vol. 30, No.2, April, 1995."

President's Page", The Florida Bar Journal, 1993-94

- (1) *Good Humor and Practical Advice Sought Here*, August, 1993
- (2) *Care and Feeding of Our Spirit*, September, 1993
- (3) *Tales of Peanut Butter and Jelly*, October, 1993
- (4) *Whither Goest Us?*, November, 1993
- (5) *Give the Gift That Keeps on Giving*, December, 1993
- (6) *The People's Lawyer*, January, 1994
- (7) *The "Material Girl," Mother Teresa and Noah*, February, 1994
- (8) *Which Do We Want: Guardrails or Ambulances?*, March, 1994
- (9) *1-800-CLIENTS*, April, 1994
- (10) *O Lord, Give Me 48-Hour Days*, May, 1994
- (11) *Thank You*, June, 1994

"Breaking Through The Internal Glass Ceiling," Tallscope, June-August 1993.

"Keynote Address at the Introductory Ceremony of the 1995 Nova Law Class Orientation Program," 17 Nova L. Rev. 1 (Fall 1992)

"Damages in Business Torts," The Florida Bar, Trial Lawyers Section, 1989.

"Getting More Information and Less Indigestion Out of Your Interrogatories," ABA Journal, Vol. 71, March 1985.

ABA-Litigation Section, "Training the New Lawyer II: Handling the Discovery Process, Motions for Protective Orders and Motions for Sanctions," October, 1987.

"Inventing a Better Trial Notebook," Federal Litigation Guide Reporter, Vol. 1, Issue 12, Sept. -Oct. 1986.

"A Workable Solution for Net Worth Discovery in Punitive Damage Cases," Federal Litigation Guide Reporter, Vol. 1, 1985.

"Effective Federal Discovery Techniques (Non-Deposition)," ALI-ABA, June 1984.

"Hopes & Dilemmas", The Florida Bar Journal, November, 1980

"Convention on Taking Evidence Abroad in Civil or Commercial Matters," 5 Law & Pol. Intl. Bus., 906 (1973)

"Intl. Plant Protection Convention," 5 Law & Policy Intl. Bus., 925 (1973)

Speeches: I made many speeches as President of The Florida Bar. Below is a list of the speeches to the best of my present recollection. With the exception of the drafts of speeches contained in the attached two volumes of speech drafts and the published materials above which served as the basis for speeches, I do not have copies or drafts of the speeches.

Remarks by Patricia A. Seitz as President-Elect, The Florida Bar, Lakeland Bar Association, May 1, 1992

Speech to the Broward County Jewish Counsel of Women (June 1, 1992)

Speech to the Palm Beach County Chapter of The Florida Association For Women Lawyers, June 4, 1992

Speech to Volunteer Lawyers Project

Speech to Dade County Chapter of the Women's Division of The National Bar Association (To be given June 24, at Noon, in Miami)

Speech to The Dade County Women's Political Caucus, June 19, 1992.

Speech to The Florida Association for Women Lawyers in Orlando, June 26, 1992 at 12:00 p.m.

Speech to Florida Defense Lawyers Association, Orlando, July 24, 1992

Speech to The Young Lawyers Section of The Dade County Bar Association Summer Clerk Luncheon, Miami, August 5, 1992

Speaker at the Introductory Ceremony of the 1995 Nova Law Class Orientation Program, Fort Lauderdale, August 13, 1992

Stetson Law School Inns of Court Speech, St. Petersburg, Florida, October 1, 1992

Speech to The Concerned Citizens of Northeast Dade County, Inc., November 23, 1992.

Remarks on behalf of The Florida Bar at Judge Judy Kreeger investiture, Miami, January 4, 1993

Remarks on behalf of The Florida Bar at Judge Barbara Levenson investiture, Miami, January 6, 1993

Speech to The Central Chapter of F.A.W.L., given January 8, 1993, in Orlando

Speech to Honeywell, Inc. - Women's Management Group, given in Clearwater, January 25, 1993

Remarks on behalf of The Florida Bar at Judge Linda Singer Stein investiture, Miami, January 29, 1993

Remarks on behalf of The Florida Bar at Judge Caryn Canner Schwartz investiture, Miami, February 26, 1993



Speech to The Rotary Club of Tallahassee, *Justice For All - - All For Justice*, May 12, 1993 at Noon

Speech to The Lawyers Title Fund, May 14, 1993, 9:00 a.m.

Law School Graduation Speech, University of Florida, May 15, 1993

Speech to The Florida Bar Convention, June 25, 1993

Speech - Maxine Lando investiture, February 2, 1995

Panel Presentations to the National Conference of Bar Presidents on Legal Technicians

Opening Speech (Professionalism) to Bridge-the-Gap Seminar (10/23/95 and 4/15/96)

Keynote Speech "Strange Bedfellows: Law Firms and Corporate Counsel -- Can This Partnership Be Saved?" (Spring 1994)

Speech to Women's Forum Bethesda-By-The-Sea Episcopal Church, Palm Beach, FL (11/2/94)

Southern Conference of Bar President's Annual Meeting Panel Presentations (1992 & 1993)

Association of Legal Administrators, Palm Beach, FL (6/14/94)

Speech to the Indian river County Bar Association (6/10/94)

Speech to Hillsborough Association for Women Lawyers's Annual Achievement Award

Speech to Jacksonville Rotary Club (also made speeches to the Miami Rotary Club as well as I believe the Bradenton Rotary Club)

**13. Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. Last physical exam was March 25, 1996. Last comprehensive exam was in January 1996.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

N.A.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge; and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Yes. Served as law clerk to:  
The Honorable Charles R. Richey  
United States District Court for the District of Columbia  
August, 1973 thru August, 1974.

2. whether you practiced alone, and if so, the addresses and dates;

No.

**3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

- **November 7, 1974 to April 30, 1996**

Steel, Hector & Davis, LLP  
4000 First Union Financial Center  
200 South Biscayne Blvd.  
Miami, FL 33131-2398

- Associate (1974 - 1979)
- Partner (1980 - 4/30/1996)

- **1984 thru 1988 (Part-time Teaching)**

- University of Miami School of Law  
1311 Miller Drive  
Coral Gables, FL 33124

- Adjunct Professor of Law, Trial Advocacy Program

- **1982, 1983, 1984, 1987, 1989, 1995 (National Institute of Trial Advocacy Faculty)**

Faculty -- Advanced Trial Advocacy Course, 1995;  
Faculty -- National Course, Boulder, CO, July, 1982, 1987;  
SE Regional, Chapel Hill, NC May, 1983, 1984;  
Florida Regional, Ft. Lauderdale 1989.  
Will also teach the July, 1988 National Course at Boulder, CO.

- **May 1, 1996 to October 10, 1997**

Office of National Drug Control Policy (ONDCP)  
Executive Office of the President  
Washington, D.C. 20503

- Director, Office of Legal Counsel -- chief counsel of ONDCP (White House Drug Policy Office), directed all legal activities in ONDCP, managed the legal staff and served as confidential legal advisor to

General (Ret.) Barry R. McCaffrey, in his capacity as the Director of ONDCP and a member of the President's Cabinet

- **October 11, 1997 to present**

On sabbatical.

Other relevant particulars:

- **1993-1994**

President  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300

Between 1991-92, successfully campaigned among The Florida Bar's 50,000 in and out-of-state members to become President-elect of The Florida Bar. Served as President-elect (92-93) and as President (93-94). Primary Presidential Accomplishments:

- Reunification of a disaffected Bar through the Solo and Small Firm initiatives and Regional Town Hall Conferences.
- Strategic Long Range Plan, the first long range plan since 1984.
- Bar Leaders' Professionalism Retreat with Michael Josephson of the Josephson Institute of Ethics
- Led effort to generated Bar member acceptance of the Florida Supreme Court's 1993 Pro Bono Rule.

- **1992-97**

American Arbitration Association  
Certified Complex Case Arbitrator (1992-to present)  
National Board of Directors (1995-97)

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

**Federal Judicial Clerkship 1973-74**

Served as a law clerk to the Honorable Charles R. Richey, United States District Court for the District of Columbia. In this capacity, I was responsible for the legal research, case management and drafting of judicial findings, opinions, orders and jury instructions on the Court's even-numbered cases.

#### **Private Practice 1974-96**

During my twenty-two years with Steel Hector & Davis, I was a civil trial lawyer. I am "AV" rated by Martindale-Hubbell and became board certified by the Florida Bar as a Civil Trial lawyer in 1987. I have had the opportunity to try a wide range of cases. I have also handled the appellate litigation relating to all my cases.

At the start of my career, I appeared in state and federal courts on defamation, copyright and media related matters. As I began handling my own caseload, I appeared primarily in federal court defending EEOC cases, contract actions, Medicare regulation challenges and, in the state courts, I defended companies in negligent security, product liability, and personal injury cases especially those involving children.

In approximately 1986, commercial disputes such as complex foreclosures, lender liability suits and construction defect cases began to dominate my practice. This evolved into a focus on business contracts and torts arising out of partnership, manufacturer/distributor and franchising disputes. Additionally, in the late 80's, I assumed responsibility for the defense of an asbestos manufacturer in its cases in Dade and Broward Counties.

In 1994, with Miami's growth as an international business center, my practice began to develop an international and corporate consulting component, with a particular emphasis on Brazil. This led to increased involvement in mediation and arbitration. I became certified by the American Arbitration Association as a complex case arbitrator and a Florida Supreme Court Certified mediator.

#### **Public Service May 1, 1996 to October 10, 1997**

As Director, Office of Legal Counsel of ONDCP, I was the chief counsel to the Director, ONDCP, a member of the President's Cabinet, and responsible for all legal activities in the agency. Moreover, due to delays in the nomination and confirmation of ONDCP's deputy directors, I often functioned as one, briefing foreign officials, speaking to and working with national, state and local officials, business and community groups, and mediating differences in the interagency process.



In addition to general counsel and litigation management duties, I was responsible for policy development and implementation and legislative review. The latter included drafting ONDCP's proposed reauthorization legislation, working it through the interagency concurrence process, and assisting in Congressional briefings and hearings.

- 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

In private practice, my clients were national and international companies, public utilities, newspapers, television stations, publishing companies, banks, insurance companies, pharmaceutical companies, funeral home companies, manufacturers (from medical products to dynamite to automobiles), hospitals, home health agencies, medical associations, hotels, and educational institutions. I have also represented individual clients in disputes ranging from estate to employment to real estate disputes.

My practice has been diverse. My expertise is as an effective, cost-efficient jury trial lawyer involved principally in personal injury, defamation, business torts, franchising and distribution matters. In other areas of the law, I developed the substantive matter knowledge as needed or would team with a partner who had the expertise.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Before 1992, I appeared in court regularly. Since then, my appearances have been fewer due to the nature of my practice, the Bar Presidency, and my work with ONDCP.

- 2. What percentage of these appearances was in:**

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

- a) Federal Courts – 20%
- b) State Courts – 75%
- c) Other courts – 5% (administrative bodies)

- 3. What percentage of your litigation was:**

- (a) civil;
- (b) criminal.

- a) Civil -- 99+%
- b) Criminal -- less than 1%

**4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

Jury -- total 11  
 3 as sole counsel;  
 4 as lead counsel;  
 4 as associate counsel.

Non-jury -- total 12  
 6 as sole counsel;  
 3 as lead counsel;  
 3 as associate counsel.

**5. What percentage of these trials was:**

- (a) jury;
- (b) non-jury.

48% jury, 52% non-jury

**18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**(1) Florida Department of Highway Safety and Motor Vehicles and NB Motors Inc. V. BMW of North America, Inc.**, Case No. 92-20704-23, 11th Judicial Circuit of Florida

**Substance of case:** State of Florida and a Florida automobile dealer (Norman Braman) challenged BMW's 1992 North American Distributor's policy to promote the sale of BMW products within the United States rather than in the overseas grey market.

Party represented: Defendant BMW of North America, Inc.

Applicant's participation: Lead counsel, responsible for case strategy and management, pleadings, discovery, pre-trial motions and legal memoranda, all pre-trial preparation, four days of preliminary injunction hearing.

Final disposition: Settled after the preliminary injunction hearing while awaiting the Court's ruling.

Court and trial dates: Four days, fall of 1993, before Judge Bernard Jaffe.

Co-counsel: Frank P. Scruggs II, Esq.  
Greenberg Traurig  
515 E. Las Olas Blvd., Suite 1500  
Ft. Lauderdale, FL 33301  
(954) 768-8262

NB Motors, Inc.: Michael Nachwalter, Esq.  
1100 Miami Center  
201 S. Biscayne Blvd.  
Miami, FL 33131-4324  
(305) 373-1000

State of Florida: Richard Doran  
Assistant Attorney General of Florida  
1323 Winewood Blvd., Bldg. 1, Rm 407  
Tallahassee, FL 32399-1099  
(904) 488-2381

**(2) Macias, et al. v. Fireman's Fund, et al.**, Case No. 82-24597, 11th Judicial Circuit of Florida. On appeal, **Florida Power & Light v. Ileana Macias, a minor, by her mother and guardian, Neisis Macias**, 507 So. 2d 1113 (Fla. 3rd DCA 1987).

Substance of case: Suit against a highway contractor (Brewer Construction), Florida Power & Light and the Florida Department of Transportation for damages the four year old plaintiff suffered (bi-laterally crushed skull) when the car in which she was riding went off the road, deflected off of a FPL pole and struck a tree. The child had been sitting on her mother's lap in the front passenger seat.

The case involved two trials and created new law on appeal. The first trial, which was before a jury, had complex liability issues involving highway design and had the significant emotional impact of the child plaintiff's damages (plaintiffs asked jury for \$33M for the child who due to the accident had only brain stem capabilities yet a life expectancy of 70 years). The second trial determined the appropriate apportionment

(among the plaintiffs) of co-defendant Brewer's \$5M settlement for verdict set-off purposes among the defendants who went to trial. On appeal, the case was significant in two respects: (1) it established legal precedent as to a utility company's duty in the placement of utility poles -- if the appellate court had affirmed, Florida utility companies would have had the duty to replace all roadside utility poles each time highway design requirements changed; and (2) it established in Florida the requirement for the appointment of a guardian ad litem for an injured child to protect the child's financial interest where the child's guardian claims an interest in settlement proceeds.

Party represented: Defendant Florida Power & Light

Applicant's participation: Sole counsel in pleading stage and through most discovery; lead counsel in jury trial and non-jury apportionment trial; lead counsel on appeal, wrote brief, argued set-off/apportionment and guardian ad litem issues.

Final disposition: At jury trial -- verdict for the plaintiff of \$4.5M. At apportionment/set-off trial, verdict reduced to \$2.7M. On appeal, verdict reversed.

Court and dates of trial period(s): The Honorable Richard Fuller, Circuit Court Judge; Jury trial, 7 days, December 1984; Apportionment trial, 2 days, January 1985.

Co-counsel (trial): Frank P. Scruggs II, Esq.  
Greenberg Traurig  
515 E. Las Olas Blvd., Suite 1500  
Ft. Lauderdale, FL 33301  
(954) 768-8262

Co-counsel (appeal): Sam Daniels, Esq. (deceased) and Mark Hicks, Esq.  
Hicks & Anderson  
100 N. Biscayne Blvd., Suite 2402  
Miami, FL 33132-2306  
(305) 374-8171

<u>Counsel for Plaintiffs:</u>	Gil Haddad	Gary Gerrard
	P.O. Box 345118	P.O. Box 140310
	Coral Gables, FL 33114-5118	Coral Gables, FL
	(305) 666-7677	33114-0310
		(305) 443-5043

Counsel for Brewer: Michael Buckley  
Fowler White, 100 SE 2d St., 17th Fl  
Miami, FL 33131  
(305) 789-9200

DOT Counsel (trial): William Peeples (Can not locate current address)

DOT Counsel (appeal): Richard Gale  
2 S. Biscayne Blvd., Suite 3310  
Miami, FL 33131-804  
(305) 374-3300

**(3) Sea Air Towers Ltd. V. Melvin Grossman and Bliss & Nyitray, Inc.**, Case No. 82-3855 CA 02, 11th Judicial Circuit of Florida; on appeal, 513 So. 2d 686 (Fla. 3rd DCA 1987)

Substance of case: Construction design defect caused the parking deck in an 11 year-old high-rise rental apartment building to collapse. Plaintiff incurred costs to repair the deck and loss of rental income.

Party Represented: Plaintiff, Sea Air Towers, Ltd.

Applicant's participation: Sole counsel in pre-trial stages, drafted pleadings, opposed motions to dismiss and for summary judgment; conducted discovery of fact and expert witnesses; trial preparation; lead counsel at trial handling liability issues; post-trial motions; on appeal wrote brief and argued appeal.

Final disposition: Jury award of \$540,000 of which \$300,000 represented lost rents. Lost rents affirmed on appeal; appellate court reversed that portion of awarded repair costs associated with increasing the load bearing capacity of the parking deck.

Court and dates of trial periods: The Honorable Lewis Whitworth, Circuit Court Judge of the 11th Judicial Circuit, FL; March 13 through 20, 1984.

Co-counsel (trial): Frank P. Scruggs II, Esq.  
Greenberg Traurig  
515 E. Las Olas Blvd., Suite 1500  
Ft. Lauderdale, FL 33301  
(954) 768-8262

Melvin Grossman: Cecyl L. Pickle, Esq.  
(at time of case with Peters, Pickle, Flynn, et al)  
904 E. Ridge Village Drive  
Miami, FL 33157-8068  
(305) 255-0129

Bliss & Nyitray, Inc.: Michael Spring, Esq.  
Oak Plaza, Suite B-4  
8525 S.W. 92 Street  
Miami, FL 33156  
(305) 274-1222



**(4) Citizens of the State of Florida v. Public Service Commission and Florida Power & Light Company**, 435 So.2d 784 (Fla. 1983)

**Substance of case:** FPL's 1980 utility rate case. (The case sought a \$480M rate increase, had significant impact on the citizens of Florida and involved very complex economic, financial, accounting, and regulatory issues. This was FPL's first rate case since 1973 and the first rate case before the newly appointed Public Service Commission which had instituted full discovery and an adversarial trial procedure.)

**Applicant's participation:** In charge of case discovery, including expert discovery; assisted my partners Matthew Childs (lead counsel) and William Steel at trial; prepared written testimony, exhibits; prepared company witnesses for cross-examination; prepared cross-examination of opposing parties' witnesses; conducted cross-examination at trial; argued legal/evidentiary motions during trial; assisted in the preparation of proposed findings of facts, conclusions of law, proposed final order, and supporting brief; assisted in the preparation of the brief to the Florida Supreme Court.

**Final disposition:** PSC staff recommended nearly full amount requested; PSC Commission awarded half of requested relief. Decision affirmed on appeal.

**Court and trial dates:** Three weeks, July 1984, before the Florida Public Service Commission: Commissioners Cresse, Gunter, Leisner, Marks and Nichols.

**Party Represented:** Florida Power & Light

**Co-Counsel:** Matthew Childs and William Steel, Esq. (Deceased)  
Steel, Hector & Davis LLP  
215 South Monroe, Suite 601  
Tallahassee, FL 32301-1804  
(904) 222-2300

**Appeal**

**Co-counsel:** William B. Killian  
Steel, Hector & Davis LLP  
200 S. Biscayne Blvd., Suite 4000  
Miami, FL 33133-2398  
(305) 577-2821

**Fla. PSC:** Joseph A. McGlothlin, Legal Dir.  
McWhirter, Reeves et al  
117 S. Gadsden St.  
Tallahassee, FL 32301  
(904) 222-2525

Paul Sexton  
Haydon Burns Bldg.  
605 Suwannee St.  
Tallahassee, FL 32399  
(904) 488-6212

Public Counsel: Jack Shreve, Esq.  
111 W. Madison St., Rm 812  
Tallahassee, FL 32301-1906  
(904) 488-9330

**(5) Dade County Society of Internal Medicine, et al. v. Florida Blue Cross/Blue Shield, et al.**, Case No. 80-2999 CIV-SMA, U.S. District Court of So. Dist. of FL.

Substance of case: Mandamus and constitutional challenge of Secretary of Health and Human Services' application of Medicare regulation in Florida in a manner different than in other states. This case also had implications nationally as it was the first defeat in the nation of a government's motion to dismiss based on lack of jurisdiction to review such challenges.

Parties represented: Dade County Society of Internal Medicine, H. Kermit Green and Mildred Sheldon

Applicant's participation: Retained as counsel after initial counsel's (Tobias Simon) untimely death; sole counsel, developed jurisdictional theory to allow court review; successfully opposed government's motion to dismiss for lack of jurisdiction; conducted investigation and discovery on the merits.

Final disposition: While case was stayed pending the U.S. Supreme Court's decision on the jurisdictional issue in the U.S. 6th Circuit case of: Michigan Society of Family Physicians v. Michigan Blue Cross and Blue Shield, it became clear that Congress intended to change the entire Medicare reimbursement scheme. Clients voluntarily dismissed case.

Court: The Honorable Sidney Aronovitz, U.S. Dist. Court for So. District of FL

Counsel for Defendants: Marc Fagelson, Esq.  
U.S. Attorney's Office  
299 E. Broward Blvd.  
Ft. Lauderdale, FL 33301  
(954) 356-7314

Intervener. Florida Academy of Family Physicians:  
Alan Gilchrist, Esq.  
Fernet Bellamy & Gilchrist  
333 West Fort, Suite 2000  
Detroit, Michigan 48226  
(313) 964-2710

**(6) Frank Gatto, et al. v. Florida Power & Light Co. and John Burke**, Case # 78-18760-CA04, 11th Judicial Circuit, FL.

**Substance of case:** Personal injury; FPL truck ran over a 7-year old boy. The case involved extremely challenging discovery and evidentiary issues. The case also had difficult persuasion issues as the plaintiff was a very attractive child model, the individual defendant had DUI record and the corporate defendant was very unpopular because its utility bills at that time were higher than most monthly mortgage bills.

**Parties represented:** Defendants FPL and John Burke

**Applicant's participation:** Sole defense counsel, responsible for all pleadings, conducted all discovery and opposing discovery challenges. Prepared case for trial 5 times, each time a unique circumstance prevented the case from going forward (i.e. emergency tumor surgery of individual defendant, death of Judge's mother, etc.). After the fifth time case was set to start trial, Plaintiffs amended their complaint to allege the truck driver was drunk at time of accident; filed motion to strike the amended pleading as a sham.

**Final disposition:** Plaintiffs took settlement offer of \$162,500 pending ruling on motion to strike as sham.

**Court and trial dates:** The Honorable Herbert Klein, Circuit Court for the 11th Judicial Circuit of Florida. Case set for trial in June, July, September, October, December 1979.

<b><u>Counsel for Plaintiffs:</u></b>	J.B. Spence, Esq. 2950 SW 27th Avenue Miami, FL 33133 (305) 567-1200	Stuart Grossman, Esq. Grossman & Roth, P.A. 2665 S. Bayshore, PH1 Miami, FL 33133-5401 (305) 442-8666
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**(7) Triangle Publications v. Knight-Ridder Newspaper, Inc.**, 626 F.2d 1171 (5th Cir. 1980); lower court case, 445 F.Supp. 875 (S.D. Fla. 1978)

**Substance of case:** Copyright infringement seeking a permanent injunction arising out of a Miami Herald comparative ad featuring the cover of TV Guide.

**Party represented:** Defendant Knight-Ridder Newspapers, Inc.

**Applicant's participation:** Prepared pleadings, original and supplemental memorandum in opposition to preliminary injunction, supporting affidavits and evidentiary exhibits; assisted at preliminary injunction evidentiary hearing; assisted in preparation of the brief and oral argument on appeal.

Final disposition: Preliminary injunction denied; affirmed on appeal.

Court and trial dates: The Honorable James L. King, U.S. Dist. Ct. So. Dist. Fla., January 1978, one day trial on the merits.

Co-Counsel: Talbot D'Alemberte  
President's Office  
Florida State University  
211 Westcott Bldg.  
Tallahassee, FL 32306-1037  
(904) 644-1085

For TV Guide: Reginald L. Williams ( deceased)  
Formerly with Blackwell, Walker, Gray, Flick

Opposing co-counsel on appeal  
Melville B. Nimmer, Esq.  
Sidley & Austin  
2049 Century Park East, 35th Floor  
Los Angeles, CA 90067

**(8) American Home Insurance Co., et al. v. Donald S. Zuckerman**, U.S.D.C. So. Dist. Fla, Case No. 87-1711 Civ-Nesbitt

Substance of case: Insurance companies' suit for breach of contract against its attorney seeking to discharge him, obtain access to approximately 90 case files and recover four years of fee overcharges (\$400,000). Defendant counterclaimed for attorney's fees.. The case had difficult facts, involved multiple legal relationships and complex accounting/allocation issues not only in the 90 underlying cases but also among the defendant's various practice entities/partnerships in determining responsibility for overcharges.

Parties represented: American Home Insurance Co. and National Union Fire Insurance Co.

Applicant's participation: Sole counsel for plaintiffs. Prepared pleadings, tried injunction trial (1 day) to require counsel to accept discharge and obtain access to case files; conducted discovery (written and deposition); devised method to handle this "can-of-worms" case in an aggressive yet cost-efficient manner.

Final disposition: Obtained preliminary injunction; second trial, on the accounting issues, settled the eve of the non-jury trial. Defendant accepted plaintiffs' accounting.



Court and trial dates: The Honorable Lenore Nesbitt, U.S.D.C.So.Dist.Fla. Preliminary injunction hearing March 1988.

Counsel for Defendant (Insurance Counsel):

Paul Huck, Esq.  
200 S. Biscayne Blvd., Suite 2800  
Miami, FL 33131-2335  
(305) 372-1800

Related state court action's counsel:

Alex Hofrichter, Esq.  
9350 S. Dixie Hwy, Suite 1500  
Miami, FL 33156-2945  
(305) 670-4888

**(9) Barbara Boney v. ITT Community Development Co.**, Case No. 76-15, U.S.D.C.So. Dist. Fla., on appeal 609 F. 2d 1006 (5th Cir. 1979), cert. denied March 31, 1981.

Substance of case: Alleged employment discrimination on the basis of race and sex. Ms. Boney alleged she was discriminated against in work assignments and in the amount she was paid. She also claimed the Defendant discriminated against her in its termination her employment.

Significance of case: This case involved numerous difficult witness and evidentiary issues plus the fact that the law in this area was still developing. It was also my first solo trial to judgment in Federal Court and the Judge's first EEOC case. On appeal, the plaintiff appeared pro se which raised additional difficulties.

Party Represented: Defendant ITT Community Development Co.

Applicant's participation: Sole counsel. At the trial level, prepared all pleadings, conducted all discovery and all pre-trial preparation including trial brief and tried case. On appeal, wrote brief in the 5th Circuit and opposition to petition for cert. to the U.S. Supreme Court.

Final disposition: Judgment for Defendant, affirmed on appeal, cert. denied.

Court and trial dates: The Honorable Sidney Aronovitz, U.S.D.C.So.Dist. Fla., three days in November 1977.

Opposing trial counsel: Richard J. Scrabis, Esq.  
PO Box 6051  
Key West, FL 33041-6051  
(305) 294-7628



**(10) Flintkote Asbestos Litigation.**

In the late 1980's, my firm asked me to assume responsibility for defending Flintkote, a manufacturer of asbestos containing products, in the complex multi-case asbestos dockets filed in Dade and Broward Counties. This required handling, at any given time, approximately 140 cases involving various combinations of claimed product exposures and medical damages, plus representing Flintkote at video taped depositions of terminally ill Florida plaintiffs and witnesses in cases which were filed outside of Florida. In addition to lawyering skills, this representation required management skills to handle the cases in an expeditious yet cost-efficient manner. I was able to do this with the assistance of an associate and a paralegal and a computerized case management system.

**Co-counsel:** Brian Felcoski, Esq.  
 Steel Hector & Davis LLP  
 200 S. Biscayne Blvd, 4000  
 Miami, FL 33133-2398  
 (305) 577-2974

A significant number of counsel were involved in these cases. Those with whom I worked most closely were:

**Co-Defendant, Counsel for Eagle Pitcher and Keene:**  
 Susan J. Cole, Esq.  
 2801 Ponce de Leon Blvd., #550  
 Coral Gables, FL 33134-6924  
 (305) 444-2400

**Co-Defendant, Counsel for W.R. Grace:**  
 Virginia Easley Johnson, Esq.  
 Broad & Cassel  
 201 S. Biscayne Blvd., 3000  
 Miami, FL 33131  
 (305) 373-9415

**Plaintiffs' Counsel:** David M. Lipman, Esq.  
 5901 SW 74th St. Suite 304  
 Miami, FL 33143-5163  
 (305) 862-2600

The attorneys with whom I had the most recent contact include:

1. **Nicholas J. Kouletsis, Esq.**, Pepper Hamilton & Scheetz, Suite 500, Liberty View Building, 457 Haddonfield Road, Cherry Hill, NJ 08002-2002, (609) 317-9530.
2. **Scott Walter Rothstein, Esq.**, Kusnick & Rothstein, 8211 W. Broward Blvd., Suite 420, Ft. Lauderdale, FL 33324-2741, (954) 472-8900.
3. **The Honorable Michael H. Salmon**, 3601 Avocado Ave., Miami, FL 33133-6205, (305) 444-4378.
4. **Michael Nachwalter, Esq.**, 1100 Miami Center, 201 S. Biscayne Blvd., Miami, FL 33131-4324, (305) 373-1000.
5. **Stuart Z. Grossman, Esq.**, 2665 S. Bayshore Dr., Ph. 1, Miami, FL 33133-5401, (305) 442-8666.
6. **Carol DiBattiste, Esq.**, Deputy United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Suite 800, Miami, FL 33132, (305) 961-9100.
7. **Janet Napolitano, Esq.**, Janet 98, P.O. Box 2525, Phoenix, AZ 85002-2525, (mailing), 909 North 1st Street (street address), Phoenix, AZ 85002-2525, (602) 985-2638.
8. **Jonathan Schwartz, Esq.**, Department of Justice, Office of The Deputy General Office, Associate Attorney General, 950 Pennsylvania Ave. NW, Room 4208, Washington D.C. 20530, (202) 305-8060..
9. **Mary Harkenrider, Esq.**, Department of Justice, 950 Pennsylvania Ave NW, Room 2212, Washington D.C. 20530, (202) 514-2419. She is the ex officio member of the U.S. Sentencing Commission. Worked closely with her on drug-related sentencing issues.
10. **Judith Leonard, Esq.**, Acting General Counsel, Office of National Control Policy, Executive Office of the President, 750 17th Street NW, Washington D.C. 20503, (202) 395-6622.

Other long-time references include:

11. **Chesterfield H. Smith, Esq.**, Holland & Knight, P.O. Box 015441, Miami, FL 33131-5441, (305) 789-7748.
12. **Frank P. Scruggs Greenberg Taurig**, 515 E. Las Olas Blvd., Suite 1500, Ft. Lauderdale, FL 33301, (954) 768-8262.

13. **Alan T. Dimond, Esq.**, Greenberg, Traurig, 1221 Brickell Ave., Miami, FL 33131-3260, (305) 579-0770.

14. **Talbot "Sandy" D'Alemberte**, President, Florida State University, 211 Westcott Blvd., Tallahassee, FL 32306-1037, (904) 644-1085.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

**(1) Article V Task Force, 1994-95.**

Mini-constitutional revision commission, established by the Florida Legislature, which focused on the provisions of the Florida Constitution governing the judiciary. It made recommendations on such matters as the judicial disciplinary process, judicial selection and tenure.

**(2) Devitt Proposals Review Committee.**

Chief Justice Burger of the U.S. Supreme Court appointed Judge Devitt to examine the quality of attorneys' representation in the nation's Federal Courts and make recommendations for improving it. I co-chaired the American Bar Association Young Lawyers Division Committee which analyzed the recommendations and proposed workable alternatives. The recommendations of our YLD committee were adopted as the ABA position. Thereafter, I worked with Judge James Lawrence King, Chair of the King Committee (also established by Chief Justice Burger) to implement modified Devitt Committee recommendations. Judge King's Committee led to the creation of Admission Standards for Federal Courts and the Admission Standards Committee for the U.S. District Court for the Southern District of Florida. I co-chaired the latter and chaired the Examination Sub-Committee. The Sub-Committee developed an exam which particularly targeted the areas in which the judges found lawyers had difficulties.

**(3) Amendment to the Rules Regulating the Florida Bar (Continuing Legal Education), 510 So. 2d 583 (Fla. 1987).**

In 1983-84, I chaired the Lawyer Competency and Training Sub-Committee of the Florida Bar Long Range Planning Commission. The Commission was chaired by past President Leonard Gilbert. After an in depth analysis of the data regarding lawyer's educational needs for the next ten years, the experience of other bars in addressing

these needs, and the alternatives for meeting these needs, the subcommittee recommended the adoption of a rule requiring Florida lawyers to continue their legal education, as befits a learned profession. The Commission adopted the recommendation and submitted to the Florida Bar Board of Governors. I advocated the rule's adoption before the Board of Governors. The Board adopted it and referred it to an implementation committee. When the implementation committee presented its proposal, I again appeared before the Board to urge its adoption. It passed by one vote. Thereafter, then Florida Bar President Joe Reiter invited me to participate in the oral argument before the Florida Supreme Court to urge its adoption. The Court adopted the proposed rule in 1987.

#### **(4) Unfair Trade Practices Case Favorably Resolved.**

The Attorney General of Florida (economic crimes division) filed an investigatory complaint against my client, a large publishing company, alleging the multi-million dollar subscription sweepstakes campaign for one of its national magazines violated the advertising provisions of Florida's Little FTC. After four years of in-depth negotiations (1992-96), I persuaded the Attorney General's office to dismiss the case without any penalty or attorneys fees. This victory was particularly gratifying considering the recent actions Florida's Attorney General has taken against other major publishing companies.



**II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)**

- 1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

None. Am no longer a participant in the Steel Hector & Davis 401k Plan (my interest was rolled into an IRA at Smith Barney) and I have received a return of my capital account and all other sums to which I am entitled.

- 2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Regarding those items in which I or my husband have a financial interest, I would recuse myself. Regarding any matter involving one of my major clients, an organization in which I was an officer or served on its Board in the past 8 years, an agreement I negotiated or an issue in which I took a public position, I would recuse myself. I also plan to recuse myself in any matter in which my husband's firm, my former firm, close personal friends or the parents of my godchildren are counsel of record. Because of my Bar activities, I know many lawyers. In those instances in which I know one counsel well and not the other, I believe it is important that the judge raise this fact at the first opportunity, so that any issue regarding it is put to rest immediately. At all times I will follow the guidelines of the Code of Judicial Conduct, 28 USC §455.

- 3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

- 4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and**



other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached financial disclosure report, required by the Ethics in Government Act of 1978.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See attached financial net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Have served:

- (1) as campaign treasurer (1972) for campaign of John A. Darlson, Democratic candidate for Florida's 10th Congressional District;
- (2) served on campaign committees for state judicial candidates at various times from the 1970s up to 1992. At this point I do not recall all judicial candidates, but they included Judge Hatchett against Judge Duval; Judge Mike Salmon, Judge Maxine Lando; Judge Steve Robinson;
- (3) counsel for John Anderson for President Campaign in 1980.
- (4) organized (and maybe was treasurer, can't recall) of Florida Lawyers for Dukakis-Bensten (1988);
- (5) counsel for Buddy McKay for U.S. Senate (1990) in the post-election ballot count challenge (a process prescribed by Florida law).

No complaints lodged to my knowledge.

**FINANCIAL STATEMENT**  
**NET WORTH**  
 (As of 05/11/98)

PROVIDE A COMPLETE, CURRENT FINANCIAL NET WORTH STATEMENT WHICH ITEMIZES IN DETAIL ALL ASSETS (INCLUDING BANK ACCOUNTS, REAL ESTATE, SECURITIES, TRUSTS, INVESTMENTS, AND OTHER FINANCIAL HOLDINGS) ALL LIABILITIES (INCLUDING DEBTS, MORTGAGES, LOANS, AND OTHER FINANCIAL OBLIGATIONS) OF YOURSELF, YOUR SPOUSE, AND OTHER IMMEDIATE MEMBERS OF YOUR HOUSEHOLD.

ASSETS				LIABILITIES			
Cash in hand and in bank	80,000			Notes payable to Banks-secured	37,000		
U.S. Government securities-add schedule.	0			Notes payable to banks-unsecured	0		
Listed securities-add schedule. Schd. A	379,408			Notes payable to relatives	0		
Unlisted securities-add schedule	0			Notes payable to others	0		
Accounts and notes receivable:	0			Accounts and bills due	8,000		
Due from relatives	0			Unpaid income tax	0		
Due from others	7,500			Other unpaid tax and interest	0		
Doubtful	0			Real estate mortgages payable-add schedule	0		
Real estate owned - add schedule Schd B	930,000			Chattel mortgages and other liens payable	0		
Real estate mortgages receivable	0			Other debts - itemize:	0		
Autos and other personal property	100,000						
Cash value - life insurance	0						
Other assets - itemize: Schd C	1,939,000						
				Total liabilities	45,000		
				Net Worth	3,390,908		
Total Assets	3,435,908			Total liabilities and net worth	3,435,908		

CONTINGENT				GENERAL INFORMATION			
As endorser, co-maker or guarantor	0			Are any assets pledged? (add schedule.) Schd D	Yes		
On leases or contracts	0			Are you defendant in any suits or legal actions?	Yes		
Legal Claims	0			Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	0						
Other special debt	0						

SCHEDULE A

1. Davis New York Venture fund, Class C	\$378,714.76
2. The Panda Project, Inc.	<u>693.00</u>
	\$379,407.76

**SCHEDULE B**

1. Residence	
Coral Gables, FL 33133	800,000
2. Condominium Boat Slip	
Cocoplum Yacht Club, Coral Gables, FL	80,000
3. Unimproved farm/timber land	
Clark County, Ark.	50,000
4. 1/4 of 1/2 of mineral rights on	
Kansas farm land	0*
<hr/>	
Total	931,000

\*Value is negligible until discovery of minerals

SCHEDULE C

1. Patricia A. Seitz P.A. (Cash and office equipment)	50,000
2. 14% interest in law firm of Richman Greer Weil Brumbaugh et. al.	100,000
3. Fine art	300,000
4. 1.3% interest in limited partnership Signature Grand LTD	130,000
5. 1 unit Zond Wind System Partners LTD	25,000
6. 1% interest in Calefee Investment LTD	50,000
7. Richman Greer et. al. 401K Retirement Fund	1,100,000
8. City National Bank IRA	82,000
9. First Union National Bank IRA	102,000
	<hr/>
Total	\$ 1,939,000



**SCHEDULE D**

1. 1.3% interest in Signature Grand LTD is pledged to City National Bank of Miami to secure \$37,000 loan balance.

10-10-94  
Rev. 1/98**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial)		<b>2. Court or Organization</b>	<b>3. Date of Report</b>
Seitz, Patricia A.		U.S. District Court S.Dist. FL	05/22/1998
<b>4. Title</b> (Article III judges indicate active or senior status, magistrate judges indicate full- or part-time)		<b>5. Report Type (check type)</b>	<b>6. Reporting Period</b>
U.S. District Judge (Nominee)		X Nomination, Date 05/22/1998	01/01/1997
		Initial Annual Final	to 05/11/1998
<b>7. Chambers or Office Address</b>		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>	
224 Ridgewood Road		Reviewing Officer _____ Date _____	
Coral Gables, FL 33133			

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Partner (thru P.A.Seitz, P.A.)	Steel Hector & Davis, LLP
2 Pres., Sec., Treas., Dir.	Patricia A. Seitz, P.A.
3 Member, Board of Directors	International Women's Forum, FL Chapter

**II. AGREEMENTS** (Reporting individual only; see pp.14-16 of Instructions.)

DATE	PARTIES AND TERMS
X <input type="checkbox"/> NONE (No reportable agreements.)	
1 _____	_____
2 _____	_____
3 _____	_____

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME (year, and spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 1996	Patricia A. Seitz, P.A. (Legal services as partner in Steel Hector & Davis LLP)	\$ 27,750.00
2 1996	Floyd, Pearson, Richman, Greer et al. (S)	
3 1997	Richman, Greer, Weil, Brumbaugh et al (S)	
4 1998	Richman, Greer, Weil, Brumbaugh et al (S)	

## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

Date of Report:

05/22/1998

## IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements.)	
1	EXCEPT	
2		
3		
4		
5		
6		
7		

## V. GIFTS

Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts.)		
1	EXCEPT		
2			
3			

## VI. LIABILITIES

Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities.)		
1	City Nat. Bk of FL	Loan (J)	K
2			
3			
4			
5			
6			

\* VAL CODES: J—\$15,000 or less K—\$15,001-\$50,000 L—\$50,001 to \$100,000 M—\$100,001-\$250,000 N—\$250,001-\$500,000  
O—\$500,001-\$1,000,000 P1—\$1,000,001-\$5,000,000 P2—\$5,000,001-\$25,000,000 P3—\$25,000,001-\$50,000,000 P4—\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

Period Report  
05/22/1998

## VII. Page 1 INVESTMENTS and TRUSTS— income, value, transactions

(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) Amount Code (A-B)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)						Exempt			
1 Patricia A. Seitz, P.A., former corp. law partner in SH&D	A	Interest	K	U					
2 Timberland, Clark Co, AR (S), Appraisal 1996		None	K	Q					
3 Richman Greer P.A. 14% interest in law firm(S)		None	L	U					
4 Signature Grand Ltd, Banquet Hall Broward Co, FL 1.3%int. (J)		None	M	U					
5 Zond Windsystem Ltd, Calif (S)		None	K	U					
6 Calcefee Investmt Ltd., Indust. Park, WPB, FL (S)		None	L	U					
7 City Nat. Bk Money Mkt, Miami, FL (J)	C	Interest	L	T					
8 City Nat. Bk IRA, Miami, FL (S)	C	Interest	L	T					
9 1st Union Nat. Bk IRA, Miami, FL (S)	C	Interest	M	T					
10 Davis New York Venture Fund Class C (Mutual Fund)		None	N	T					
11 Smith Barney Money Mkt Funds	B	Dividend							
12 Allegiance Corp. Common Stock	A	Dividend							
13 Banctec Inc., Common Stock		None							
14 Cisco Sys., Inc Common Stock		None							
15 Eli Lilly & Co. Common stock	K	Dividend							
16 MAC Record Common Stock	A	Dividend							
17 Pioneer Natural Resources Common Stock	A	Dividend							
1 Incl/Grn Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000					
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more					
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market						

## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

05/22/1998

## VII. Page 2 INVESTMENTS and TRUSTS— income, value, transactions

(Includes those of spouse and dependent children. See pp. 36-54 of instructions.)

A Description of Assets	B Income during reporting period	C Gross value at end of reporting period	D Transactions during reporting period
Indicate where applicable, owner of the asset by using the parenthetical "J" for joint ownership of reporting individual and spouse, "S" for separate ownership by spouse, "DC" for ownership by dependent child.	(1) Account Code (A-B)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P) (2) Value Method Code (Q-W)
Place "X" after each asset exempt from prior disclosure.			Exempt
NONE (No reportable income, assets, or transactions)			Exempt
18 Tiffany & Co, Common Stock	A Dividend		
19 Travelers Group Inc. Common Stock	A Dividend		
20 Bank United Common Stock	A Dividend		
21 Gulfstream Aerospace, Common Stock	None		
22 Newlon Consumer Prod Corp, Bond Maturity date 6/1/99	B Interest		
23 CATSerk-Coupon-Int. Pmt. 11.875% 2003-T/BD-11/15/00 Reg	None		
24 Strips-Tints-U.S. Treasury	None		
25 Ryder System Common Stock	A Interest		
26 Tammex Corp Common Stock	None		
27 Com Cast Corp Common Stock	A Dividend		
28 Magellan Health Common Stock	None		
29 Archer Daniels Common Stock	A Dividend		
30 Electronic Data Common Stock	A Dividend		
31 USF&S Common Stock	A Dividend		
32 Monasato Common Stock	A Dividend		
33 Loral Space Common Stock	None		
34 U.S. Diagnostics Common Stock	None		
1 Int/Gain Codes: A-\$1,000 or less (Cat. B1, D4) F-\$50,001-\$100,000	B-\$1,001-\$2,500 G-\$100,001-\$1,000,000	C-\$2,501-\$5,000 H1-\$1,000,001-\$5,000,000	D-\$5,001-\$15,000 H2-\$5,000,001 or more
2 Val Codes: J-\$15,000 or less (Cat. C1, D3) O-\$500,001-\$1,000,000	E-\$15,001-\$50,000 P1-\$1,000,001-\$5,000,000	L-\$50,001-\$100,000 P2-\$5,000,001-\$25,000,000	M-\$100,001-\$250,000 P3-\$25,000,001-\$50,000,000
3 Val Mth Codes: Q-Appraisal (Cat. C2) U-Book Value	R-Cost (real estate only) V-Other	S-Assessment W-Estimated	T-Cash/Market



## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

12/15/88

## VII. Page 3 INVESTMENTS and TRUSTS— income, value, transactions

(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period	If not exempt from disclosure				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)						
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.					Exempt					
Place "(0)" after each asset exempt from prior disclosure.										
NONE (No reportable income, assets, or transactions.)					Exempt					
35 Solutia Inc. Common Stock	A	Dividend								
36 Zweig Appreciation Mutual Fund	A	Dividend								
37 Panda Project Inc. Common Stock		None	J	T						
38 1/4 of 1/2 mineral rts. Trego & Ellis Co. Rs (See VIII Notes)		None								
39 Interest in Richman Greer 401K Plan (S) (See VIII notes)			P1	T						
40										
41										
42										
43										
44										
45										
46										
47										
48										
49										
50										
51										

1 Inco/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 O=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000
2 Val Codes: J=\$15,000 or less (Col. C1, D5) O=\$50,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

## FINANCIAL DISCLOSURE REPORT

Sells, Patricia A.

Date of Report  
05/22/1992

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Re VII #38, 1/4 of 1/2 interest in mineral rights in farm lands in Trego and Ellis, KS has value only if oil is discovered.

Re VII #39, Interest in Richman Greer 401K Plan (S). This law firm 401K plan is managed by Northern Trust.

## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

Disc. Report

05/22/1998

## SECTION HEADING. (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

## PART 1. POSITIONS (cont'd.)

Line	Position	Name of Organization/Entity
4	Member, Executive Comm.	Miami Coalition for a Safe & Drug Free Community
5	Member, Board of Directors	American Arbitration Association
6	Member, Board of Directors	Greater Miami Chamber of Commerce

## FINANCIAL DISCLOSURE REPORT

Seitz, Patricia A.

Date of Report

05/22/98

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 37 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

*Patricia A. Seitz*

Date

*05/22/98*

## Note:

Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Examples are:

- Have represented a number of individuals in landlord/tenant court through the Dade County Bar's "Put Something Back" Program in which Steel Hector & Davis established a landlord/tenant program in conjunction with the Legal Services of Greater Miami.
- Through Dade County Guardian Ad Litem Program, I have been counsel to a guardian ad litem in a termination of parental rights case; have been the court appointed guardian in a child support case and a denial of parental visitation case.
- Helped establish and organized lawyer training for in St. Hugh's Legal Clinic, a walk-in legal clinic in the Black Grove of Miami.
- Was the organizing agent for "Judge Barkett's Kids" a program to match lawyers with families of the 3rd grade class in Little Haiti's elementary school. The program, which required sensitivity to cultural and language differences, was part of a national effort led by Zoe Baird and Attorney General Reno to bring lawyers together with at risk children and their families.
- Represented a Haitian refugee in a INS proceeding seeking to exclude her from entry into this country.
- Have participated in a number of walk-in legal clinics in conjunction with the Dade County Bar Association. This involves spending an evening or afternoon providing legal guidance to indigent people.
- Was the Development Chair of the Miami City Ballet in the Company's second year of existence. We surpassed the fund raising goal of \$3.5M by \$40,000.
- Was Chair of the Family Abuse Task Force for the United Way in the early '80s. Our committee identified the need for greater uniformity in reporting among Dade County's 27 different municipalities to ensure reliable data for planning and allocation of resources to address family abuse. It also emphasized the need for and type of police and public education on this issue.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you**



currently belong, or have you belonged, to any organization which discriminates — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not and have not belonged to any private club which unlawfully discriminates. I have belonged to groups whose members are/were women:

Chi Omega Fraternity (College Sorority) (1964-68)  
 Various collegiate women's scholastic and service honoraries  
 International Women's Forum (women's network) (1995 to present)  
 Florida Women's Alliance a/k/a Florida Women's Network (business and professional women's network) (in 80's and early 90's)  
 The 200 Club, a Society of Professional Women (women's network) (1980-81)

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

Yes. Yes.

I submitted my application in response to a Florida Federal Judicial Nominating Commission notice of the opening in the December 1, 1997 issue of The Florida Bar News. The notice asked those interested in the position to file an application similar to that of the Senate Judiciary Committee by January 2, 1998. At the end of January 1998, I was advised I was one of the 10 candidates to be interviewed. The Southern District Committee of the Florida Federal Judicial Nominating Commission interviewed me in late February 1998. After the Committee interviews, I was informed that I was one of the three names submitted to Senator Bob Graham. Senator Graham interviewed me on March 8th. He advised me on March 16th that he was sending my name to the White House. The next day, March 17th, the White House sent me, by overnight delivery, forms for the FBI, the Department of Justice, the American Bar Association, the Senate Judiciary and the Ethics in Government Act of 1978 financial disclosure. I completed and returned the forms to The Justice Department. DOJ interviewed me in April. The FBI interviewed me on April 20th. The ABA interviewed me on May 18<sup>th</sup>. On May 22, 1998, the President sent my name to the Senate.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that**

could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

**5. Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing overnight responsibilities.

Our Constitution defines the responsibilities of each of the three branches of government. It is the responsibility of the federal judiciary to apply the law Congress enacts. Congress, as the elected representative of the citizens of this country, is the body with the responsibility of legislating citizens' rights and responsibilities to promote the common good. In cases requiring the interpretation and application of a federal statute, a judge must faithfully interpret the will of Congress consistent with the provisions of the Constitution.

In administering justice, it is essential that a judge focus on the parties' dispute before the court and assist those parties, within the bounds of the law, to resolve that conflict in the most expeditious and cost efficient manner possible. It

happens in some cases, however, that the law may not provide the relief or the outcome a party desires. In those instances, hopefully, the growing use of alternative dispute resolution mechanisms will provide disputing parties with meaningful ways to craft resolutions and move on with their lives in a constructive manner. Where the law does not provide relief, however, the court cannot function as a legislative body to create it.

## QUESTIONS AND ANSWERS

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARYWritten Questions from Chairman Orrin G. Hatch to Timothy Dyk:

- [22] 1. In *Loretto v. Teleprompter CATV Corp.*, the Supreme Court examined whether a recognized property interest depended upon the size of the interest claimed. In that case, as you may recall, the Court was considering whether the placement of two small cable boxes -- pursuant to statutory authorization -- on an apartment rooftop constituted a compensable taking. Despite the only minimal intrusion of the cable boxes, the Court found that a taking had occurred. Do you agree with the Court's holding in that case? Is a taking a taking, no matter how small?

Mr. Chairman, I would follow the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), holding that a taking is a taking, no matter how small.

- [23] 2. Mr. Dyk, could you identify for me what you believe to be the five most important Takings Clause cases of the past 20 years?

In my opinion, the five most important takings cases in the past twenty years are: *Dolan v. City of Tigard*; 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

- [24] 1. As you know a very important part of the Federal Circuit's docket deals with Fifth Amendment property rights. I would like to ask several questions in this area. Under current case law, a takings claim must be "ripe" in order to be heard in federal court. In a key decision entitled *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court attempted to clarify the principles of the ripeness doctrine.

The Court stated that a takings claimant must show: (1) that there has been issued a "final decision regarding the application of the regulations to the property at issue" from "the government entity charged with implementing the regulations," and (2) that the claimant requested



"compensation through the procedures the State has provided for doing so." [*Id.* at 194.] A takings plaintiff must meet both requirements before the case will be considered ripe for federal adjudication; if either has not been met, then the claimant will be procedurally barred from bringing such a claim in federal court.

Unfortunately, this ripeness standard has been abused by localities and lower federal courts so that, in one study, over 90 percent of takings claims against localities never reach federal court. My question for you is that since the Supreme Court in the recent *Suitum* decision termed the second prong of *Williamson County* "prudential," does not Congress have the duty to clarify and define for federal courts what ripeness is? Would you comment on this ripeness dilemma. For no other federal constitutional right -- First Amendment free speech for example -- do we require exhaustion of endless state procedures before access is granted to the federal courts.

I understand the question to be whether Congress, by legislation, can or should define or eliminate what has been described as the second of "two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court" under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1664-65 (1997). Studies have documented the significant delays and difficulties encountered in bringing state takings claims into federal court. This and a variety of other policy considerations bear on the desirability of such legislation. There are also important and complex constitutional questions. I have not previously studied either the policy or constitutional issues. However, the constitutional issues could come before the Federal Circuit if such legislation were enacted.

- [25] 2. Even after 200 hundred years of government under our Constitution, many are surprised to learn that the courts are split on the definition of a takings. Some courts have held that a takings is only hypothetical until compensation has been awarded or denied by a state or locality. This has led lower federal courts to dismiss takings claims against localities until the state determines compensation. Generally years of costly litigation occurs before the ripeness claim is decided. Other courts indicate that a taking occurs if all or substantially all the value of property was taken and that the federal district court can determine the remedy of just compensation as well as the state courts. Where do you fall in this debate? Would you comment on how *Eastern Enterprises v. Apfel*, No. 97-42 (U.S. June 25, 1998), decided on the next to last day of the 1997-1998 Supreme Court term, affects this debate?



I understand this question to be whether the second "hurdle" of *Williamson* is still good law or whether the federal courts, even without legislation, may adjudicate a just compensation claim before compensation has been awarded or denied by a state or locality. In the Supreme Court case of *Eastern Enterprises v. Apfel*, 1998 WL 332966 (U.S. June 5, 1998), the plurality opinion concluded that where "monetary relief against the Government is [not] an available remedy," the "lack of a compensatory remedy" could be "assumed" and "equitable relief for Takings Clause violations" would be appropriate. Again, this is an important and complex constitutional question, at least where a state remedy is in fact available, that I have not previously studied and that could come before the Federal Circuit in the context of a federal taking.

- [26] 3. As you know, the Federal Circuit hears appeals from the Court of Federal Claims. The jurisdiction between the Court of Federal Claims in Washington, D.C., and the regional federal district courts over federal Fifth Amendment takings claims is muddled. The Tucker Act grants the Court of Federal Claims exclusive jurisdiction over takings claims seeking compensation. Thus, property owners seeking equitable relief must file in the appropriate federal district court.

I believe that this division, similar to the one between law and equity, is archaic and results in burdensome delays as property owners who seek both types of relief are "shuffled" from one court to the other to determine which court is the proper forum for review. This phenomena is called the Tucker Act Shuffle. Do you think that this is a problem? Should Section 1500 of the Tucker Act be repealed?

The division of jurisdiction between the Court of Federal Claims and the district courts with respect to takings claims, like the historic division of jurisdiction between law and equity courts, can impose a significant burden on litigants and lead to unnecessary delays and complexity in litigation. It appears that repeal of 28 U.S.C. § 1500, in and of itself, would not completely solve this problem because the basic division of jurisdiction between the Court of Federal Claims and the district courts would continue to exist. I note also that the Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (1994), reaffirmed its earlier construction of section 1500, under which section 1500 does not bar a claim for monetary relief in the Court of Federal Claims merely because an equitable claim based on the same operative facts is pending in district court.

Written Questions from Senator Strom Thurmond to Timothy Dyk:

- [27] 1. Mr. Dyk, you appear to be a strong supporter of cameras in the courtroom. Do you feel there should be a federal rule of procedure providing that cameras must be allowed in federal courts or do you believe a particular trial judge should have wide discretion in deciding whether to permit cameras in their courtroom?

Senator Thurmond, no, I do not believe that rules should be adopted compelling individual trial judges to allow cameras. Rather, I believe that, at least until federal trial judges have more familiarity with camera coverage, rules should be adopted giving each individual trial judge wide discretion in deciding whether to allow cameras in any particular case or part of a case.

- [28] 2. Mr. Dyk, in a 1994 Federalist Society Roundtable Discussion that you participated in, you discussed the Roe v. Wade decision and the Rehnquist Supreme Court's treatment of the issue. Do you view the Roe v. Wade decision as a moderate decision at the time it was announced, based on the Supreme Court precedent that existed in that area at the time the decision was announced? Please explain.

No. At the time it was first announced, I viewed *Roe v. Wade*, 410 U.S. 113 (1973), as a decision that broke significant new ground; it was not a decision that merely reflected a moderate change from existing precedent. The Supreme Court's decision later not to overrule *Roe* was cited as an example of a moderate jurisprudence because it reflected adherence to existing precedent.

- [29] 3. Mr. Dyk, in the same Roundtable Discussion, you discussed statutory construction in the Rehnquist Supreme Court. Do you believe that the Rehnquist Court has placed too much emphasis on the words of the statute as opposed to legislative history, such as Committee Reports?

I believe that the Rehnquist Supreme Court has, in general, placed appropriate emphasis on the obligation of courts to interpret statutes according to their plain language. Where the language is plain, that should end the matter. At times, however, the language of the statute is ambiguous, and I believe that resort to competing dictionary definitions of the words of the statute cannot always resolve these ambiguities. Under these circumstances, committee reports, articulating the basic purpose of the statute, can be useful aids in statutory construction, though they sometimes may be unreliable. Of course, as a subordinate federal judge, I would follow the Supreme Court's requirements for statutory construction.

- [30] 4. Mr. Dyk, during your confirmation hearing, you apparently referred to Bailey v. United States, 516 U.S. 137 (1995), as a case in which the Rehnquist Court did not base its interpretation on the plain meaning of the statute. In that decision, the Court limited the term "use" to situations where the Government could "show that the defendant actively employed the firearm during and in relation to the predicate crime." In so doing, the Court overruled some circuit courts' interpretations of the phrase "uses or carries a firearm" because they had interpreted the phrase so broadly that the two operative terms had no independent meaning. Why do you consider this case to be an example of the Court not following the plain meaning of a statute?

My reference at the hearing was to the recent and related case of *Muscarello v. United States*, 118 S. Ct. 1911 (1998). *Muscarello* involved the interpretation of 18 U.S.C. § 924(c)(1) which imposes a mandatory five-year prison term on a person who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime." The issue in *Muscarello* was whether a person who had a gun in a locked glove compartment of a car or in the trunk was guilty of "carrying" the firearm. The Court was unable to find a single uniform definition of the term "carry", but held that the statute was applicable, in part, by resort to legislative history showing that the purpose of the statute was to persuade the criminal "to leave his gun at home." On this basis, the Court affirmed the convictions. This is an example of a situation in which the language of the statute may be appropriately interpreted in the light of legislative history revealing the purpose of the statute.

- [31] 5. Mr. Dyk, in the same Roundtable Discussion, you stated, and I quote, "In the area of criminal law, I do think the Court is changing the law. The Court is rolling back the decisions of the Warren Court and is very radical in the sense of overruling a number of significant precedents." Do you believe that the legal rules that have been established by the Rehnquist Supreme Court have been radical in the area of criminal law? Please explain.

No, I do not believe that the legal rules adopted by the Rehnquist Supreme Court in the area of criminal law are radical rules. I characterized the departure from precedent as being a radical approach, just as the Warren Court's departure from precedent was radical in the sense that any departure from precedent can be characterized as radical, i.e., reflecting fundamental change, rather than preserving the existing situation.



- [32] 6. **Mr. Dyk, you appear to have been involved with various committees of the American Bar Association. Do you believe it is appropriate for the ABA to take positions on controversial social policy issues, such as the death penalty and trigger locks on handguns?**

I do not believe it is desirable for the American Bar Association to take positions on controversial social policy issues, such as the death penalty and trigger locks on hand guns. The Association should limit itself to issues affecting the profession so that lawyers with widely divergent views will become and remain members of the Association.

- [33] 7. **Mr. Dyk, a former Supreme Court Justice once expressed his view of Constitutional Interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.**

I do not agree with the statement. The meaning of the words used in the Constitution does not change, though the principles articulated must be applied to changing fact situations.

- [34] 8. **What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?**

The failure of the legislature repeatedly to address social policy issues does not give the federal courts either the power or the responsibility to legislate solutions to those problems through case law.

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

Written Questions from Senator Charles E. Grassley to Timothy Dyk:

- [1] 1. Mr. Dyk, you were the attorney of record in many of the *Action for Children's Television* cases in the D.C. Circuit. In these cases, you fought hard against FCC regulations intended to protect children from inappropriate sexual content on broadcast television and radio. Why did you take this position in these cases and do you still hold to it?

Senator Grassley, I think that the Federal Communications Commission has authority to issue appropriate regulations to protect children from indecent radio and television broadcasts. The position taken by me as lead counsel in the *Action for Children's Television* cases reflected the interests of clients who had retained me to litigate those cases on their behalf. Under the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), we recognized that Congress had authority to regulate broadcast indecency to vindicate the interests of parents in denying children access to such material. In large part, the cases concerned the appropriateness of a blanket ban on indecency during all hours of the broadcast day and the issue of appropriate scope of such regulation (i.e., the hours during which indecency could be banned). Since the time of my last appearance in those cases, the Supreme Court has decided two cases in the area of indecency regulation. *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 117 S. Ct. 2329 (1997). My current views as to the constitutionality of such legislation reflect the constitutional rules articulated by the Supreme Court.

- [2] a. Do you believe that Congress has the constitutional authority to prohibit the broadcast of indecent material when children are likely to be in the audience? If so, under what circumstances?

Yes, in appropriate circumstances. The Supreme Court held in *Reno v. ACLU*, 117 S. Ct. 2329 (1997), that Congress has an interest "in protecting children from harmful materials." However, the Supreme Court also said in *Reno* that that interest "does not justify an unnecessarily broad suppression of speech addressed to adults." Restrictions narrowly tailored to protect children would pass constitutional muster. The District of Columbia Circuit has upheld a prohibition from 6:00 a.m. to 10:00 p.m. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), (*en banc*) cert. denied, 116 S. Ct. 701 (1996).



- [3] b. Do you believe that Congress has the constitutional authority to prohibit the cablecast of indecent material when children are likely to be in the audience? If so, under what circumstances? Does your analysis differ if the content originator is also the cable system operator?

Yes, Congress has the constitutional authority to regulate the cablecasting of indecent material in appropriate circumstances to protect children. While there is no majority Supreme Court opinion in the *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC* case, the Supreme Court seemed to say that the same test described in the answer to the preceding question would apply in the cable area. Thus, for example, requiring lockboxes would be constitutional. I am unaware as to why, under existing precedent, the test should be different if the content provider is also the cable system operator.

- [4] c. Do you believe that Congress has the power to restrict the display of pornographic material when children on federal property are likely to view such material?

Many cases have upheld the right of government, in appropriate circumstances, to restrict the public display of pornographic material when children are likely to view such material. This rule would apply to federal property.

**Written Questions from Senator John Ashcroft for All Candidates:**

- [5] 1. Which Supreme Court Justice, past or present, do you most admire and why?

Justice Holmes, because of his willingness and ability to discard his own personal views in the adjudication of constitutional issues.

- [6] 2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Justice Jackson, because of his important opinion for the Court in *Steel Seizure* cases. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring). I had occasion to apply that analytic framework in successfully arguing for invalidation of the striker replacement executive order in *Chamber of Commerce v. Reich*, 83 F.3d 439 (D.C. Cir. 1996).

- [7] 3. What does the discretionary power of the judiciary mean to you?

Court of Appeals judges have little discretionary power. No judge has discretionary power in adjudicating questions of law, but, for example, district court judges have discretion in setting procedural schedules, in allowing or restricting discovery and in a variety of other areas where Congress has specifically intended that judges exercise discretion.

- [8] 4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

Again, my model would be Justice Holmes, because of his commitment to discarding his personal views in constitutional adjudication.

- [9] 5. Which law review article or book has most influenced your view of the law?

Hart and Wechsler, *The Federal Courts and the Federal System*.

- [10] 6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

The Supreme Court has made clear that the plain language of the statute governs. In cases where the language of the statute is ambiguous, the Supreme Court has also held that resort to the legislative history is appropriate. Committee Reports are generally viewed as the most reliable legislative history. It can be difficult to determine the intent of Congress as a whole from the floor statements of individual members.

**Written Questions from Senator Jeff Sessions to Timothy Dyk:**

- [11] Which current U.S. Supreme Court Justice do you admire most and why?**

I particularly admire the Chief Justice, because of his willingness to listen to opposing arguments and his ability to produce clearly written opinions that directly address the issues.

- [12] In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?**

There are many Supreme Court decisions in the last thirty years that would vie for the honor of greatest decision. I view the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), holding that the press and the public have a First Amendment right of access to most judicial proceedings, as one of the most important. My own personal view is that one of the worst Supreme Court decisions in recent years was the decision in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997), where the Court upheld differential state taxation of natural gas sales by public utilities and natural gas marketers. Admittedly, I am influenced by the fact that I was the unsuccessful counsel in the case.

- [13] In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?**

The Supreme Court held in *Felker v. Turpin*, 518 U.S. 651 (1996), that Title I of the Antiterrorism and Effective Death Penalty Act, which restricted second or successive *habeas corpus* applications by state prisoners, is constitutional. I have no reason to disagree with that analysis.

**If confirmed, you will preside over many employment discrimination cases as a federal judge.**

- [14] **In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?**

I would follow the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

- [15] **In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?**

Under *Adarand*, it is difficult to survive strict scrutiny. The government must have a compelling interest, and the remedy must be narrowly tailored.

- [16] **Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?**

The Supreme Court has not passed on the issue, but the Ninth Circuit upheld the initiative in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). The Supreme Court denied review. 118 S. Ct. 397 (1997). I argued at the 1997 American Bar Association annual convention moot court that the initiative was constitutional.

- [17] **As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?**

No, I am not aware of any authority that would support closer scrutiny.

- [18] **Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?**

The Supreme Court has held that Congress may limit the jurisdiction of the lower federal courts if it does so in a constitutional fashion. For example, the



Supreme Court held that the Norris LaGuardia Act, limiting federal court jurisdiction to issue injunctions in labor disputes, is constitutional. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938).

**Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.**

- [19] **In your personal legal opinion, is the Prison Legal Reform Act constitutional?**

The Supreme Court has not yet decided the question, although the courts of appeals generally have agreed that the Act is constitutional. The statute, of course, is entitled to a presumption of constitutionality. I have not studied the issue and do not have a personal legal opinion.

- [20] **In your personal legal opinion, is the death penalty constitutional?**

Yes, the Supreme Court has held that the death penalty is constitutional. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976). The text of the Constitution itself appears to recognize that the death penalty may be imposed in appropriate cases.

- [21] **Would you personally be reluctant to impose or uphold the death penalty?**

If confirmed, it is unlikely that I would face this question as a judge of the Federal Circuit. If I did, I would have no difficulty in imposing the death penalty or in upholding its imposition in appropriate cases.

RESPONSES OF PATRICIA A. SEITZ

**QUESTIONS FROM SENATOR ASHCROFT****1. Which Supreme Court Justice, past or present, do you most admire, and why?**

Justice Sandra Day O'Connor. As a pioneering woman lawyer and the first woman to be a U.S. Supreme Court Justice, she is a role model of professionalism for my generation of women lawyers. As a Justice, she is clear and succinct in her legal analysis, respectful of her colleagues and precedent, and reflects an understanding that the law impacts real people.

**2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?**

Judge Learned Hand. In his view, the lower courts in the federal system must obey the commands of their superiors. He believed this limitation was essential to a democratic government under the rule of law.

**3. What does the discretionary power of the judiciary mean to you?**

In the federal system, the discretionary power of the judiciary is a limited one. It is the power prescribed by law whereby the court, upon consideration of all the circumstances, makes a decision which will promote the administration of fair and impartial justice. Examples are rulings on discovery and evidentiary matters and imposing sentences under the Sentencing Guidelines.

**4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?**

My role model is a composite of three judges: The Honorable Charles R. Richey, U.S.D.C.D.C., the Honorable Peter T. Fay, U.S. Court of Appeals for the Eleventh Circuit, and the Honorable Sidney Aronovitz, U.S.D.C.So.D.FL. All three judges are distinguished by their commitment to justice for all. Judge Richey is a particular role model for his diligent case management and mentoring of law clerks. Judge Fay is a role model because of his life of service to others as well as his commitment to his community. Judge Aronovitz was my favorite judge to appear before -- he gave the parties a sense that, win or lose, they had had a full and fair hearing. He was always prepared, prompt and succinct in his rulings, and unfailing in his courtesy.

**5. Which law review article or book has most influenced your view of the law?**

Alex de Tocqueville's "*Democracy in America*."

**6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?**

In interpreting the text of a statute, one must look at the language and apply it as written. If there is an ambiguity, one should look to precedent interpreting the language and follow precedent. Legislative history should not play a controlling role in statutory interpretation.

## QUESTIONS FROM SENATOR SESSIONS

### 1. Which current U.S. Supreme Court Justice do you admire most and why?

Justice Sandra Day O'Connor. As a pioneering woman lawyer and the first woman to be a U.S. Supreme Court Justice, she is a role model of professionalism for my generation of women lawyers. As a Justice, she is clear and succinct in her legal analysis, respectful of her colleagues and precedent, and reflects an understanding that the law impacts real people.

### 2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

The most helpful Supreme Court decision in the last 30 years has been the Daubert decision. I can not think of a decision in the last thirty years on the level of the Plessy v. Ferguson, the Dred Scott, and Korematsu decisions, which characterize my standard for the worst decisions of the Supreme Court.

### 3. In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

Any legislative enactment carries the strong presumption of constitutionality. The U.S. Supreme Court upheld the constitutionality of the Habeas Corpus Reform legislation in Felker v. Turpin, 518 U.S. 651 (1996). If confirmed, I will follow the law.

### 4. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

If confirmed, I will follow Adarand v. Peña.

### 5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

The strict scrutiny standard is the highest level of judicial scrutiny. It requires substantial evidence of a compelling governmental interest and a narrowly tailored remedy to achieve that interest to survive.

### 6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The U.S. Court of Appeals for the Ninth Circuit, in Coalition for Economic Equity v. Wilson, 122 F.3d 692, cert. denied 118 S.Ct. 397 (1997) found that the initiative did not violate any federal or state constitutional provision. I have no reason to doubt the Ninth Circuit's reasoning.

### 7. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

Voter referenda and legislative enactments should be given equal respect by the courts.

**8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?**

Yes.

**9. Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act. In your personal legal opinion, is the Prison Legal Reform Act constitutional?**

Nine of the ten circuits which have considered the Prison Legal Reform Act have upheld it including the U.S. Court of Appeals for the Eleventh Circuit in Dougan v. Singletary, 129 F.3d 1424 (11<sup>th</sup> Cir. 1997). If confirmed, I would follow the law.

**10. In your personal legal opinion, is the death penalty constitutional?**

The U.S. Supreme Court has ruled the death penalty is constitutional. If confirmed, it would be my duty to apply the law as it relates to the death penalty in the appropriate case.

**11. Would you personally be reluctant to impose or uphold the death penalty?**

No.

## QUESTIONS FROM SENATOR STROM THURMOND

1. **A former Supreme Court justice once expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.**

The U.S. Constitution is a remarkably succinct yet enduring document. Its principles are as applicable to the present time as to the time the Constitution was drafted. When interpreting the Constitution, a judge must rely on the actual text and the existing legal precedent.

2. **What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?**

A court is limited to applying existing law to resolve the case or controversy before it. Legislation, which reflects decisions on public policy, is the province of the legislature. Even if the legislature fails to address matters the public feels is important, a judge is not free to enter into the policy making arena.

3. **As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?**

The existence of Rule 11 acts as a reminder to counsel of their responsibilities as officers of the court. It is a powerful tool available to the court should other methods of control prove unsuccessful and should be used as such.

4. **Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?**

I have no reluctance to imposing the death penalty in the appropriate case.

5. **What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose or uphold them as a Federal judge?**

Mandatory minimum criminal sentences, as enacted by Congress, achieve a public policy which reflects the will of the people. If confirmed, I would apply the law enacted.



6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

The Sentencing Guidelines were established to create consistency and predictability in sentencing, and thus, promote fairness. They reflect Congress' effort to deal with an important public policy issue. If confirmed, I will follow the guidelines.

7. What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

The most significant was Brown v. Board of Education which held the concept of "separate but equal" violates the U.S. Constitution. The decision has ensured that our Constitution means what it says.

# ANSWERS OF CARL J. BARBIER TO QUESTIONS BY SENATOR THURMOND

1. A former Supreme Court justice once expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with the statement? Please explain.

As a district court judge, I would interpret the Constitution by first looking to the actual words of the text and giving those words their plain and ordinary meaning, as intended by the original framers. Next, I would look for Supreme Court or Court of Appeal precedent which interpreted the constitutional provision. I would follow such precedent.

2. What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Federal judges have no role in setting or developing public policy through case law. Under our constitutional doctrine of separation of powers, it is the role of the legislative branch, Congress, to make laws and develop public policy. Regardless of whether the legislature repeatedly fails to address certain important matters, the federal judiciary should not attempt to make laws or otherwise set public policy. The sole role of the judiciary is to interpret the laws as enacted by Congress.

3. As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

Rule 11 is an important tool for a trial judge to discourage and, where appropriate, sanction truly frivolous claims or pleadings. Attorneys should not be sanctioned for making nonfrivolous arguments for the extension or modification of existing law.

4. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

I have no personal moral or legal philosophy that would prevent me from following the precedent of the Supreme Court and imposing or upholding the death penalty in appropriate cases.

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

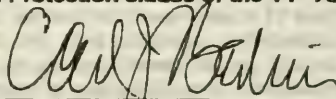
This is a policy decision within the prerogative of Congress. I would follow the law as enacted by Congress and impose sentence accordingly.

6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

The enactment of the Federal Sentencing Guidelines was a policy decision solely within the power of Congress as the legislative branch. It is up to Congress and the Federal Sentencing Commission to determine the appropriate guidelines. As a district court judge, I would adhere to the guidelines and sentence criminal defendants accordingly.

7. What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

I believe one of the most significant decisions in the past half century was the Supreme Court's unanimous ruling in Brown v. Board of Education, which held that the doctrine of "separate but equal" violated the Equal Protection clause of the 14<sup>th</sup> Amendment.



CARL J. BARBIER

July 21, 1998

## ANSWERS OF CARL J. BARBIER TO QUESTIONS BY SENATOR ASHCROFT

1. Which Supreme Court Justice, past or present, do you most admire, and why?

The life and career of Justice Sandra Day O'Connor are admirable for several reasons. As a young attorney fresh out of law school, unable to get a job with an established law firm, she started her own law practice. Later she became a justice of the Arizona Supreme Court, and eventually, the first female justice of the United States Supreme Court. Once on the Supreme Court, Justice O'Connor quickly established herself as a centrist or moderate. Justice O'Connor interprets the federal constitution and statutes according to the plain language of the text and stare decisis. The life and career of Justice O'Connor are notable for her perseverance and her respect for the rule of law.

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

One of the earliest Chief Justices, John Marshall, has most influenced my thinking regarding the doctrine of separation of powers because of his analysis of the judiciary as one of three separate and Independent branches of government in Marbury v. Madison.

3. What does the discretionary power of the judiciary mean to you?

The federal judiciary has little discretionary power under the Constitution. As the third branch of government, the judiciary has only limited powers and authority. Its jurisdiction is determined by Congress. Federal courts are also limited to consideration of only actual cases or controversies, and then only when there is demonstrable standing to bring the particular action. Furthermore, federal courts are generally prohibited from creating a federal common law right or claim that is not recognized in the Constitution or in a federal statute. When sitting in a diversity case, federal courts are bound to apply state substantive law. The role of the federal courts is to interpret the Constitution and the law enacted by Congress, and not to legislate or attempt to create new rights that do not otherwise exist. Of course, federal judges do exercise discretion in areas such as case management, evidentiary rulings and as allowed by the federal Sentencing Guidelines.

4. Which Judge has served as a model for the way you would want to conduct yourself as a judge, and why?

My first job after law school was as a law clerk to the late Fred J. Cassibry, United States District Court Judge for the Eastern District of Louisiana. To those who knew him, Judge Cassibry was a great trial judge and a wonderful human being. He had the ability to maintain firm control over his courtroom, while at the same time treating all who appeared in his court, lawyers, litigants, jurors and witnesses alike, with the utmost respect and dignity. By setting the proper tone, he commanded the respect of all who appeared before him. At the time of his death several years ago, his integrity and courage remained unquestioned.

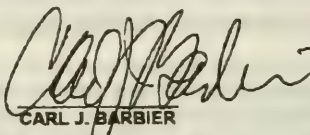


5. Which law review article or book has most influenced your view of the law?

Because a great deal of my practice has been in maritime law, I think that The Law of Seamen by Martin J. Norris has undoubtedly been one of the most influential and useful books in my legal practice.

6. What role do you think legislative history—by which I mean the various committee reports, hearing transcripts and floor statements—should play in the interpretation of the text of a statute?

As a district judge, I would interpret the text of a statute by looking at the plain language of the statutory provision. Next, I would look for controlling precedent from the United States Supreme Court or the Courts of Appeals. I would follow the law as set forth in the statute, as interpreted by the higher courts. If this analysis did not resolve the issue, I would then look for analogous cases from either the Supreme Court or the Courts of Appeals. Only if this approach still left some ambiguity with respect to the meaning of the statutory provision would I consider looking for legislative history. Such legislative history is generally unreliable and should not serve as the basis for interpretation of a statutory provision. Rather than trying to decipher the meaning of a statute by reading the floor speeches of a few legislators or committee reports written by others, it is better to determine intent by looking at the actual words of the statute and giving those words their plain and ordinary meaning.



CARL J. BARBIER

July 20, 1998



## ANSWERS OF CARL J. BARBIER TO QUESTIONS BY SENATOR SESSIONS

1. Which current U.S. Supreme Court Justice do you admire most and why?

The life and career of Justice Sandra Day O'Connor are admirable for several reasons. As a young attorney fresh out of law school, unable to get a job with an established law firm, she started her own law firm. Later she became a justice of the Arizona Supreme Court and, eventually, the first female justice of the United States Supreme Court. Once on the Supreme Court, Justice O'Connor quickly established herself as a centrist or moderate. Justice O'Connor interprets the federal constitution and statutes according to the plain language of the text and stare decisis. The life and career of Justice O'Connor are notable for her perseverance and her respect for the rule of law.

2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

One of the greatest and yet, ironically, the worst Supreme Court decisions in the last thirty years was Daubert v. Merrell Dow Pharmaceuticals, Inc., in which the Court rejected the Frye rule regarding the admissibility of expert scientific evidence and made the trial judge the "gatekeeper" of such evidence. The practical effect of this case was to eliminate one set of litigation problems though I believe it may have created a new set of difficult issues for a trial court. On the one hand, I view the case as one of the greatest recent Supreme Court cases because it should serve to prevent truly "junk science" from invading the courtroom. On the other hand, in some ways it may have created new problems because of the increased litigation which has arisen in the context of holding "Daubert hearings," often serving only to add additional layers of costs and attorney's fees to the litigation.

3. In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

The United States Supreme Court upheld this statute as constitutional in Felker v. Turpin, 618 U.S. 651 (1995). As a district court judge I would follow this precedent.

4. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

Yes.

5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

Under the Adarand case, a federal district court must apply the strict scrutiny test to any government program or statute that is based on racial preferences. This is the highest type of scrutiny. To pass muster, such a program or statute would have to be very narrowly tailored to meet a compelling state interest. It would be extremely difficult for any such program or statute to meet this test.

6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The Ninth Circuit Court of Appeals has recently upheld the California Civil Rights Initiative as constitutional in Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9<sup>th</sup> Cir. 1997), cert. denied, 118 S.Ct. 397 (1997). The United States Supreme Court denied certiorari. The analysis and reasoning by the Ninth Circuit appear sound.

7. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. Such voter referenda or initiatives should be given the same strong presumption of constitutionality as a statute enacted by the legislature.

8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

9. In your personal legal opinion, is the Prison Legal Reform Act constitutional?

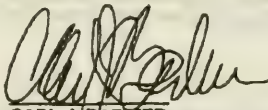
The constitutionality of this statute has been considered by ten of the Courts of Appeals, nine of which have found the statute is constitutional. In Norton v. Dimazans, 122 F.3d 286 (5<sup>th</sup> Cir. 1997), the Fifth Circuit upheld the statute against a constitutional challenge. As a district judge within the Fifth Circuit I would follow this precedent.

10. In your personal legal opinion, is the death penalty constitutional?

The United States Supreme Court has held the death penalty to be constitutional. I would follow the precedent of the Supreme Court.

11. Would you personally be reluctant to impose or uphold the death penalty?

I have no personal moral or legal philosophy that would prevent me from following the precedent of the Supreme Court and imposing or upholding the death penalty in appropriate cases.

  
 CARL J. BARBIER

July 20, 1998

RESPONSES OF JEANNE E. SCOTT TO THE  
QUESTIONS FROM SENATOR ASHCROFT

1. Which Supreme Court Justice, past or present, do you most admire and why?

The Supreme Court Justice I most admire is John Marshall. I have undoubtedly been influenced by my law school Constitutional Law professor who returned time and again to the contributions of Chief Justice Marshall. I believe, in his thirty-four years on the Supreme Court bench, he virtually defined the Supreme Court as an institution (Marbury v. Madison). In addition, his landmark decisions construing the supremacy clause (McCulloch v. Maryland), the commerce clause (Gibbons v. Ogden), and the contract clause (Fletcher v. Peck and Dartmouth College v. Woodward) provided a legacy for constitutional government that has endured.

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Robert H. Jackson. I think Justice Jackson's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, which invalidated President Truman's executive order authorizing the Secretary of Commerce to take over the steel mills, provides a seminal analysis of the limitations of presidential power and the relationship between the executive and legislative branches of government.

3. What does the discretionary power of the judiciary mean to you?

Discretionary power is the exercise of judicial judgment which is restrained by the rules of law. In the federal system, the discretionary power of the court is quite limited; it exists in such contexts as the rulings on evidentiary issues, the setting of scheduling orders, and sentencing within the parameters of the Sentencing Guidelines.

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RESPONSES OF JEANNE E. SCOTT TO THE  
QUESTIONS FROM SENATOR ASHCROFT

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

I have admired Walter V. Schaefer, a former member of the Illinois Supreme Court. I feel that he was a wonderful role model for any Judge because he was widely recognized as a man of impeccable integrity and highly respected for his scholarly opinions and his fairness.

5. Which law review article or book has most influenced your view of the law?

Cleary and Graham Handbook of Illinois Evidence.

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

I believe legislative history should play only a slight role in the interpretation of the text of a statute. I believe a Judge should look first to the language of the statute in order to see if the clear meaning can be gleaned from the words used. Next a Judge should review the decisions of the United States Supreme Court and the applicable Court of Appeals to see if the same or similar language has been construed. If so, the Judge should follow those precedents or analogize from them. If those methods of construction fail, then the Judge may wish to review the legislative history. The danger, however, is that the stated legislative history

may be incomplete or inaccurate. Consequently, I feel that the legislative history should be used sparingly in statutory construction.



RESPONSES OF JEANNE E. SCOTT TO  
QUESTIONS FROM SENATOR SESSIONS

1. Which current U.S. Supreme Court Justice do you most admire and why?

I admire Justice Stephen Breyer. I saw an interview of Justice Breyer on television about one year ago when he was conducting a seminar for law students on the Constitution. From his remarks, it was apparent that he views the Constitution with a sense of reverence and his own presence on the Supreme Court with a sense of humility and commitment.

2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

Best Decision: Maryland v. Craig, 497 U.S. 836 (1990). I picked this decision because I recall from my years as a prosecuting attorney a number of cases where young victims of sexual assault were so traumatized at the thought of face-to-face contact with the accused that they simply could not testify. Those cases were either compromised or lost. I believe the Court in Maryland v. Craig protected both the right of the accused to meaningful confrontation and at the same time, in certain limited cases where the reliability of the testimony is otherwise assured, approved a procedure that will enable these important cases to be tried. In response to Maryland v. Craig, the people of Illinois voted to amend their State Constitution, which had previously required face-to-face confrontation, in order to avail themselves of the procedures approved in Craig.

Worst Decision: Aguilar v. Felton, 473 US 402 (1985). The predicate reasoning underlying Aguilar was faulty, as the Supreme Court recently recognized in Agostini v. Felton, 117 Sct. 1997 (1997). Agostini overruled Aguilar v. Felton.

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RESPONSES OF JEANNE E. SCOTT TO  
QUESTIONS FROM SENATOR SESSIONS

3. In your personal legal opinion, is the 1995 Habeas Corpus Reform Legislation constitutional?

In Felker v. Turpin, 518 US 651 (1996), the 1995 Habeas Corpus Reform legislation was upheld. I would follow the decision of the United States Supreme Court and any precedents of the Courts of Appeal.

4. If confirmed, you will preside over many employment discrimination cases as a federal judge. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest scrutiny?

Yes.

5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

The strict scrutiny test is the highest standard for any program to meet. Consequently, it will be very difficult for any government program to meet this test. Whether a particular government program can survive that test will, of course, turn on the facts in the particular case.

6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

I believe the 9th Circuit Court of Appeals, in Coalition for Economic Equity v. Wilson, 122 F. 3d 692, has upheld the constitutionality of the California Civil Rights Initiative. I, of course, would follow the precedents of the Courts of Appeal and the Supreme Court.

7. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by

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RESPONSES OF JEANNE E. SCOTT TO  
QUESTIONS OF SENATOR SESSIONS

the judiciary than laws enacted by legislatures?

No. I believe Judges should use the same constitutional standard in evaluating laws passed by legislatures and laws enacted by voter referenda.

8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes, Congress has certain power under Article III to limit the jurisdiction of the lower federal courts, provided that the provisions of the Constitution are not abrogated. Congress can, for example, determine the amount which must be at issue before the federal court's diversity jurisdiction applies.

9. Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act. In your personal legal opinion, is the Prison Legal Reform Act constitutional?

The Prison Litigation Reform Act has been followed by the Court of Appeals for my district in Zehner v. Trigg, 133 F3d 459 (7th Cir., 1997). I will follow the precedents of the Seventh Circuit.

10. In your personal legal opinion, is the death penalty constitutional?

The United States Supreme Court has upheld the death penalty as constitutional, and I accept those precedents and will follow them.

11. Would you personally be reluctant to impose or uphold the death penalty?

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RESPONSES OF JEANNE E. SCOTT TO  
QUESTIONS FROM SENATOR SESSIONS

As an Illinois State Court Judge, I have handled death penalty cases. I have followed the law with regard to those cases over which I presided, and I would likewise follow the death penalty precedents if confirmed as a Federal District Court Judge. I have no reluctance in following the law on this issue.

RESPONSES OF JEANNE E. SCOTT TO THE  
QUESTIONS FROM SENATOR THURMOND

1. A former Supreme Court justice once expressed his view of Constitutional Interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.

No, I do not agree with the above statement. The words of the Constitution do not change from era to era, and there should be consistency in the interpretation of them.

2. What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

I don't believe it is the role of the judiciary to develop public policy, whether the legislature repeatedly fails to address important matters or not. That is the role of the legislative branch of government. Judges should confine themselves to following the law and applying the law to the facts in a particular case.

3. As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

I do believe that Federal Rule 11 of Civil Procedure is an important rule to permit the Court to impose sanctions when warranted in order to assure the steady progress of the Court's work and to limit the filing of frivolous pleadings that cannot be substantiated. Since the Rule does not apply to bonafide arguments for the extension or modification of existing law, I do not think it inhibits litigants from testing the boundaries of the law. Based on my knowledge of the members of the bar who practice in the Courts of Central Illinois, I am hopeful that Rule 11 would need to be invoked only sparingly.

4. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

No. As an Illinois State Court Judge, I have handled death penalty cases. I have followed the law with regard to those cases over which I presided, and I would likewise follow the death penalty precedents if confirmed as a Federal District Court Judge. I have no reluctance in following the law on this issue.



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Responses of Jeanne E. Scott to the  
Questions from Senator Thurmond

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

It is within the power of the legislative branch of government to enact laws which carry mandatory minimum criminal sentences, and Judges should follow them. I would have no reluctance to impose them if I were a Federal judge; I have imposed mandatory minimum sentences and followed the law of Illinois in my current role as a State Court Judge.

6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

I accept that the Federal Sentencing Guidelines are part of the law which I, as a Federal Judge, would be sworn to uphold. I intend to follow them as conscientiously as possible.

7. What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

I believe that Gideon v. Wainwright, 372 U.S. 335 (1963) was one of the most significant Supreme Court opinions of the last fifty years. That decision made meaningful the Constitutional right to counsel to those who faced prison sentences and who were too poor to have an attorney. The right to counsel is one of the hallmarks of our legal system, and I believe the Supreme Court in Gideon strengthened our legal system by committing it to fairness in guaranteeing the right to legal representation to indigent accused felons.

**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO WRITTEN QUESTIONS FROM  
SENATOR STROM THURMOND**

1. A former Supreme Court justice once expressed his view of Constitutional interpretation as follows: " We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.

No. The Constitution is the supreme law of the land. The United States Supreme Court is the final arbiter of constitutional law. Judges must give appropriate consideration to the judicial doctrine of stare decisis. Stare decisis requires that a court adhere to precedents in order to insure stability in the law. I do not agree with the idea that current members of the Supreme Court may revisit the Constitution and decide what they think the words of the text mean in our time without regard for precedent. The evolution of constitutional law is not without instances where the words of the Constitution have been reinterpreted to take into account developments in the law. Such changes, for example, have been as a result of amendments to the Constitution. Additionally, the Supreme Court has from time to time overruled precedents in interpreting the Constitution. As a District Court judge interpreting the text of the Constitution, I would accord the highest degree of deference to the text of the Constitution, and applicable Supreme Court, and Circuit Court precedents.

2. What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

A judge's role is to adjudicate the case or controversy before the court and to render a ruling that concludes the dispute. It is not the judge's role to develop public policy, whether or not the legislature has acted with respect to an issue. I believe that the legislature is responsible for enacting the laws. As a Federal judge presented with a case where the legislature had not addressed an issue, I would endeavor to follow the existing precedents and statutes and render a ruling in that case.

**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO WRITTEN QUESTIONS FROM  
SENATOR STROM THURMOND**

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3. As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

Rule 11 requires that a lawyer conduct a reasonable inquiry into the law and facts underlying a claim before it is filed or maintained in court. The Rule is intended to protect individuals and the courts from an abuse of the judicial process and to insure that judicial resources are available for legitimate claims. Where the Court finds an abuse under Rule 11, the judge may impose a variety of sanctions including limiting a party's proof and requiring payment of attorneys fees incurred in the defense of spurious lawsuits.

I do not believe that Rule 11 inhibits creative advocacy of novel claims or facts. When a lawyer has a novel theory or claim, Rule 11 allows such claims to be advanced provided that the claim is well-grounded in fact and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law.

4. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

No.

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

I think that mandatory minimum sentences represent a legislative judgment that certain types of crimes warrant mandatory periods of incarceration. Mandatory minimum sentences exist in state and federal courts for very serious offenses.

**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO WRITTEN QUESTIONS FROM  
SENATOR STROM THURMOND**

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If I were a Federal judge, I would have no reluctance to follow the law and impose mandatory minimum sentences.

6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

The Federal Sentencing Guidelines were intended to reduce unwarranted disparity between criminal sentences imposed on offenders and to structure trial judges' discretion. I think the purpose of the Guidelines is laudatory. Fairness requires that similar criminal conduct warrants similar punishment. As a Federal judge, I would adhere to the Guidelines.

7. What do you believe was the most significant, or at least one of the most significant, Supreme Court decisions in the past half century and why?

Brown v. Board of Education, 347 U.S. 483 (1954) was the most significant Supreme Court decision in the past half century because it held that *de facto* and *de jure* government sanctioned racial discrimination in public education was unconstitutional. The Brown case furthered educational opportunities for minorities and school integration advanced America as a nation closer to the ideal of, *e pluribus unum* "out of many, one."

**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO WRITTEN QUESTIONS FROM  
SENATOR CHARLES GRASSLEY**

1. Judge Lee, would you explain your role in obtaining a court order stopping an organization from distributing voter guides? Many, if not most, would argue that distributing voter guides is a constitutional exercise of political speech.

- a. What was your rationale for seeking this court order?

I agree that the distribution of literature like a voter guide is a constitutional exercise of free speech protected by the Constitution. As a private attorney, in the late 1980s, I represented Ms. Linda "Toddy" Puller, a candidate for the Virginia House of Delegates, and the Democratic Party of Virginia seeking an injunction under the Virginia election laws enjoining the distribution of materials that purported to be voter guides. My clients asserted that the materials were illegal under the Virginia Fair Election Practices Act, Virginia Code Section 24.1-251, *et. seq.* [repealed in 1993]. The materials were being distributed in the district where Ms. Puller was a candidate in the days prior to the 1989 general election.

My recollection is that Ms. Puller asserted that the so-called "voter guide" was in fact her opponent's or some unidentified source's campaign literature, which unlawfully circumvented the Virginia election laws. The materials did not comply with Virginia election law in that the author of the documents had not made the required filing with the Board of Elections and did not disclose on the face of the "voter guide" that it was authorized or issued by a named group or individual properly registered with the Board of Elections. The rationale I presented on behalf of my client was that the illegal distribution of this material caused my clients to suffer irreparable harm warranting the granting of an injunction. The Fairfax Circuit Court granted our petition and issued an injunction enjoining the illegal distribution of this material. See Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997) [This is not my case, but it contains a discussion of the Puller case in 1989.] Neither the Virginia Supreme Court nor any federal court have



**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO WRITTEN QUESTIONS FROM  
SENATOR CHARLES GRASSLEY**

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declared the current statute unconstitutional. See Jordahl, id.

**b. What other limitations on political speech do you support?**

I do not believe that there should be any limits on a citizen's right to engage in constitutionally protected political speech.

**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO SENATOR ASHCROFT  
QUESTIONS TO ALL CANDIDATES**

- 1. Which Supreme Court Justice, past or present, do you most admire, and why?**

I most admire two Supreme Court Justices, the late Justice Thurgood Marshall and Justice Sandra Day O'Connor, without regard to their particular judicial philosophy or opinions. I admire these Justices because of their personal history of overcoming obstacles and their accomplishments in their personal lives prior to becoming members of the Supreme Court.

- 2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?**

None. As a state court trial judge, I have not had the occasion to follow with any regularity the decisions of the Supreme Court concerning separation of powers issues. As a federal judge, I would carefully adhere to precedents of the Supreme Court, United States Court of Appeals for the Fourth Circuit and examine other Circuits in rendering decisions. I further acknowledge that there are three distinct branches of government, legislative, executive and judicial departments, each with its own powers. Article 1 of the United States Constitution vests in the United States Congress all legislative power delegated to the federal government. I start there in analyzing a constitutional question and presume, as I must under the law, that Congressional legislative enactments come to federal courts cloaked in the presumption that they are constitutional and must be upheld.

- 3. What does the discretionary power of the judiciary mean to you?**

The responsibility of a trial judge is to render decisions consistent with the United States Constitution, Acts of Congress, the existing controlling

**Response of Judge Gerald Bruce Lee to  
SENATOR ASHCROFT  
QUESTIONS TO ALL CANDIDATES  
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precedents of the United States Supreme Court and the Circuit Courts of Appeals. I do not believe there is any inherent or implied discretion for a trial judge to create law or to identify new causes of action or implied rights in the Constitution or other laws. Having said that, the term "discretionary judicial power" means that there are certain areas of the law in which it is within the sound reasoned decision making power of the judge to enter an order or to direct matters within the courts. The areas that come to mind concerning judicial discretion include: controlling the conduct and incidents of trial, making evidentiary rulings within the Federal Rules of Evidence, making decisions within the Federal Rules of Civil Procedure, imposing a sentence with the parameters of the Federal Sentencing Guidelines, and applicable statutes or case law.

**4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?**

Judge Thomas A. Middleton, retired judge from the Fairfax Circuit Court in Virginia, is a model for the kind of judge I strive to be. I admire and strive to emulate Judge Middleton for several reasons.

First, Judge Middleton always comported himself as a "gentleman judge" in court. He was a fair, but firm judge. Although Judge Middleton maintained control of his courtroom, he was always patient, dignified, and courteous to all who appeared before him.

Second, Judge Middleton was always prepared on the issues and the law. One of the hallmarks of a good trial judge is preparation. Anyone appearing before Judge Middleton could rightfully anticipate that he had read the briefs and authorities and considered them beforehand.

Third, Judge Middleton was fair and unbiased. He had a way of letting

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the litigants know that he had considered their point of view. If he rejected a particular point of view, he explained the rationale for doing so. His approach made the litigants feel that they had been heard, even if they did not prevail in court.

Finally, Judge Middleton was very circumspect in making his rulings. When I was a new judge, he counseled me by giving me the following advice: when making a ruling, be considerate of the parties; be decisive, that is, make up your mind and rule on the case; rule succinctly, and be careful what you say, because you can hurt people unnecessarily; render a judgment on the case presented to you without regard to things not pertinent to the case; do not make statements about matters not before you as a judge; and do the best you can and move on.

I am guided by this advice as I conduct myself in court.

**5. What law review article or book has influenced your view of the law?**

None. My view of the law has been shaped by my experiences as a trial lawyer for 15 years and as a trial judge for 6 years. The sum of my experience with the law influences me to respect precedent, to exercise restraint in judicial decision making, to balance the legal considerations as best as I can, and then to render a fair and impartial decision.

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- 6. What role do you think legislative history--by which I mean the various committee reports, hearing transcripts and floor statements--should play in the interpretation of the text of a statute?**

Legislative history is not controlling in the interpretation of a statute and should be considered by the judge as a last resort in interpreting a statute where there is ambiguity. In my opinion, a judge should consider legislative history only in seeking to ascertain the context for interpretation of words in the face of ambiguous terms in a statute. The court must be very careful when reviewing legislative history, committee reports, and floor statements because these documents were made as a part of the legislative process and politics, and, not for judicial construction of the law. Many times "legislative history" is a submission of a statement by a legislator to a hearing he or she never attended. The value of legislative reports must be measure against an extremely limited backdrop.

I will follow the law regarding the rules of statutory construction. Rules of statutory construction require a judge to read the statute using the plain meaning of the words to interpret the law. The judge must consider controlling precedents or analogous judicial decisions under the statute. Additionally, in my case, if I am confirmed as a United States District Judge in Virginia, I will follow controlling or analogous precedent of the United States Court of Appeals for the Fourth Circuit, and review other Circuit decisions and relevant District Court decisions.



**RESPONSE OF JUDGE GERALD BRUCE LEE  
TO QUESTIONS FROM SENATOR SESSIONS**

- 1. Which current U.S. Supreme Court Justice do you admire most and why?**

I most admire two Supreme Court Justices, the late Justice Thurgood Marshall and Justice Sandra Day O'Connor, without regard to their particular judicial philosophy or opinions. I admire these Justices because of their personal history of overcoming obstacles and their accomplishments in their personal lives prior to becoming members of the Supreme Court.

- 2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?**

The greatest decision of the Supreme Court in recent years is Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). This decision will have considerable impact in the court's consideration of the place of emerging technology and science in the courtroom. Under Daubert, the trial judge performs a gate-keeping function applying a carefully constructed test to ascertain the admissibility of evidence and opinions regarding scientific evidence.

I cannot think of a decision that I consider the worst Supreme Court decision in the last thirty years. As a general practitioner before I became a judge and as a state trial judge, I have not had the occasion to consider Supreme Court cases except as to considering the rule of law pronounced or how it impacted my caseload. In this century, the case of Dred Scott stands out as the worst Supreme Court decision.

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- 3. In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?**

Yes. The United States Supreme Court has upheld the Antiterrorism and Effective Death Penalty Act from constitutional attack in Felker v. Turpin 518 U.S. 651 (1996).

- 4. If confirmed, you will preside over many employment discrimination cases as a judge.**

**In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?**

Yes.

- 5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?**

It is extremely difficult for racial preference based governmental action to survive the strict scrutiny test. As I understand the Adarand v. Peña decision, all racial classifications imposed by federal, state, or local government must be analyzed by the reviewing court under strict scrutiny. Such classifications by race are constitutional only if they are narrowly tailored measures that further compelling government interests.

Response of Judge Gerald Bruce Lee to  
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6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The Ninth Circuit in Coalition for Economic Equity v. Wilson, 122 F.3d 692, cert. denied, 118 S.Ct. 397 (1997) has analyzed the California Civil Rights Initiative and several constitutional challenges to it and held that the Act does not violate any federal or state constitutional provision. I do not disagree with the analysis of this decision.

7. As a matter of constitutional law, do you believe that voter referenda should be strictly scrutinized more closely by the judiciary than laws enacted by legislatures?

No. Legislation, whether initiated by voter referendum or legislative enactments come before the Court cloaked in a presumption of constitutionality and is subject to the same level of judicial scrutiny.

8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes. Under Article III of the Constitution, the federal court's jurisdiction is limited to cases or controversies arising under the Constitution or federal statutes. As Congress may modify or create statutes, it has the responsibility to set forth the forum for litigation of disputes arising under constitutional legislative enactments.

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9. Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

**In your personal legal opinion, is the Prison Legal [Litigation] Reform Act constitutional?**

The Prison Litigation Reform Act has been upheld as constitutional where it has been challenged in all Circuits except the Ninth Circuit. The Fourth Circuit has upheld the statute against constitutional challenges. Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997); Plyler v. Nelson, 100 F.3d 365 (4th Cir. 1996).

10. In your personal legal opinion, is the death penalty constitutional?

Yes. The Constitution contemplates that there are certain crimes so horrible that the death penalty would apply. Federal law requires consideration of capital punishment in extreme cases specifically enumerated in federal statutes. The application of the death penalty is allowed after the Government and the accused receive a fair trial with substantial procedural and substantive rights. In such cases, a jury or judge has to be persuaded by proof beyond a reasonable doubt of the guilt of the accused. Further, a jury or judge has to engage in separate consideration of whether to impose the death penalty.

11. Would you personally be reluctant to impose or uphold the death penalty?

No. The Supreme Court has held that the death penalty is constitutional. Indeed, the United States Constitution has references to capital

**Response of Judge Gerald Bruce Lee to  
QUESTIONS FROM SENATOR SESSIONS  
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offenses in its text. Virginia has the death penalty for certain horrible violent crimes as a possible penalty if the jury or judge deems it a proper punishment. As a state judge and as a federal judge, I would have no reluctance to uphold and impose the ultimate punishment, the death penalty.



**Answers to Questions Posed by Senator Ashcroft**  
**Nora M. Manella, U.S. Attorney**  
**Nominee, U.S. District Court, Central District of California**

**1. Which Supreme Court Justice, past or present, do you most admire, and why?**

I admire Justice Oliver Wendell Holmes, Jr. for the clarity, cogency, and precision of his prose. I also admire the second Justice Harlan, for his judicial restraint, incremental approach to the law, and respect for the principles of federalism.

**2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers and why?**

The second Justice Harlan has had the most influence. He believed the constitutional separation of powers established a structure that preserved moderation and proportion in the exercise of government. He did not view the judiciary as the ultimate arbiter of the wisdom of legislative policy. His respect for the constitutional limitation on judicial review to cases or controversies is reflected in his belief that "rules respecting matters daily arising in the federal courts are ultimately likely to find more solid formulation [on a] case-by-case basis."

**3. What does the discretionary power of the judiciary mean to you?**

The discretion of the judiciary in general, and federal district judges in particular, is limited. The role of a district judge is to decide the case or controversy before that judge, based on the facts as found by the trier of fact and the law as set forth in the Constitution and federal statutes as construed by higher courts. A judge lacks discretion to make policy, decide political questions, or substitute his or her judgment for that of elected legislators.

In some areas, such as evidentiary rulings, the law affords a measure of discretion to trial judges. That discretion, however, is limited by appellate review, and a decision to admit or exclude evidence will be reversed for abuse of that discretion.

**4. Which judge has served as a model for the way you would want to conduct yourself as a judge and why?**

My model is the judge for whom I clerked, Judge John Minor Wisdom of the Fifth Circuit Court of Appeals. Appointed by President Eisenhower, he had served nearly twenty years on the bench when I clerked for him in 1975 and has served over twenty since, receiving countless accolades, including the Presidential Medal of Freedom. Lamar Alexander, former Governor of Tennessee and former Wisdom law clerk, has described him as one of the most "broad-gauged" men he has ever known.

Judge Wisdom's towering intellect and rigorous scholarship have been amply documented in books and articles. His opinions are models of clarity, intellectual honesty, and persuasiveness. Like all his clerks, I admire his mastery of the English language and believe my own writing benefited from his tutelage.

As his clerk, I had the privilege of seeing Judge Wisdom on the bench. He was always engaged and attentive to the arguments. His questions were designed to allow the advocate to explain his position -- never to intimidate or humiliate. He was unfailingly courteous to all in the courtroom.

5. Which law review article or book has most influenced your view of the law?

My view of the law has been informed less by academic writings and books on legal topics than by my own experience as a civil litigator, federal prosecutor, and trial judge. I cannot say any single article or book has significantly shaped my approach to my work as a lawyer or judge.

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

The interpretation of a statute begins with the text of the statute itself. The text should be interpreted in a way consistent with common usage and with the statutory scheme in which the text appears.

In the rare case in which review of the text and the statutory scheme itself does not definitively reveal the statutory meaning, the court may resort to legislative history. A recent example is the Supreme Court's decision in Muscarello v. U.S., in which the Court was required to determine what Congress intended when it imposed a five-year mandatory minimum penalty on one who "carries a firearm" during and in relation to a drug trafficking crime. Because the term "carries firearms" can mean both carry on one's person and carry in a vehicle, the Court looked to the legislative history for clarification. It found nothing to suggest Congress intended to limit the term "carry," and found support in the statements of numerous congressmen, including the chief sponsor of the bill, that the provision was designed "to persuade the man who is tempted to commit a federal felony to leave his gun at home." Accordingly, the Court interpreted the statute to include the carrying of firearms in a vehicle, in accordance with what it determined Congress intended.

**Answer to Question from Senator DeWine to Nora Manella,  
Nominee for U.S. District Court, Central District of California**

**Question:**

As the U.S. Attorney for the Central District of California, you work with the appellate unit of DOJ's criminal division and the Solicitor General's Office in determining whether or not to seek Supreme Court review of cases from the Ninth Circuit. Would you please cite and describe cases in which you recommended Supreme Court review, and what the outcome was in the Supreme Court?

**Answer:**

The following are, to the best of my recollection, the cases from the Ninth Circuit decided since I became U.S. Attorney, in which my office has recommended, and the Solicitor General has sought, Supreme Court review, along with the outcomes of those cases in the Supreme Court.

1. United States v. X-Citement Video, 513 U.S. 64 (1994): A Ninth Circuit panel held that the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. 2252) is unconstitutional on its face because the First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of child pornography requires knowledge of the minority of the performers as an element of the crime it defines. The Supreme Court reversed, holding that the language of 18 U.S.C. 2252(a) does not omit a scienter requirement as to the statute's "use of a minor" element. Rather, the statute's use of the term "knowingly" extends to the age of the performer.

2. United States v. Armstrong, 517 U.S. 456 (1996): An *en banc* panel of the Ninth Circuit upheld the district court's discovery order in a case alleging selective prosecution in crack cocaine cases. The Supreme Court reversed, reaffirming the principle that a defendant seeking discovery on a claim of selective prosecution based on race, must make a threshold showing that the government has declined to prosecute similarly situated suspects of other races.

3. United States v. \$405,089.23, 518 U.S. 267 (1996): A panel of the Ninth Circuit held that forfeiture of currency is a bar under the Double Jeopardy Clause to a later criminal prosecution. The Supreme Court reversed, holding that civil *in rem* forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause.

4. United States v. Keys, 117 S.Ct. 1816 (1997): An en banc panel of the Ninth Circuit held that an unobjected-to jury instruction error is not subject to the plain error review. The Supreme Court reversed and remanded for reconsideration after issuance of its opinion in Johnson v. United States, 117 S.Ct. 1544 (1997).

5. United States v. Bajakajian, 118 S.Ct. 2028 (1998): A Ninth Circuit panel held that the forfeiture of currency is unconstitutional under the Eighth Amendment when the crime to which the forfeiture is tied is a failure to report currency pursuant to 31 U.S.C. 5316. The Supreme Court did not adopt the reasoning of the Ninth Circuit, but in a 5-4 decision, upheld the finding that the forfeiture was excessive under the Eighth Amendment.

6. United States v. Qualls, 140 F.3d 824 (9th Cir. 1998): An en banc panel of the Ninth Circuit reversed a defendant's felon-in-possession conviction, holding that such conviction is precluded when state law permits the felon to carry some weapons, not including the guns which were the subject of the federal conviction. A decision was made to seek Supreme Court review in the event the Court ruled in the government's favor in another case already pending in the Court, Caron v. United States, 118 S.Ct. 2007 (1998). Caron was subsequently decided in the government's favor, and a petition for cert. has been filed in Qualls.

In the following cases, the U.S. Attorney's Office for the Central District of California supported the recommendation of another U.S. Attorney's office to seek Supreme Court review of an adverse decision of the Ninth Circuit, review was sought, and the case was decided by the Court.

1. United States v. Mezzanatto, 115 S.Ct. 797 (1995): The Supreme Court reversed a Ninth Circuit panel decision, and held that a defendant's agreement to waive the Federal Rules' prohibition against the use of plea agreement statements for impeachment at trial is enforceable absent any showing that the defendant entered into the agreement unknowingly or involuntarily.

2. United States v. Hyde, 117 S.Ct. 1630 (1997): The Supreme Court reversed a Ninth Circuit panel decision and held that a defendant who entered a guilty plea pursuant to a plea agreement could not withdraw his plea absent a "fair and just reason."



**Answers to Questions Posed by Senator Thurmond  
Nora M. Manella, Nominee  
United States District Court, Central District of California**

**Question 1:**

A former Supreme Court justice once expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.

**Answer:**

I agree that a judge looks to the text of the Constitution to determine its meaning and that the words are of paramount importance. To the extent judges are required to apply constitutional precepts to contemporary fact situations, they must necessarily apply the words "in our time." Courts have no choice, for example, but to construe the Fourth Amendment's prohibition on unreasonable searches and seizures as it applies to searches of computers, because we live in an age of computers. This does not mean, however, that judges are free to re-interpret basic constitutional principles simply because they may be required to apply those principles to factual situations that did not arise when the Constitution was written.

**Question 2:**

What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

**Answer:**

I do not believe it is the role of judges to "develop public policy" through case law or otherwise, regardless of whether the legislature has chosen to act.

**Question 3:**

As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

**Answer:**

From my experience practicing in the Central District of California, judges appear to use Rule 11 sparingly and appropriately, and I have seen no evidence that Rule 11 discourages litigants from testing the boundaries of existing law.



## Question 4:

Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

## Answer:

I have no personal objections to the death penalty, and I would not be reluctant to impose or uphold a death sentence in a criminal case.

## Question 5:

What is your view of mandatory minimum criminal sentences, and do you have any reluctance to impose them as a Federal judge?

## Answer:

Congress has the power to establish sentences for federal crimes, including mandatory minimum prison terms. I would have no reluctance to impose the sentences mandated by Congress.

## Question 6:

As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

## Answer:

The constitutionality of the Sentencing Guidelines is well settled. Moreover, the Guidelines are not inflexible; they do provide judges with limited discretion to tailor a sentence to the criminal and the crime. As a judge, I would follow the Sentencing Guidelines.

## Question 7:

What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

## Answer:

Brown v. Board of Education stands in my mind as one of the most important Supreme Court decisions in the past half-century. It established the principle of equal educational opportunity for all.

**David R. Herndon**  
District Court  
Southern District of Illinois

**SENATOR THURMOND QUESTIONS**

1. A former Supreme Court justice once expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.

Should I be confirmed as a District Court judge and confronted with a question of the meaning of a provision of the United States Constitution, I would look to the plain meaning of the Constitution and the interpretation of it by the Supreme Court and Circuit Courts. If confirmed, I think it highly unlikely that I would ever find it appropriate to look beyond the plain reading of the Constitution. It is not the role of the District Court judge to substitute his opinion of the subject matter of the Constitution for that of its framers.

2. What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

Judges do not have a role in developing public policy. If the legislature fails to regulate something, the public policy is that it should not be regulated. A judge should not legislate.

3. As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law? What is your opinion of Rule 11?

Rule 11 is an appropriate tool for a district judge to insure that litigants and their counsel remain accountable for the claims they make in court. The existence of the rule, as the Advisory Committee worded it, causes "litigants to 'stop and think' before initially making legal or factual contentions." The plain language of the rule suggests to this nominee that litigants will not be discouraged from testing the boundaries of the law, in a responsible fashion.

David R. Herndon  
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4. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

No.

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

Mandatory minimum criminal sentences are matters of public policy for which Congress is empowered to determine. Additionally, I support their use and, if confirmed, would certainly not have any reluctance to impose them.

6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

If confirmed, I would have absolutely no reluctance to follow the Sentencing Guidelines. Once again, I feel guidelines for sentencing are an appropriate exercise of the legislature's public policy making role. In my own circuit, I was instrumental in establishing guidelines for fines in all traffic cases. Although insignificant in comparison to federal crimes, my actions represent a belief in fairness through consistency.

7. What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

*Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). During my trial experience, I learned that expert witnesses can be hired to opine anything the proponent of their testimony wishes. *Daubert* provides the trial judge with the tools necessary to shield the fact finder from opinions that do not have an adequate basis.

**David B. Herndon**  
District Court  
Southern District of Illinois

**SENATOR ASHCROFT QUESTIONS**

**1. Which current Supreme Court Justice do you most admire and why?**

I admire Justice Sandra Day O'Connor. Justice O'Connor seems to take particular care to look at each case on its own merit. Her opinions adhere closely to the doctrine of *stare decisis* and the plain meaning of the Constitution and statutes. Justice O'Connor appears to best personify the proper role of a judge.

**2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers and why?**

Melvin I. Urofsky, in his book Felix Frankfurter: Judicial Restraint and Individual Liberties, described (at page 175) Justice Frankfurter's view on the subject: "For him judicial restraint meant that the popular will should not be thwarted by the courts unless a specific constitutional prohibition existed." His views, prior to his tenure as an associate justice, led him to criticize the *Lochner* era Court, which he found to be an example of personal bias entering the adjudication of cases. Urofsky concluded (at page 179): "But by adhering to his beliefs in judicial restraint, in deference to the coordinate branches of government, in respect for precedent, Frankfurter held up a clear standard that forced the advocates of change such as Hugo Black to rethink their assumptions. . . . In the 23 years Felix Frankfurter sat on the U.S. Supreme Court he forced his more activist colleagues to slow down and think about what they were doing. . . ." I agree with Justice Frankfurter's philosophy of separation of powers and intend to adhere to it on the bench. Like the doctrine of *stare decisis*, adherence to traditional concepts of separation of powers is crucial to the stability of our nation as overseen by three coordinate branches of government.

David R. Herndon  
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**3. What does the discretionary power of the judiciary mean to you?**

Federal courts, as courts of limited jurisdiction, are empowered only to hear matters specifically directed to them by the Constitution and the Congress. It is rare that discretion is granted to a Federal District Court. Matters which are appropriate for the exercise of discretion include the admissibility of the testimony of expert witnesses, rulings relative to the admissibility of other kinds of evidence, decisions within the parameters of the Sentencing Guidelines and case management. In exercising the discretion entrusted to it, the trial judge must be certain that his or her personal biases are not part of the analysis. Objectivity and fairness are the keystones to the exercise of any discretion.

A federal district judge does not have discretion relative to the application of statutes. The judge must enforce the statute as written regardless of that judge's opinion about the wisdom of the law. A federal trial judge does not have the discretion to legislate or solve general societal problems.

**4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?**

I have the extreme good fortune of being nominated to the seat held by Judge William Beatty, who has always served as the model for the kind of judge I want to be. I tried my first solo jury trial with Judge Beatty presiding in state court. Judge Beatty was a seasoned trial lawyer before going on the bench and he willingly shared his knowledge with me. He accorded me respect and had a great deal of patience with me. Over the years, he and I discussed many matters concerning the practice of law and case management. I greatly admire and respect him. As I litigated cases across the country, I frequently talked with lawyers who had litigated before Judge Beatty. Everyone who has appeared before Judge Beatty shares the view that he makes his courtroom a very comfortable place for lawyers, witnesses and jurors. Judge Beatty accords respect to those appearing before him and in return he has gained everyone's respect and admiration.

**5. Which law review article or book has most influenced your view of the law?**

Trial Handbook for Illinois Lawyers by Robert Hunter is a book which I had by my side as a trial lawyer and have continued to refer to it as a judge.



David R. Herndon  
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6. What role do you think legislative history - by which I mean the various committee reports, hearing transcripts and floor statements - should play in the interpretation of the text of a statute?

Legislative history should not play a role in the interpretation of a statute, except in the extraordinarily rare instance when the meaning of the statute cannot be discerned by simply reading it. Before even considering an examination of the history of a law, the court should look to the plain meaning of the act, cases of precedential value and analogous statutes. If I were confirmed to be a District Court Judge, it is not likely that I would ever be required to look to the legislative history to determine the meaning of a statute. As a state court judge and from my prior experiences, I have learned that the difficulty with legislative history lies in determining the authoritative nature of what is gleaned from the history. Although I have been urged to do so, I have never relied on legislative history for an interpretation of the meaning of a statute.

**David R. Herndon**  
**District Court**  
**Southern District of Illinois**

**SENATOR SESSIONS QUESTIONS**

1. Which current U.S. Supreme Court Justice do you admire most and why?

I admire Justice Sandra Day O'Connor. Justice O'Connor seems to take particular care to look at each case on its own merit. Her opinions adhere closely to the doctrine of *stare decisis* and the plain meaning of the Constitution and statutes. Justice O'Connor appears to best personify the proper role of a judge.

2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years?

**Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993).**

What is the worst Supreme Court decision in the last thirty years?

**Finley v. United States 490 U.S. 545 (1989).**

3. In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

In the case of *Felker v. Turpin*, 518 U.S. 651 (1996), the Court considered a significant portion of the habeas corpus portion of the Antiterrorism and Effective Death Penalty Act of 1996, which it found to be constitutional. If confirmed, I would certainly follow the ruling of the *Felker* case.

David R. Herndon  
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If confirmed, you will preside over many employment discrimination cases as a federal judge.

4. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Peña* decision and subject that racial preference to the strictest judicial scrutiny?

Yes.

5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

It is very difficult. The proponent of a racial classification must demonstrate that it is narrowly tailored to further compelling governmental interests. Furthermore, the plurality opinion in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and the Fifth Circuit opinion in *Hopwood v. Texas*, 78 F.3d 932 (1996), suggest that to be a "compelling" interest, it must be a past discriminatory practice for which a remedy is sought.

6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

The amendment to the California Constitution known as the California Civil Rights Initiative, or Proposition 209, withstood a constitutional challenge in the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (1997), *cert. denied* 118 S.Ct. 397 (1997). Although this particular issue is not under consideration in the Seventh Circuit, if confirmed I certainly would not have any difficulty following this particular Ninth Circuit case in a like or similar case. Analogous precedent for this ruling can be found in the United States Supreme Court case of *Adarand v. Peña*. As stated above, I would have absolutely no problem following the *Adarand* case.

7. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No, I believe all laws should be given a presumption of constitutionality regardless of the source of that law, whether legislative body or voter initiative. The role of the judge is not to pass on the wisdom or lack of wisdom of a given law. No judge should substitute his personal opinion for that of the legislature or the will of the People.

David R. Herndon  
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8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes.

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

9. In your personal legal opinion, is the Prison Legal Reform Act constitutional?

I am aware that ten circuits have considered different aspects of this Act and nine of them have found no constitutional infirmity. In my own Seventh Circuit, the case of *Zehner v. Trigg*, 133 F.3d 459 (1997), brought into question the constitutionality of the Act in the context of prisoners suing for exposure to asbestos without the requisite physical injury. The court found the Act constitutional as applied to the facts. I would certainly not have any problem following the *Zehner* case or any other circuit case in applying the Act.

10. In your personal legal opinion, is the death penalty constitutional?

Yes.

11. Would you personally be reluctant to impose or uphold the death penalty?

No.

Rebecca R. Pallmeyer  
July 20, 1998

Questions from Senator Sessions

Which current U.S. Supreme Court Justice do you admire most and why?

I greatly admire Justice Sandra Day O'Connor. Justice O'Connor compiled an extraordinary academic record, overcame resistance to women in the legal profession, and had a notable career in state government before her appointment to the Supreme Court. As a member of the High Court, Justice O'Connor has written careful opinions and made efforts to achieve consensus in order to decide difficult cases on narrow grounds. Her commitment to her family as well as her apparent humility and good humor make her a fine role model.

In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

Although they did not make any new substantive law, a pair of 1986 decisions had a profound impact on the procedure and analysis of motions for summary judgment in the federal courts: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Any decision of the Supreme Court that has not been overruled is binding precedent, and I hesitate to characterize a controlling decision as the "worst." Although I am comfortable with the result in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), I was somewhat disappointed by the Court's conclusion that neutral, generally applicable laws that arguably burden religious conduct are subject only to rational-basis scrutiny.

In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

All acts of Congress are cloaked with a strong presumption of constitutionality. In *Felker v. Turpin*, 518 U.S. 651 (1996), the United States Supreme Court concluded that the Antiterrorism and Effective Death Penalty Act neither unconstitutionally restricts the jurisdiction of the Supreme Court nor unconstitutionally suspends the writ of habeas corpus. The Court of Appeals for the Seventh Circuit has similarly rejected constitutional challenges to the provisions of the Act that relate to deportation proceedings. See *Chow v. Immigration and Naturalization Service*, 113 F.3d 659 (7th Cir. 1997) (rejecting due process challenge); *Tang v. Immigration and Naturalization Service*, 109 F.3d 1185 (7th Cir. 1997) (rejecting separation of powers challenge). If confirmed as a U.S. District Judge, I would adhere to these precedents.



If confirmed, you will preside over many employment discrimination cases as a federal judge.

In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Peña* decision and subject that racial preference to the strictest judicial scrutiny?

**Yes.** Under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), racial classifications are constitutional only if they are narrowly tailored to further a compelling governmental interest. If confirmed, I would subject any racial preferences to the strictest scrutiny.

In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

**Most difficult.** Historically, few government measures have survived strict scrutiny.

Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

In *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), the Court of Appeals for the Ninth Circuit reversed the grant of a preliminary injunction against the California Civil Rights Initiative. The Ninth Circuit held that the Initiative does not violate the equal protection clause of the Constitution. I know of no other basis for a constitutional challenge to the Initiative.

As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

**Voter referenda are entitled to the same deference as legislative acts.**

Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes. The lower federal courts are created by statute, and the Supreme Court has held that a court created by statute has no jurisdiction other than that which is conferred upon it by statute. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). The Constitution leaves to Congress the power to determine and limit the judicial powers vested in the lower federal courts. *Sheldon*, 49 U.S. at 449; see also *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982).

Last year, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

In your personal legal opinion, is the Prison Litigation Reform Act constitutional?

All acts of Congress are cloaked with a strong presumption of constitutionality. In *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997), the Court of Appeals for this Circuit upheld sections of the PLRA against Eighth Amendment and separation of powers challenges. If confirmed as a U. S. District Judge, I would adhere to this precedent. Although I am unaware of any decisions specifically addressing the PLRA's restrictions on court supervision of prisons, those provisions are presumed constitutional.

Would you personally be reluctant to impose or uphold the death penalty?

I have no personal beliefs that would interfere with my ability to follow the law in this area.

Rebecca R. Pallmeyer  
July 20, 1998

**Senator Ashcroft**  
**Questions for All Candidates**

1. Which Supreme Court Justice, past or present, do you most admire, and why?

I greatly admire Justice Sandra Day O'Connor. Justice O'Connor compiled an extraordinary academic record, overcame resistance to women in the legal profession, and had a notable career in state government before her appointment to the Supreme Court. As a member of the High Court, Justice O'Connor has written careful opinions and made efforts to achieve consensus in order to decide difficult cases on narrow grounds. Her commitment to her family as well as her apparent humility and good humor make her a fine role model.

2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

Justice John Marshall wrote forceful opinions concerning the most difficult constitutional problems that faced the United States in its early years, including problems concerning the separation of powers. More recently, Justice Robert Jackson eloquently addressed separation of powers concerns in his concurring opinion in the Steel Seizures case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

3. What does the discretionary power of judiciary mean to you?

The duty of a U. S. District Court judge is to follow the law as set forth in the Constitution and Acts of Congress, as interpreted by the United States Supreme Court and the controlling Court of Appeals. This duty does not include discretion to create law or to reject established precedent. A district judge's discretion is limited to conducting trials and ruling on evidentiary matters. In addition, a district judge exercises discretion and supervises pre-trial procedures to ensure that each case proceeds to a prompt and fair resolution.

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

After my graduation from law school it was my privilege to clerk for Justice Rosalie Wahl of the Minnesota Supreme Court. Justice Wahl, who retired recently, worked extremely hard, wrote careful, lucid opinions, and strove to be fair to every litigant before her. I particularly admired her willingness to learn areas of the law with which she was unfamiliar prior to her appointment.

5. Which law review article or book has most influenced your view of the law?

My view of the law was most influenced by the casebook from which I studied constitutional law as a student at the University of Chicago Law School: GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS (9th ed. 1975).

6. What role do you think legislative history—by which I mean the various committee reports, hearing transcripts and floor statements—should play in the interpretation of the text of a statute?

In interpreting a statute, the District Court judge looks first to the plain language of the statute. If the language is ambiguous and there is no controlling precedent, legislative history may be of limited assistance in determining Congressional intent. Statements in legislative history may not, however, be relied upon to alter the plain meaning of the statutory language.

Rebecca R. Pallmeyer

July 21, 1998

Questions from Senator Thurmond

1. A former Supreme Court justice once expressed his view of Constitutional Interpretation as follows: "We look to the history of the time of framing of the Constitution and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time." Do you agree with this statement? Please explain.

In interpreting Constitutional provisions, I am guided, first, by the plain language of the text, and bound by the interpretations made by the United States Supreme Court and by the Court of Appeals for the Seventh Circuit. The Constitution is capable of accommodating changing circumstances (one example is the way the First Amendment has been applied to television and other modern communications methods); but what should remain constant is faithful construction of the Constitution according to the expressed intent of the Founding Fathers.

2. What role do you believe judges have in developing public policy through case law when the legislature repeatedly fails to address important matters?

The fact that the legislature has not addressed an important policy matter may well reflect the legislature's considered judgment concerning that matter. The responsibility of a federal District Court judge is to decide the individual cases before him or her, basing the decision on the language of the Constitution, any relevant statutes, and precedential case law. The District Court judge plays no role in developing public policy.

3. As you probably know, Federal Rule of Civil Procedure 11 permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

I have been called upon to enforce Rule 11 as a U. S. Magistrate Judge. I think the Rule is an important tool in requiring lawyers to meet their responsibility to investigate the facts and law supporting their positions before filing pleadings. I do not believe the Rule discourages lawyers from testing the boundaries of existing law.



4. Do you have any personal objections to the death penalty that would cause you to be reluctant to impose or uphold a death sentence in a criminal case?

**I have no personal beliefs that would interfere with my ability to follow the law in this area.**

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to impose them as a Federal judge?

**The imposition of mandatory minimum sentences for certain offenses is a decision for Congress. I have no reluctance to impose such sentences.**

6. As you probably know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

**I have had the opportunity to enforce the Federal Sentencing Guidelines concerning misdemeanors as a U. S. Magistrate Judge, and have had no difficulty with them. I applaud the Guidelines' goal of consistency and uniformity for sentencing persons in similar circumstances.**

7. What do you believe was the most significant, or at least was one of the most significant, Supreme Court decisions in the past half century and why?

**Although they did not make any new substantive law, a pair of 1986 decisions had a profound impact on the procedure and analysis of motions for summary judgment in the federal courts: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).**

**NOMINATIONS OF MARSHA L. BERZON (U.S. CIRCUIT JUDGE); RICHARD M. BERMAN, DONOVAN W. FRANK, COLLEEN McMAHON, ALVIN K. HELLERSTEIN, WILLIAM H. PAULEY III (U.S. DISTRICT JUDGES)**

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**THURSDAY, JULY 30, 1998**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.***

The committee met, pursuant to notice, at 1:01 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Also present: Senators Specter, Kennedy, and Feinstein.

**OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. This hearing will come to order.

Senator Moynihan, I believe you have someone you would like to introduce to the committee. We would be pleased to hear your remarks at this time.

**STATEMENT OF HON. DANIEL P. MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator MOYNIHAN. Thank you, Mr. Chairman. I have a passel of New Yorkers present and past. Would you like them to come up first, or——

Senator SESSIONS. That would be fine. I would be pleased if you would invite them up. We had some other Senators appearing, but they have not arrived, so it will be the New York time.

Senator MOYNIHAN. All right. Would Mr. Alvin K. Hellerstein come forward? Would Judge Richard Miles Berman come forward? Would Judge Colleen McMahon come forward? Would Mr. William H. Pauley III, come forward? And finally, a very special occasion for us, would Marsha Siegel Berzon come forward?

Senator SESSIONS. Very good, if you will please have a seat.

Senator MOYNIHAN. Have you ever seen so many New Yorkers in one place? [Laughter.]

May it please the court if I just give you a brief introduction to these distinguished candidates who appear before you at this point.

Alvin Hellerstein is a graduate of the Columbia College and Columbia University Law School, where he was a Harlan Fiske Scholar and the James Kent Scholar, that, of course, being Chancellor Kent, and he was editor of the Columbia Law Review. He later was

a clerk to Edmund Palmieri, Judge Palmieri of the Southern District of New York, the court for which he is now nominated. He has been an active member in the bar, particularly the Federal Bar Council, and was chair of the Judiciary Committee of the Association of the Bar of New York. He has also served in the Judge Advocate General's Corps, currently a partner at the law firm of Stroock, Stroock, and Lavan, and an attorney of large repute and distinction in our city.

Judge Miles Berman is a graduate of Cornell University School of Industrial and Labor Relations. Later, he studied at the University of Stockholm and did his law degree at New York University. He comes to us, sir, from the family court in Queens. He is a distinguished attorney, a partner in LeBoeuf, Lamb, Greene and MacRae. He was executive assistant to my revered former colleague, Senator Jacob K. Javits. He could have had any judicial position he wanted in New York. He chose instead for as long as anybody could endure it, the family court in Queens, a hugely demanding, exhausting, and depleting job, which he has done brilliantly and with great humanity and a measure of severity which is required much too often in those settings.

Colleen McMahon graduated summa cum laude from Ohio State University, first in her class, Phi Beta Kappa. She went on to Harvard Law School, where she took a law degree cum laude, joined Paul, Weiss, Rifkind, Wharton and Garrison, and is every bit the white-shoe lawyer that ladies have become these days. She was a special assistant and speech writer to the Hon. Donald McHenry, who was then permanent representative to the United Nations, Ambassador McHenry, and she was later appointed to the New York Court of Claims in 1995 and subsequently been selected to serve as acting justice for the New York Supreme Court. It is the great pleasure of Senator D'Amato and I to present her to this distinguished committee.

William Pauley is a graduate of Duke University, Phi Beta Kappa, magna cum laude. There is no end of honors. He practiced in Nassau County, which is Senator D'Amato's native county, in the firm of Orenstein, Snitow, Satak and Pauley, and more recently in his own firm. He serves on a part-time basis as assistant counsel to the office of the New York State Assembly Minority Leader, where he advises members of the assembly on personnel and management issues.

Finally, it is a very special pleasure, Mr. Chairman, to introduce to you Marsha Siegel Berzon, who has been nominated for the Ninth Circuit Court of Appeals. She is a native New Yorker and spent her youth in Sheepshead Bay and Brooklyn and East Meadow, Long Island. When she testifies, a learned ear will recognize those origins and, I hope, celebrate them. She graduated cum laude from Harvard/Radcliffe College and earned her law degree at Boalt Hall School of Law at the University of California. She was law clerk to Justice William J. Brennan, a blessed memory. She has been a faculty lecturer in the School of Social Welfare at the University of California and a practitioner in residence at New York Cornell Law School. She is currently a partner at Altshuler, Berzon, Nussbaum, Berzon and Rubin in San Francisco.



With that, sir, I present to you this venerable and honored body, these distinguished New Yorkers. I see your colleague, Senator Feinstein, is here, and she, of course, has a Californian before us, as well. I thank you, sir, for this opportunity, and I think you would probably like to call the nominees up personally one at a time.

Senator SESSIONS. I think we may try to have them all stay up.

Senator MOYNIHAN. Very well, sir.

Senator SESSIONS. Thank you, Senator Moynihan, for your very wise and insightful introduction. That was most fitting for the occasion and we appreciate it very much.

I see Senator Boxer has arrived and I know she would like to make some comments before we begin. Senator Boxer, we would be delighted to have your comments at this time.

#### **STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Mr. Chairman, I will be very brief because I know Senator Feinstein, as a member of the committee, will have much to add about Marsha Berzon, and I will actually skip over her incredible qualifications because I would leave that to my colleague to present to you.

I wanted to thank Senator Moynihan for saying those kind words about Marsha Berzon. We are absolutely delighted to have her here because we think she is eminently qualified to sit on the U.S. Court of Appeals for the Ninth Circuit.

I wanted to introduce Stephen Berzon, Marsha's husband, and ask him to stand. She has been married to Stephen since 1967. Along with Mr. Berzon is their daughter, Ali, their son, Jeremy, and Marsha's father, Jack Siegel. Unfortunately, her mom, Sylvia Siegel, could not be here due to health reasons, but Marsha has also brought her brother, Arthur, and—there are more—her sisters, Beth and Mariam, and her nephew, Adam. So she has an entire cheering section here in addition to Senator Feinstein and myself.

Senator SESSIONS. It is good to have you here.

Senator BOXER. I am going to skip over all the details of the resume and leave that to my good colleague. What I wanted to concentrate on, really, is Marsha's incredible bipartisan support. I would like to put that on the record. Here are words from a few of those supporters, Mr. Chairman, because I know that is very important to this committee.

Our own Senator from Pennsylvania, Senator Specter, who sits on the committee, said in a letter dated July 10 of this year that he was impressed with Marsha Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and the union." I am very pleased that Senator Specter has made those comments.

Former Republican Senator James McClure of Idaho in support of Marsha's nomination writes, "What becomes clear is that Ms. Berzon's intellect, experience, and unquestioned integrity have led to strong and bipartisan support for her appointment."

J. Dennis McQuaid, a Republican and an attorney who, by the way, ran against me in my Congressional race in 1982, writes, "Unlike some advocates, she enjoys a reputation that she is devoid of

any remotely partisan agenda. Frankly, her presence will enhance the reputation of the ninth circuit."

California State Superior Court Judge Michael Johnson, who was appointed by Governor Wilson, believes Ms. Berzon, "is a brilliant appellate attorney, and she would be an excellent addition to the ninth circuit."

Associate Justice of the State of California Court of Appeal Paul Haerle, who was appointed by Governor Wilson, thinks she would make, "a fine appellate court judge".

We have Fred Alvarez, who was appointed by Ronald Reagan to the Department of Labor, recommending her, "without hesitation".

Charles Curtis, who was the opposing counsel in the *United Auto Workers v. Johnson Controls, Inc.* writes, "All who have worked with her or against her know that she is fair, reasonable, and respectful toward opposing views."

The California Correctional Peace Officers Association represents correctional peace officers employed by the State of California. Their organization has endorsed Republican Governors Deukmejian and Wilson and they say about Marsha, that she is "among the best legal practitioners in the country."

So I am just so pleased to introduce her to you. Her other supporters include the International Union of Police Associations, the National Association of Police Organizations, the Los Angeles County Professional Peace Officers Association, and the corporate secretary for Chevron Corp. and a Republican, Lydia Beebe, writes that Ms. Berzon has a "reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on the plaintiff and management side."

I think the record will show this is a nominee who is just perfect for these times, and I am very hopeful that after hearing my good colleague make what I know will be an eloquent presentation that we will be able to move her forward and move her forward favorably.

Thank you so much, Mr. Chairman.

Senator SESSIONS. Thank you, Senator Boxer.

I believe Senator D'Amato has arrived and would like to make some comments. We appreciate your insight, Senator D'Amato.

#### **STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator D'AMATO. Thank you very much, Mr. Chairman. I am going to ask that all of my remarks be placed in the record as if read in their entirety because of the time constraints that the committee faces.

Let me say it is, indeed, a great pleasure and an honor to have five such distinguished jurists and jurists-to-be before this committee. The President has nominated wisely.

I note that while this is the first time that I have had the opportunity to meet Marsha Siegel Berzon, that we share a very common background, I having been born in Brooklyn and moved to Nassau County at the age of 8, Marsha Siegel Berzon having lived in Brooklyn and moved to Nassau County and, indeed, the same town, the town of Hempstead in the community of East Meadow,



having moved there at the age of 8. From there on, things begin to change. [Laughter.]

I cannot say to you that my academic endeavors ever made it possible for me to attend the great universities which she did, and not only attend them, but graduate at the top of her class, graduating No. 1 from East Meadow High School as the valedictorian, No. 1. I will not tell you what number I graduated from my high school. [Laughter.]

Senator SESSIONS. We have not put you under oath yet.

Senator D'AMATO. Indeed, I think the President has nominated wisely and I am delighted to be supportive of a nominee who was a former Long Islander who came from my own town where I served as the supervisor while she was going through high school.

Having said that, I am equally delighted to be supportive of the nominations that went through Senator Moynihan's distinguished screening committee, Richard Berman and Alvin Hellerstein, both men of great accomplishments in the legal community and who will distinguish themselves in this position as well. Indeed, they will make our Federal district courts the best in the land, and we are very proud of our courts, particularly the Eastern District in New York. On a more personal note, it is of great delight for me to be presenting these nominees personally.

Mr. Chairman, we have a unique arrangement. New York is the only State that I am aware of where over the past 24 years the Senators, starting in the days of Senator Javits and Senator Moynihan, and continuing in that tradition today Senator Moynihan and I share in our judicial recommendations.

I am very privileged to put forth with the support of Senator Moynihan Colleen McMahon. She is currently serving as a distinguished jurist. She has attained the highest of scholastic achievements, graduating No. 1 from Ohio State University, Harvard law cum laude, and then going on to a brilliant law career. She became a partner in the great firm of Paul, Weiss, Rifkind, Wharton and Garrison, taking time off after attaining partner to be special assistant to the Hon. Donald F. McHenry, permanent representative to the United Nations. Thereafter, she was selected to be an acting justice at the State supreme court.

She has written extensively on the glass ceiling in the law, and she contributes tremendously to the enrichment of judicial service. I believe that the Southern District will be enhanced by her service, and I fully recommend her to this committee.

She is joined here by her children, Katie, Patrick, and Brian, and Frank Sica—is Frank here?

Judge MCMAHON. Frank is here.

Senator D'AMATO. The children are not here.

Judge MCMAHON. They are at camp.

Senator D'AMATO. They are at camp, but Frank, it is good to see you.

Mr. Chairman, as I said, I have known Judge McMahon over the years and it is a personal privilege to be recommending her.

The same is true for Bill Pauley, William Pauley III. He has been nominated by the President for the prestigious position on the district court in the Southern District. I would like to take this opportunity to recognize Bill's wife, Kimberly, and their two oldest chil-

dren, William and Kendall, and Bill's mother and father. They must be bursting with pride.

Bill graduated from Duke University magna cum laude and Duke Law School, as well. He became the deputy county attorney in my county on Long Island, where he argued some of the great cases in front of the Federal courts. He became known as a litigator's litigator, and, indeed, a short time after leaving the county, became a senior partner at a renowned law firm. There, he specialized in employment practices and discrimination cases. He has been hired and retained as special counsel by just about every major municipality in the area Nassau County, Suffolk County, so many of the political subdivisions. Indeed, he has tried dozens of cases and always has come away with the respect of not only those who he have opposed, but more importantly, the court itself, as one of the great trial lawyers.

We are so fortunate to have people who will be giving up tremendous sums of money in the private sector to be representing the people of this country in the most important position, as judges in our district court.

I heartily support Mr. Pauley. I thank the committee for this opportunity and certainly hope that we will have swift approval of their nominations.

Senator SESSIONS. Thank you very much, Senator D'Amato. We appreciate those good remarks. I know you and Senator Moynihan are rightly proud of these nominees.

Senator D'AMATO. Thank you, Mr. Chairman.

[The prepared statement of Senator D'Amato follows:]

#### PREPARED STATEMENT OF SENATOR ALFONSE M. D'AMATO

##### REMARKS INTRODUCING MARSHA SIEGEL BERZON BEFORE THE SENATE JUDICIARY COMMITTEE

I would like to thank the Committee for providing me with this opportunity to mention a former New Yorker that is also before the Committee today, Marsha Siegel Berzon, who has been nominated to the Ninth Circuit Court of Appeals.

Ms. Berzon's parents were lifelong residents of Brooklyn, attending college in New York City. Her father owned a mattress factory in Brooklyn, and her mother was a social worker for Nassau County, working with nursing home residents and adopted children. Ms. Berzon grew up in Brooklyn, New York, in the Sheepshead Bay area, before moving with her family to East Meadow when she was eight. She graduated valedictorian of her East Meadow High School class in 1962 and won numerous academic awards. She then attended Harvard/Radcliffe College, graduating cum laude in 1966 and thereafter undertook graduate study at Columbia University. Ms. Berzon received her law degree in 1973 from the University of California, Berkeley.

Ms. Berzon has an impressive and varied legal career beginning with clerkship for a U.S. Court of Appeals Judge for the Ninth Circuit and a clerkship for U.S. Supreme Court Justice William Brennan. She joined a law firm in Washington, D.C. before leaving the East Coast to join the firm of Altschuler, Berzon, Nussbaum, Berzon & Rubin in San Francisco. She has been with the firm since 1978, becoming Partner in 1990.

I am pleased to say that Ms. Berzon did return to New York, albeit for a semester, as a distinguished practitioner in residence at Cornell Law School in Ithaca.

Her parents still live on Long Island, in Lawrence, and her brother, Arthur, an accountant, lives in the Riverdale section of The Bronx. I am pleased to say that New York still draws her back.

She has argued four cases before the Supreme Court and written more than one hundred party and amicus briefs to the Court, demonstrating her excellent skills and knowledge of the law.

I thank the Committee for this opportunity to present Ms. Berzon and urge the Committee's swift consideration of her nomination to the Ninth Circuit.



## REMARKS INTRODUCING RICHARD BERMAN BEFORE THE SENATE JUDICIARY COMMITTEE

I would like to introduce Richard Miles Berman who has been nominated by the President to be United States District Judge for the Southern District of New York.

Born and raised in New York, Mr. Berman went to Cornell University School of Industrial and Labor Relations, making the Deans List, and graduated from New York University School of Law, on scholarships. During law school, his skills earned him a seat on the Moot Court Executive Board. He attended University of Stockholm School of Law as lecturer and graduate assistant studying comparative law and international law—receiving diplomas in each field.

For four years, Mr. Berman worked as a Litigation Associate for Davis, Polk and Wardwell before coming to Washington, D.C. to work for United States Senator Jacob Javits as his executive assistant. As Litigation Associate, he oversaw Senator Javits' New York City office, acting as his liaison to government agencies and community groups.

As Executive Director for the New York State Alliance to Save Energy, co-chaired by Senators Javits and Moynihan, he promoted energy conservation. He left that organization to act as General Counsel and Executive Vice President for Warner Cable Corporation where he was responsible for all corporate legal affairs for eight years. He then joined the law firm of LeBoef, Lamb, Green & MacRaie as Partner representing telecommunications companies including the Discovery Channel in corporate, litigation and regulatory proceedings.

In March of 1995, New York City Major Rudy Giuliani appointed Mr. Berman to the New York State Family Court where he presided over both civil proceedings, including child protection, family offenses, custody, paternity and adoption, and criminal proceedings including juvenile delinquency cases. Since his appointment he has presided over hundreds of trials and hearings.

Judge Berman's knowledge and experience is diverse, involving antitrust cases, contractual disputes, criminal actions and regulatory proceedings. His skill in dealing with complex litigation and administrative agency proceedings, particularly in federal court, will be an asset when he takes to the bench. I look forward to swift action on his nomination.

## REMARKS INTRODUCING ALVIN HELLERSTEIN BEFORE THE SENATE JUDICIARY COMMITTEE

I would like to thank the Committee for providing me with this opportunity to introduce Alvin K. Hellerstein to the U.S. District Court for the Southern District.

I would like to take a moment to recognize his wife, Mildred, who has joined him today at this nomination hearing.

Mr. Hellerstein was born in New York, attended Columbia College and Columbia University School of Law, graduating with an LL.B., attending on various scholarships. He was editor of the Law Review and was recognized as best speaker in a trial advocacy competition.

Upon graduation, he clerked for United States District Judge Edmund L. Palmieri in the Southern District of New York. This experience will prove invaluable during this nominations process and during his tenure as a federal judge.

His distinguished legal career also includes several years at the U.S. Army's Judge Advocate General's Corps, as First Lieutenant.

For nearly thirty-eight years, Mr. Hellerstein has been with the firm of Stroock & Stroock & Lavan, making Partner in 1969. He has specialized in litigation including arbitration for complex cases. In fact, in one case, he handed a case that covered nearly 11,000 pages of transcripts, about 600 exhibits and involved 60 sessions before arbitrators.

He has written and spoken extensively on all aspects of the law and has been active in the City of New York Bar Association, offering improvements to the judiciary. He currently serves as Chairman of the Federal Bar Foundation and has been its President for two previous years.

Mr. Hellerstein's experience will translate into a capable and judicious District Court Judge and I look forward to swift action on his nomination.

## REMARKS INTRODUCING COLLEEN MCMAHON BEFORE THE SENATE JUDICIARY COMMITTEE

I am pleased to introduce Colleen McMahon, whom the President has nominated to serve as U.S. District Court Judge for the Southern District of New York. I have known Judge McMahon for many years and I am proud to call her a friend.

I would also like to take a moment to recognize her husband, Frank Sica, who has joined her here today and mention her children, Katie, Patrick and Brian, who were not able to make it to the hearing because they are at camp.

Colleen McMahon has a distinguished academic record, graduating first in her class from The Ohio State University, where she received numerous honors and awards. She earned her Law Degree from Harvard, graduating Cum Laude in 1976.

Upon graduating from law school, Judge McMahon joined the noted law firm of Paul, Weiss, Rifkind, Wharton & Garrison, making Partner in September 1984. As a civil litigator, she handled cases including contracts, securities fraud, copyright, trademark and employment discrimination. She tried cases before judges, juries and arbitration panels.

From November 1979 to September 1980, Judge McMahon took time from her private practice to be the Special Assistant to the Honorable Donald F. McHenry, Permanent Representative of the U.S. to the United Nations.

In 1995, she was appointed as Acting Justice of the State Supreme Court where she presides over felony cases and non-trial civil proceedings.

Judge McMahon has been active in numerous bar associations—too numerous to list them all—working especially on the issues of judicial administration and women in the legal profession. She devised, oversaw and wrote the introduction to a ground-breaking study of the “glass-ceiling” in the legal profession that was published in the Fordham Law Journal. She also chaired the Jury Project, the task force that successfully recommended far-reaching changes in New York’s jury service practices; the project report, which Judge McMahon wrote, won wide-spread acclaim. She has served as a Member of the House of Delegates for the New York State Bar Association.

Her knowledge of the law is diverse, writing and speaking on issues ranging from employment law to federal civil procedure. She also possesses an important attribute for someone who will sit on the federal bench—a balanced and fair interpretation of the law as applied to individual cases.

Judge McMahon is well known in New York as a first class trial attorney and respected as a judge who can move a calendar and handle complex cases. Those qualities of intellect and character which make her a sought-after attorney and jurist will enhance her service as a judge in the Southern District.

I am looking forward to the support of this Committee.

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#### REMARKS INTRODUCING WILLIAM H. PAULEY III BEFORE THE SENATE JUDICIARY COMMITTEE

I am pleased to introduce William Pauley to the Committee. Mr. Pauley has been nominated to be U.S. District Court Judge for the Southern District of New York. I am pleased to be here to offer my support to his nomination.

First, I would like to take this opportunity to recognize Mr. Pauley’s wife, Kimberly, and their two oldest children, William and Kendall. Their youngest child, Adam (who is only two) stayed home. I am also delighted to introduce Mr. Pauley’s parents, William and Mildred, who are both here today.

William Pauley graduated from Duke University, magna cum laude, and, in 1977, earned his Law Degree from Duke University as well.

Following his graduation from law school, Mr. Pauley argued appeals on behalf of Nassau County as a Deputy County Attorney.

In 1985, Mr. Pauley established his own law firm in mid-town Manhattan and proceeded to build a successful and distinguished practice. He appeared in federal courts around the country, litigating complex civil actions ranging from RICO claims to federal civil rights matters and class actions.

One of the unique features of Mr. Pauley’s practice has been his representation of municipalities and government officials. He has represented a number of large municipalities on Long Island, including Nassau County, Suffolk County, the Town of Hempstead and the Town of Brookhaven. As special counsel, he has defended municipalities and government officials in a wide spectrum of litigation, including employment discrimination actions, land use and zoning matters.

Mr. Pauley has tried dozens of cases in state and federal courts and argued numerous appeals in the United States Court of Appeals for the Second Circuit, as well as the appellate courts in New York State.

As a seasoned litigator, he will bring a broad range of practical, hands-on experience to the district court bench. He is highly regarded among his colleagues with a reputation for fairness and integrity.



In his capacity as an Assistant Counsel to three Assembly Minority Leaders, he advised them on personnel and human resources issues and appeared in litigation where they were named in their official capacity.

Mr. Pauley's extensive experience and keen ability to analyze the law makes him a qualified candidate for the position on the Southern District Court bench. I am confident that he will fulfill the responsibilities of this office with the professionalism and skill with which he performs all his work.

I thank the Committee for this opportunity and look forward to swift approval of his nomination.

Senator SESSIONS. I see Senator Wellstone here, and I believe Mr. Frank had not been invited up to the table, and I apologize for that. I do not know which one could sit there, Paul. Maybe you can pull the chair there. That will be fine.

#### STATEMENT OF HON. PAUL D. WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator WELLSTONE. Thank you, Mr. Chairman. Let me move right along.

One thing I would like to do is to make sure that I introduce Judge Frank's family.

Senator SESSIONS. Please.

Senator WELLSTONE. His wife, Kathy—is everybody here?

Judge FRANK. They are all here.

Senator WELLSTONE. His wife, Kathy, and everybody, please keep standing. This is a wonderful family. We want to show Senator Feinstein that there is a lot of support among women for this nomination. [Laughter.]

Now we move to Kathy, spouse of 25 years, daughter Rachel, age 14, daughter Hilary, age 13, daughter Lindsay, age 13, daughter Samantha, age 9, daughter Alexandra, age 9. We have got strong support among women in Minnesota for this judge.

Senator SESSIONS. I believe you do.

Senator FEINSTEIN. It is unanimous.

Senator WELLSTONE. Mr. Chairman and members of the committee, I would like to thank you for scheduling Judge Donovan Frank for this final hearing before we leave on the August recess. He has strong bipartisan support and that will be underscored by Senator Grams' presence. I know he will be here later today to indicate his strong support. I am confident that once you complete your review of Judge Frank's sterling record, you will report his nomination promptly to the full Senate for approval in early September and I urge you to do so.

Judge Frank has served with distinction on the judiciary in Minnesota for 13 years and he is regarded as one of the finest sitting judges in the State. He is noted for the excellent judgment, splendid analysis, good sense, and great care applied in each decision and ruling made. His integrity is above reproach. His intelligence is piercing. His demeanor is always cordial, but within the courtroom, firm and straightforward. In short, he personifies the best of America's judiciary. You can see that I give him a very strong recommendation.

Senator SESSIONS. Well said.

Senator FEINSTEIN. Speak in superlatives. [Laughter.]

Senator WELLSTONE. During his tenure on the bench, he has distinguished himself as an energetic, able jurist with a profound com-



mitment to social justice, a deep concern for those on society's margins, and a special talent for developing imaginative, innovative approaches to preserving, protecting, and supporting families, especially those that have been wracked by violence, neglect, and abuse, and on a personal note, I just want to say that Judge Frank is very well known around the State. One of his strongest supporters is my wife, Sheila, who has such great respect for the work that you have done, Judge.

I am now going to just take about 2 minutes more and finish. There is a whole statement that I would like to have as a matter of the record.

Senator SESSIONS. We would be pleased to have it and will accept it.

Senator WELLSTONE. I do want you to know, described by the chairman of Minnesota's Conference on Chief Judges as a judge's judge in 1996, Donovan Frank was chosen as Trial Judge of the Year by the conference out of over 250 sitting judges in the State of Minnesota.

Finally, I would be remiss if I did not, and I am not doing justice to Judge Frank, but I am trying to help you in moving your deliberations along quickly, but I do want to just again urge you to move promptly on this nomination. I have been in touch with Chief Judge Paul Magnuson of the district court in Minnesota and he has informed me that an already large caseload backlog in the district has been exacerbated by the vacancy which Judge Frank's nomination is designed to fill.

Chief Judge Magnuson has indicated that the District of Minnesota currently is operating with a weighted case filing average of 610 per judge, 180 cases per judge over the caseload considered normal by the Judicial Conference. In fact, I understand that the current case filings in the District of Minnesota would justify under the Judicial Conference formula an additional three judges to handle the growing caseload of the district, so the judges on the court have said, please, Senator, ask your colleagues to move this forward.

On a personal note, and my final point, because, Judge, I know these two colleagues to be humane, fair-minded——

Senator FEINSTEIN. Bright, intelligent——

[Laughter.]

Senator WELLSTONE [continuing]. Bright, intelligent——

Senator FEINSTEIN [continuing]. Energetic, vigilant, patriotic——

Senator WELLSTONE [continuing]. And with Judge Sessions always on my side on all the issues——

Senator SESSIONS. Trustworthy, loyal, helpful——

[Laughter.]

Senator WELLSTONE. I do want to point out, on a personal note, that in order to take a seat on the district court in the Twin Cities, and I mentioned this to Senator Hatch, who was very responsive to this, Judge Frank and his family will have to move from rural northeastern Minnesota to the Twin Cities. It is really important to have representation from what we call greater Minnesota, outside the Twin Cities area. The problem is, he would have to move, buy a house, and enroll his five children in the elementary and high schools and it would be a lot easier for him and for his family

if this nomination was acted on by the Senate as early as possible, early fall, so that he could make the appropriate arrangements.

I do believe, now just to be very serious, that he has strong and broad bipartisan support. It is unanimous. Senator Grams agrees with me. We have a lot of judicial talent. He is the best, and anything we can do to help his family out would be much appreciated. I thank you.

[The prepared statement of Senator Wellstone follows:]

#### PREPARED STATEMENT OF SENATOR PAUL WELLSTONE

Mr. Chairman, members of the Committee, I want to thank you for scheduling Judge Donovan W. Frank for this final hearing before we leave for the August recess. With the strong bipartisan support he has enjoyed in my state, underscored by Senator Grams' presence here today, I am confident that once you have completed your review of his sterling record, you will report his nomination promptly to the full Senate for approval in early September. I urge you to do so.

Judge Frank has served with distinction on the judiciary in Minnesota for thirteen years, and is regarded as one of the finest sitting judges in the State. He is noted for the excellent judgment, splendid analysis, good sense, and great care applied in each decision and ruling made. His integrity is above reproach; his intelligence is piercing; his demeanor is always cordial, but, within the courtroom, firm and straightforward. In short, he personifies the best of America's judiciary.

During his tenure on the bench, he has distinguished himself as an energetic, able jurist with a profound commitment to social justice, a deep concern for those on society's margins, and a special talent for developing imaginative, innovative approaches to preserving, protecting and supporting families, especially those wracked by violence, neglect and abuse.

Judge Frank is an experienced trial judge, having heard numerous complex and difficult criminal cases over the years. Shortly after ascending to the bench, he served a term as the Assistant Chief Judge for the Sixth Judicial District in Minnesota, and was then re-elected by his colleagues to successive terms as Chief Judge of that District. This recognition by his colleagues is confirmation of his skills in the effective administration of the court system, and of his personal sense of fairness. Described by the Chairman of the Minnesota Conference of Chief Judges as a "judge's judge," in 1996 he was chosen as "Trial Judge of the Year" by the Conference, out of over 250 sitting judges in the state.

This award was granted on behalf of all his judicial colleagues. However, it is no less significant that Judge Frank is just as well regarded by members of the practicing bar in my state. The legal community statewide clearly holds him in very high regard, as evidenced by the many awards, appointments and high ratings extended to him over the years by his colleagues.

It is also significant that the number of cases decided in Judge Frank's courtroom that were thereafter appealed is amazingly small. Indeed, no case decided by Judge Frank has ever been reversed by the Minnesota Supreme Court; and of the approximately twenty cases appealed to the Court of Appeals in the State of Minnesota (a lower appellate court than the Supreme Court), only three times did the judges of that court not entirely concur with Judge Frank's judgments.

Before ascending to the bench, and in addition to his many other professional accomplishments, Judge Frank served as an Assistant County Attorney in northern Minnesota, working on the staff of its Juvenile Welfare, Criminal and Civil Divisions, where he earned a reputation for being tough-minded, vigorous and even-handed in prosecuting numerous cases involving rape, murder, kidnapping, assault and other violent crimes. Throughout his tenure in that office, he demonstrated an especially keen sympathy for the victims of such crimes. During his many years of public service to the people of Minnesota, he has been deeply committed to ensuring that our state's legal system is effective, fair, and open to all. Ensuring equal access to justice, and equal treatment under the law, and doing so with dignity and respect to all, has been a hallmark of his service on the bench.

Judge Frank has also been remarkably active in local and regional community affairs, serving on an extraordinary number of distinguished boards, study commissions, task forces, and committees throughout the state in both policy-making and advisory capacities, all of which were intended to make the court system more effective and accessible, more equitable, less intimidating, and more free from gender-based and racial biases. He has also been active in efforts to educate the public and



the legal community about our legal system, rooted in his strong belief that the system works most effectively when its workings are understood by the public.

Having lived and worked for much of his lifetime in greater Minnesota, Judge Frank's nomination would bring to the United States District Court his vast experience and knowledge of the region, and of the special needs and problems of rural areas. I believe it is important that our District Court be balanced in all respects, including that of the geographical background.

As I said at the outset, I hope Judge Frank's nomination will be approved promptly by the Committee. I've been in touch with Chief Judge Paul Magnuson of the District Court of Minnesota, who has informed me that an already large caseload backlog in the District has been exacerbated by the vacancy which Judge Frank's nomination is designed to fill. Chief Judge Magnuson has indicated that the District of Minnesota currently is operating with a "weighted case filing" average of 610 per judge—180 cases per judge over the caseload considered normal by the Judicial Conference. In fact, I understand the current case filings in the District of Minnesota would justify, under the Judicial Conference formula, an additional 3 judges to handle the growing caseload of the District.

In addition, on a personal note, in order to take a seat on the District Court in the Twin Cities, he must move from rural northeastern Minnesota to the Twin Cities, buy a house, and enroll his five children in area elementary and high schools. It would be much easier for him and his family if his nomination were acted upon by the full Senate as soon as possible, so that he could make appropriate arrangements in this regard for the fall.

I know you have a lot of nominees today and little time. I'm delighted to commend to you this distinguished jurist. I am confident that once confirmed, he will continue to bring a deep and abiding commitment to justice to this important work, and serve ably on the federal bench for years to come. I thank the Chairman, the Ranking Democrat, and the Members of this Committee for your consideration.

Senator SESSIONS. Thank you. That weighted caseload is very high, Judge. You will be challenged. We have a district in Alabama that is reaching about those numbers, so we need to move on it.

Senator Grams.

#### **STATEMENT OF HON. ROD GRAMS, A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator GRAMS. Timing is everything. Thank you, Mr. Chairman and Senator Wellstone. I am pleased to be here and to help introduce Judge Donovan Frank, the nominee for a position as U.S. District Judge for the State of Minnesota.

Judge Frank is a highly regarded, seasoned jurist, and having held the office of District Court Judge of the Sixth Judicial District, State of Minnesota, for the last 13 years, and for 5 of those 13 years, from 1991 through 1996, Judge Frank served as chief judge. Five years is the statutory maximum in Minnesota that a judge can serve as a chief judge, and during that time, he held supervisory and assignment authority over the entire district, in addition to carrying a full caseload.

I would also like to bring to your attention Judge Frank's personal history of volunteerism and community service. He has the qualities and the background that we seek for those who serve on the Federal bench.

Judge Frank is highly regarded among his peers as a learned and thoughtful jurist and I believe he will fulfill his position with the utmost integrity and respect for the U.S. Constitution and the State and Federal statutes and I fully support his nomination and I ask the committee to report his nomination this week and request floor consideration this week, as well, if possible.

Mr. Chairman, I want to thank you for your efforts, as well, to help facilitate Judge Frank's nomination. I appreciate this oppor-

tunity to be here and to join Senator Wellstone in supporting this nomination. Thank you very much.

Senator SESSIONS. Thank you very much.

Senator WELLSTONE. Mr. Chairman, I thank my colleague, Senator Grams, for his strong support.

Senator SESSIONS. Thank you.

Senator Feinstein, I know, has a personal recommendation or some comments she would like to make and I would recognize her at this time.

### **STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. I thank you, Mr. Chairman. I would ask your consent to enter into the record a statement of the ranking member, Senator Leahy, and the full statement of my colleague, Senator Boxer, for the record.

Senator SESSIONS. That will be made a part of the record.

[The prepared statement of Senator Leahy follows:]

#### **PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

This is the ninth judicial nominations confirmation hearing this year. Today we will hear from a few more of the scores of nominees who are pending before the Committee in need of a hearing. We are receiving additional nominations every week. I commend the Chairman for holding two confirmation hearings this month, for the first time since March. Unfortunately, the timing of this hearing on the next to last day before the scheduled August recess will mean that none of these outstanding nominees will be considered by the Judiciary Committee or the Senate before September.

I also want to commend all of the Senators who are participating here today and those who are sending statements in support of these fine nominees. In particular, I note that the Committee will be hearing from Marsha Berzon, a nominee to another judicial emergency vacancy plaguing the Ninth Circuit. Her nomination has been pending before the Committee for over six months. Both Alvin Hellerstein and Colleen McMahon have been nominated to fill judicial emergency vacancies in the Southern District of New York. I look forward to prompt consideration and favorable action on all of the nominees assembled at today's hearing once the Judiciary Committee resumes meeting in September.

The Chief Justice of the United States Supreme Court has called the number of judicial vacancies "the most immediate problem we face in the federal judiciary." The Senate continues to tolerate 76 vacancies in the federal courts with another seven on the horizon—almost one in 10 judgeships remains unfilled. We are doing better here in the Judiciary Committee but the Senate needs to act more promptly in considering these nominees. The Senate has not even kept up with normal attrition over the past two years, let alone taken the type of concerted action needed to end the judicial vacancies crisis. The numerous, longstanding vacancies in some courts are harming the federal administration of justice. The Chief Justice pointedly declared in his 1997 Year End Report: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."

Only 33 judicial nominees have been confirmed by the Senate all year. There are currently 17 qualified nominees for judicial vacancies on the Senate calendar. All have been reported favorably by the Judiciary Committee. Some were reported months ago. Unfortunately, the Republican leadership in the Senate has not chosen to consider even a single judicial nomination yet this month. I hope that the Republican leadership of the Senate will reverse its course and that the Senate will proceed to consider and confirm those nominees without further delay.

Earlier this month, I attempted to draw the attention of the Senate and the public to the judicial vacancies problem by comparing the Senate lack of production with the home run pace of Mark McGwire. McGwire is still on pace to break the single-season home run record. He has hit an additional eight home runs so far in July and now has a total of 45 home runs. As the Senate approaches the end of July and its August recess, the Senate has gone "0 for July" and risks going without con-



firming any judicial nominees for a period of two months. That would be very wrong. There is still a day or two for the Senate Republican leadership to reconsider. I hope that the Senate will confirm these much-needed judicial nominees before it recessing for the month of August.

[The prepared statement of Senator Boxer and letters in support of Ms. Berzon follow:]

#### PREPARED STATEMENT OF SENATOR BARBARA BOXER

Mr. Chairman, I am delighted to be here today to introduce Marsha Berzon to the members of this distinguished Judiciary Committee. I feel confident you will all agree Ms. Berzon is eminently qualified to set on the United States Court of Appeals for the Ninth Circuit.

I would like to take this opportunity to introduce Ms. Berzon's husband, Stephen Paul Berzon, whom she has been married to since 1967. Mr. Berzon is here today, along with their daughter Ali, son Jeremy, and Marsha's father, Jack Siegel. Unfortunately, her mother, Sylvia Siegel, could not attend due to health reasons. Also here are Marsha Berzon's brother Arthur Siegel, her sisters Beth and Mariam Siegel, and her nephew Adam Kornetsky. I'll ask them to stand at this time.

Marsha Berzon graduated *cum laude* from Radcliffe College in 1966, and received her Juris Doctor from Boalt Hall, the law school at the University of California, Berkeley. Ms. Berzon clerked for Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit, and for Justice William J. Brennan, Jr. of the United States Supreme Court. She then went into private practice. Marsha Berzon has been with Altshuler & Berzon since 1978, and is now a Partner in that firm, appearing regularly in court.

Ms. Berzon's practice consists primarily of civil appellate work involving labor law, employment law, the First Amendment, and cases involving federalism and federal courts issues. U.S. Supreme Court representation is her specialty. Marsha Berzon has written more than 100 briefs in the Supreme Court. She has argued 4 cases before the Supreme Court. She was, in the last 5 years, chief counsel on 5 Supreme Court cases, as well as co-counsel before the High Court numerous times.

For years, Marsha Berzon has been involved in numerous professional activities, as a member of the State Bar of California, the Bar Association of San Francisco, California Women Lawyers, the San Francisco Women Lawyers' Alliance, the American Bar Association, the Los Angeles Bar Association, the State Bar of California, and as a Delegate to the Ninth Circuit Judicial Conference in 1985.

Marsha Berzon has strong, bipartisan support. Here are words from a few of those supporters.

Our own senator from Pennsylvania, Senator Specter who sits on this Committee, said in a letter dated July 10 of this year that he was impressed with Marsha Berzon's "intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and the unions." I would like to thank the senator from Pennsylvania for his support of Marsha Berzon.

Former Republican Senator James McClure of Idaho, in support of her nomination, writes: "What becomes clear is that Ms. Berzon's intellect, experience and unquestioned integrity have led to strong and bipartisan support for her appointment."

J. Dennis McQuaid, a Republican and an attorney, and who, by the way, ran against me in my congressional race in 1982, writes "Unlike some advocates, she enjoys a reputation that she is devoid of any remotely partisan agenda \* \* \* Frankly her presence will enhance the reputation of the Ninth Circuit."

California State Superior Court Judge Michael M. Johnson, who was appointed by Governor Wilson, believes Ms. Berzon "is a brilliant appellate attorney, and she would be an excellent addition to the Ninth Circuit." Associate Justice of the State of California's Court of Appeal, Paul Haerle, who was appointed by Governor Pete Wilson, thinks she would make a "fine appellate court judge."

Fred Alvarez, former Commissioner of the Equal Employment Opportunity Commission and Assistant Secretary of Labor for the Department of Labor in the Reagan Administration, recommends Ms. Berzon for the Ninth Circuit "without hesitation."

Charles G. Curtis, Jr. was opposing counsel in the *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). He writes "all who have worked with or against her know that she is fair, reasonable, and respectful toward opposing views."

The California Correctional Peace Officers Association (CCPOA) represents correctional peace officers employed by the State of California. This organization has en-



dorsed Governors George Deukmejian and Pete Wilson. The CCPOA also endorses Ms. Berzon as being "among the best legal practitioners in the country."

Ms. Berzon's supporters also include the International Union of Police Associations, the National Association of Police Organizations which represents 220,000 sworn law enforcement officers, and the Los Angeles County Professional Peace Officers Association.

The Corporate Secretary for Chevron Corporation and Republican, Lydia Beebe, writes Ms. Berzon has a "reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on the plaintiff and management side."

Mr. Chairman, the record will show Ms. Berzon has the support and respect of labor and management, Democrats and Republicans. Clearly, her qualifications have transcended partisan divisions.

I would like to submit these recommendation letters in full for the record.

I strongly believe Marsha Berzon will make an outstanding addition to the federal bench. I am very proud to have had the opportunity to testify today, and hope this distinguished panel will forward Marsha's name to the full Senate for confirmation. Thank you Mr. Chairman.

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UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC, July 10, 1998.

Senator ORRIN HATCH,  
*Chairman, Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.*

DEAR ORRIN: On May 7, 1998 I wrote to you to request a prompt hearing for Marsha Berzon, a nominee for the Ninth Circuit Court of Appeals (copy attached). As I expressed in my prior letter, I have met with Ms. Berzon and have received numerous letters and phone calls of support. I am impressed by her intellect, accomplishments, and the respect she has earned from labor lawyers representing both management and the unions.

Over two months have passed since I last wrote and Ms. Berzon has still not had her hearing. I understand that the Judiciary Committee is planning to have a judicial nominations hearing next Thursday, July 16. I urge you to include Ms. Berzon as a witness at this hearing. If you decide not to include Ms. Berzon, I would appreciate it if you could share with me the reasons for the delay.

Thank you for your help.

Sincerely,

ARLEN SPECTER.

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LAW OFFICES,  
GIVENS PURSLEY, LLP.,  
Boise, ID, April 9, 1998.

Re Nomination of Marsha S. Berzon to Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: We write to support the confirmation of Marsha S. Berzon, who has been nominated to the United States Court of Appeals for the Ninth Circuit. We would respectfully urge that confirmation hearings be held promptly.

Our firm is involved in litigation on numerous issues of public policy throughout the Ninth Circuit. That practice makes us vitally concerned about the quality of the nominees to all federal benches in our Circuit, and particularly to the Court of Appeals.

We first became aware of Ms. Berzon when our respective firms acted as co-counsel in complex bankruptcy proceedings related to the Bunker Hill Superfund site in northern Idaho. While she was not involved in that representation, our partners became quite familiar with her reputation and experience during their work with other members of her firm.

We have also had an opportunity to review in detail not only Ms. Berzon's resume and qualifications, but also numerous letters of recommendation from highly respected lawyers throughout the country in support of her nomination and prompt confirmation to the Court. These include several from lawyers who have represented

adverse parties in litigation with Ms. Berzon's clients which, as you know, is one of the highest compliments available in our profession.

What becomes clear is that Ms. Berzon's intellect, experience and unquestioned integrity have led to strong and bipartisan support for her appointment. She is a consensus nominee and we are confident that the Judiciary Committee will be most favorably impressed.

We join the expression of support from other legal and political quarters for Marsha Berzon's nomination and prompt confirmation.

Thank you for your consideration.

Very truly yours,

ROY L. EIGUREN.  
W. HUGH O'RIODRAN.  
KENNETH R. MCCLURE.  
JAMES A. MCCLURE.

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MCQUAID, METZLER, MCCORMICK & VAN ZANDT, LLP,  
*San Francisco, CA, February 18, 1998.*

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH, *Chairman,*  
*Senate Judiciary Committee, U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I write to support the confirmation of Marsha S. Berzon who has been nominated by the President to the United States Court of Appeals for the Ninth Circuit.

I am a Republican and an attorney. As a Republican, I have been heavily involved in Republican politics in Northern California for over twenty years. I ran for Congress twice losing in 1980 to John Burton and in 1982 to Barbara Boxer. I subsequently became quite involved with the Lincoln Club of Northern California and served as its Chairman from 1989 to 1991. I have also served on both state and local Republican Central Committees and been a delegate to the Republican National Conventions in 1984 and 1988.

As an attorney, I am the senior partner of my firm and have been practicing in the San Francisco legal community for over twenty-five years. My firm represents management in the labor arena. A large focus of my practice is in real estate with an emphasis on land use and environmental law. My clients are primarily large businesses and developers.

I am providing both my political and legal background because Marsha Berzon has generally represented clients and organizations to which my clients almost invariably would be opposed or with whom they would be in conflict. Nevertheless, I can recommend Marsha for confirmation without reservation. Marsha is well recognized by the entire Bar, including significantly the "management" Bar, for her legal skills and knowledge. Unlike some advocates, she enjoys a reputation that she is devoid of any remotely partisan agenda and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness and equanimity. Frankly her presence will enhance the reputation of the Ninth Circuit.

I have spoken to Marsha Berzon about her nomination. She demonstrated to me a keen interest in the law in general and not just in her specialties. As a former law clerk and as a volunteer to the courts, she has had a wide variety of experience in matters outside her specialties of labor, employment law, ERISA, constitutional law and environmental law.

Hopefully, a confirmation hearing will be scheduled quickly for Marsha Berzon. I am confident that the Judiciary Committee will be impressed favorably as I have been with this candidate's legal background, her love of and dedication to the law and her judicial temperament. We need more judges like her at every level of the court system. I am providing a copy of this letter supporting Marsha Berzon to each Senator on the Committee. I hope that the Committee will vote to confirm her nomination.

Very truly yours,

J. DENNIS MCQUAID,  
*McQuaid, Metzler, McCormick & Van Zandt, LLP.*

THE SUPERIOR COURT,  
CHAMBERS OF MICHAEL M. JOHNSON, JUDGE,  
Compton, CA, April 17, 1998.

Re Nomination of Marsha Berzon for the Ninth Circuit Court of Appeals.

Hon. ORRIN G. HATCH,

*Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to support the President's nomination of Marsha Berzon to the United States Court of Appeals for the Ninth Circuit.

Prior to my appointment to the Los Angeles Superior Court, I was a partner with the firm of Baker & Hostetler specializing in the representation of management in labor and employment disputes. I worked closely with Marsha during the period 1991 through 1997 when I was the Chair and Marsha and I were both members of the Executive Committee of the California State Bar Labor and Employment Law Section. Even before that, I was familiar with Marsha's reputation as an outstanding attorney in the field of labor and employment law.

Based upon my experience I can say without hesitation that Marsha is well qualified to be a member of the Ninth Circuit Court of Appeals. She is fair, open minded and has high standards of excellence and integrity. Marsha is widely respected by all attorneys (management and labor) in California and other parts of the country.

As a Republican, I do not always support the President's nominations. In Marsha's case, however, I do so without qualification. Marsha is a brilliant appellate attorney, and she would be an excellent addition to the Ninth Circuit. I urge you and the other members of the Judiciary Committee to approve her nomination.

Very truly yours,

MICHAEL M. JOHNSON,  
*Superior Court Judge.*

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STATE OF CALIFORNIA, COURT OF APPEAL,  
FIRST APPELLATE DISTRICT, DIVISION TWO,  
San Francisco, CA, April 13, 1998.

Hon. ORRIN HATCH,

*Chair, Committee on the Judiciary, U.S. Senate, Senate Office Building, Washington, DC.*

DEAR SENATOR HATCH: I am writing in support of the President's nomination of Marsha Berzon of San Francisco as a new member of the United States Court of Appeals for the Ninth Circuit.

I am well-acquainted with Brian Jones, formerly of your staff, and now on the staff of my friend Governor Pete Wilson. Brian suggested, after I talked to him on this subject, that I also write you directly.

I have only met Ms. Berzon once, when we were both members of the Ninth Circuit Judicial Conference, and never worked with or against her professionally during my days in private practice. However, several members of the court on which I now serve know her well professionally and think most highly of her abilities and experience. Although I respect the opinions of those colleagues, I opted to go beyond them before calling Brian or writing this letter. Specifically, I sought out two of my former law partners who have had extensive litigation experience with Ms. Berzon in labor and employment litigation. Both generously praised her fairness, professionalism, work ethic and general brain power, and thought she would make a fine appellate court judge.

Based on these views, and also on Ms. Berzon's impressive credentials as an appellate advocate—amply demonstrated by her resume—I am pleased to join many others here in the San Francisco Bay area in recommending her confirmation to the Ninth Circuit.

Sincerely,

PAUL R. HAERLE,  
*Associate Justice.*



WILSON SONSINI GOODRICH & ROSATI,  
PROFESSIONAL CORP.,  
Palo Alto, CA, April 30, 1998.

Re Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals.

Senator ORRIN G. HATCH,

*U.S. Senate, Russell Senate Office Building, Washington, DC.*

DEAR SENATOR HATCH: During my service with the Reagan Administration as a Commissioner of the Equal Employment Opportunity Commission and Assistant Secretary of Labor for the Department of Labor, I came to appreciate your perspective on the proper role of judges in our constitutional system. I join you in your view that federal judges should faithfully interpret laws. In that spirit, I am writing to recommend, without hesitation, that you positively consider the candidacy of Marsha S. Berzon to the Ninth Circuit Court of Appeals.

Since I left Washington in 1989, I have resumed my management-side labor law practice in the San Francisco Bay Area and have come to appreciate the respect that Ms. Berzon commands in our legal community among management and union side lawyers alike. Ms. Berzon has been an outstanding advocate for the positions of her clients and has practiced with the highest degree of integrity. Ms. Berzon's vigorous advocacy, superb intellectual acuity, and remarkable ability to articulate her position have earned her respect from both Courts and opponents.

Because of the high caliber of her legal skills, I was delighted to join with a group of other management labor lawyers to commend Ms. Berzon to President Clinton when she was under consideration to be nominated to the Ninth Circuit. In that same vein, I am delighted to join, once again, with my colleagues on the management-side to stand up for and endorse her confirmation to that position.

Like others, I would be confident as an advocate on behalf of management that were I arguing a proposition of employment law on behalf of an employer client, Ms. Berzon would fairly consider, from a completely neutral stance, the legal arguments that I would present. Ms. Berzon's intellectual capabilities, coupled with her integrity, assure me that she would fully and clearly understand my clients' arguments and would apply the law as written by the Congress and interpreted by higher courts in a fair and even-handed manner. I am also confident that her decisions as a jurist would be made within the proper limitations of that role and would not be motivated by the positions that she has previously advocated in her representation of unions in the employment law area. Clearly, someone with the intellect and integrity, which Ms. Berzon has demonstrated, understands the difference between advocacy and the solemn responsibilities undertaken as a federal appellate court judge.

In conclusion, the overwhelming support for such a highly regarded employment law adversary by so many well respected management lawyers should indicate to you and your colleagues the extraordinary talent of Ms. Berzon and the esteem in which she is held by those most likely to be her harshest critics. In fact, I can think of no other union-side lawyer who would command so strong and so compelling a consensus from management lawyers on her suitability for such an important position on the Ninth Circuit Court of Appeals. Accordingly, I am delighted to join with my management colleagues to commend her to you with confidence that she recognizes the proper role of the judiciary in our constitutional system and will interpret rather than attempt to create the law.

Very truly yours,

FRED W. ALVAREZ.

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FOLEY & LARDNER,  
ATTORNEYS AT LAW,  
Madison, WI, March 4, 1998.

Re Nomination of Marsha S. Berzon to the U.S. Court of Appeals for the Ninth Circuit.

Hon. ORRIN G. HATCH,

*Russell Senate Office Building, Washington, DC.*

DEAR SENATOR HATCH: As a former opponent of Marsha S. Berzon in a landmark Title VII case before the Supreme Court, I write in enthusiastic support of her recent nomination by the President for appointment to the United States Court of Appeals for the Ninth Circuit.

The case was *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). At issue was Johnson Control's "fetal protection policy," which excluded fertile

women from certain manufacturing jobs so as to protect the health of the unborn children they might conceive. The company's policy was grounded upon sincere, good-faith concerns about workplace health and safety. The opponents of the policy were just as sincere in their concerns about how such policies might preclude true equality of opportunity in the workplace. The lower courts had ruled for the company.

At that point, the United Auto Workers retained Marsha Berzon to handle the appeal to the Supreme Court. I already was familiar with Ms. Berzon's sterling reputation as an effective thoughtful, and highly ethical advocate. I can tell you from my experience in *Johnson Controls* that this reputation is richly deserved. I subjected Ms. Berzon's briefs and arguments to microscopic review and critique, in the way that perhaps only a litigation opponent would ever do—word-by-word, footnote-by-footnote, citation-by-citation. Her writing was clear and persuasive, and her use of the precedents was fair and balanced. Her oral advocacy was superb. As a former Supreme Court clerk and career litigator, I have observed many skillful arguments; hers was certainly among the best I have ever witnessed (much to my regret at the time).

Ms. Berzon displayed several other qualities that are all too rare in our profession today. She dealt with difficult arguments head-on and acknowledged problems with her position. She showed evident respect for the company's genuine concerns, and sought in her argument to accommodate those concerns whenever possible. She was always courteous and professional. Most important of all, she sought to build a consensus rather than tear down and attack. This perhaps is one reason why the Supreme Court unanimously agreed that the judgment in the company's favor had to be reversed. *Johnson Controls* is rightly viewed as a watershed precedent, and Ms. Berzon deserves the highest praise for her sensitive and effective handling of the case.

I have continued to follow Ms. Berzon's career with interest since the Supreme Court's decision in *Johnson Controls* seven years ago. I have been pleased—but not at all surprised—to hear repeated praise for Ms. Berzon from the "management" side as well as from the "employee" side. From my own experience, I believe that all who have worked with or against her know that she is fair, reasonable, and respectful toward opposing views.

As someone who cares very deeply about our legal system, I endorse Marsha S. Berzon without hesitation as someone who would make a magnificent federal appellate judge.

Please note that these are my own personal views, and that I do not purport to speak for Foley & Lardner.

Respectfully,

CHARLES G. CURTIS, Jr.

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CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,  
West Sacramento, CA, March 25, 1998.

Re Nominations of Marsha S. Berzon for Appointment to the United States Court of Appeal for the Ninth Circuit.

Hon. ORRIN G. HATCH,  
Chairman, Senate Judiciary Committee,  
Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: We are writing to urge you to support the nomination of Marsha S. Berzon to the United States Court of Appeals for the Ninth Circuit.

The California Correctional Peace Officers Association (CCPOA) represents correctional peace officers employed by the State of California and its Department of Corrections and the California Youth Authority. We are, I believe, the largest single employee organization representing a single bargaining unit in the State of California (public sector or private sector), and certainly we are the largest independent peace officers association in the nation.

Our organization is not affiliated with organized labor, enjoying our independence since our inception in 1957.

CCPOA has endorsed and energetically supported past-Governor George Deukmejian and Governor Pete Wilson. Moreover, as the peace officers who walk the "toughest beat in the state" inside our state prisons, we have been and continue to be strong supporters of the death penalty.

With this background, we have examined the abilities, career and reputation of Marsha Berzon. We know that her talents as a lawyer place her among the best legal practitioners in the country. Additionally, and very important to us, she would be one of the few federal appellate judges with substantial experience in employer-



employee relations, and such expertise would be helpful to the appellate branch, in analyzing the labor relations matters that come before it.

Finally, we believe that Ms. Berzon will rigorously enforce our federal criminal laws, and will review our state's criminal laws if they are challenged by criminal defendants with a perspective of the needs of law enforcement and of the working peace officer.

We believe Ms. Berzon will be an intellectually exceptional judge, one who will be fair to all sides. Senator Hatch, we urge Marsha Berzon's prompt confirmation.

With respect,

DON NOVEY,  
*President, California Correctional Peace Officers Association.*

INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO,  
*February 13, 1998.*

Hon. ORRIN HATCH,  
*Chairman, Senate Judiciary Committee,  
Dirksen Senate Office Building, Washington, DC.*

DEAR CHAIRMAN HATCH: On behalf of the International Union of Police Associations, I am writing in support of the nomination of Marsha S. Berzon for appointment to the United States Court of Appeals for the Ninth Circuit.

Ms. Berzon possesses extraordinary skills of advocacy and jurisprudence which qualify her for this appointment. Her career has been dedicated towards the resolution of complex workforce issues which has given her the highest praise from both labor and management. This dexterity of intellect can only be an asset to the Ninth Circuit.

We recommend confirmation of Marsha Berzon for the United States Court of Appeals for the Ninth Circuit. If there is further information we can provide, please do not hesitate to ask our assistance. Thank you in advance for your prompt attention to our request.

Sincerely,

ARTHUR J. REDDY,  
*International Vice President.*

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.,  
REPRESENTING AMERICA'S FINEST,  
*Washington, DC, March 18, 1998.*

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary, U.S. Senate,  
Senate Dirksen Office Building, Washington, DC.*

DEAR CHAIRMAN HATCH: On behalf of the National Association of Police Organizations (NAPO) representing 220,000 sworn law enforcement officers, I am writing in support of Marsha S. Berzon's appointment to the U.S. Court of Appeals for the Ninth Circuit. (President Clinton nominated her earlier this year.) Based on information from law enforcement officer organizations and their attorneys in California, I believe that she would be fair and impartial to law enforcement officers and open-minded to their concerns.

The Peace Officers Research Association of California conducted an informal survey of knowledgeable attorneys and others in California and determined that she has been sympathetic to law enforcement organizations. For example, she worked with an attorney who has represented law enforcement officers and effectively represented a peace officer organization. She apparently understands the myriad of problems and difficult situations facing the line patrol officer every day. She appears to have argued only "mainstream" causes and is considered by those contacted as a balanced candidate. Therefore, NAPO urges her speedy confirmation by the U.S. Senate.

Please do not hesitate to contact me if you or your staff should have any questions.

Sincerely,

ROBERT T. SCULLY,  
*Executive Director.*

The National Association of Police Organizations is a national non-profit organization representing state and local law enforcement officers. NAPO is a coalition of police associations and unions from across the United States that serves to advance

the interests of law enforcement officers through legal advocacy, among other activities. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers, 3,000 retired officers, and more than 100,000 citizens who share a common dedication of fair and effective crime control and law enforcement.

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LOS ANGELES COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION,  
*Monterey Park, CA, March 23, 1998.*

Hon. ORRIN HATCH,  
*Chairman, U.S. Senate Judiciary Committee,*  
*Senate Hart Building, Washington, DC.*

DEAR SENATOR HATCH: The Los Angeles County Professional Peace Officers Association is pleased to endorse the appointment of Marsha S. Berzon to the United States Court of Appeals for the Ninth Circuit.

We believe our 5,700 members would be well served by Ms. Berzon's service to the Ninth Circuit. She is analytical, fair and thorough. Her work has demonstrated her legal skills and knowledge. She has earned a reputation for promoting her clients interest with integrity, professionalism and dedication.

Our judicial system needs more appointments of brilliant professionals, such as Marsha Berzon. We strongly recommend the confirmation of Ms. Berzon for the United States Court of Appeals for the Ninth Circuit. If there is anything further we can provide, please feel free to contact us. Thank your for your assistance.

Respectfully,

WILLIAM SIEBER,  
*President.*

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CHEVRON CORP.,  
*San Francisco, CA, March 24, 1998.*

Re Confirmation of Marsha S. Berzon for the Ninth Circuit, Court of Appeals.

Hon. ORRIN G. HATCH,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, DC.*

DEAR SENATOR HATCH: I am writing to support the confirmation of Marsha S. Berzon who has been nominated by the President to the United States Court of Appeals for the Ninth Circuit. I am the Corporate Secretary for Chevron Corporation. Five years ago, Governor Pete Wilson appointed me to the California Fair Employment and Housing Commission. I have been Chair of the Commission for the past three years. I am a Republican.

Although I do not personally know Marsha Berzon, I know of her reputation as an excellent appellate advocate. Of particular interest to me in my role as a Commissioner is the fact that Ms. Berzon successfully argued *United Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, before the United States Supreme Court. The Commission followed this case carefully, since it had decided the same issue in a case involving the same employer in the late 1980's. The Commission, as did the Supreme Court, held that the employer's bar of all fertile women from certain jobs was unlawful sex discrimination under the relevant anti-discrimination statutes.

Ms. Berzon has a reputation of being a brilliant attorney and of imposing an extremely high intellectual standard to whatever she does. She has the support of many in the employment and labor law community, both on the plaintiff and management side: She would, in my opinion, be an extremely valuable addition to the federal judiciary system.

I am providing copies of this letter to each Senator on the Judiciary Committee. I hope that the Committee will vote to confirm Ms. Berzon's nomination at the earliest possible occasion.

Very truly yours,

LYDIA BEEBE,  
*Chair, Fair Employment and Housing Commission,*  
*Corporate Secretary, Chevron Corp.*

Senator FEINSTEIN. As Senator Boxer said, Mr. Chairman, I would like to just have an opportunity to fill out the details and credentials of Ms. Berzon's background. She earned a B.A. degree cum laude from Harvard. She received her law degree from Boalt



Hall School of Law at the University of California-Berkeley. She earned the Order of the Coif and she was an articles editor for the California Law Review.

On graduation from law school, she clerked for U.S. Court of Appeals Judge James Browning and for U.S. Supreme Court Justice William J. Brennan. Following her clerkship, she practiced law from 1975 to 1977 as an associate at the Washington, DC, law firm of Woll and Mayer. Since 1978, she has practiced with the San Francisco law firm of Altshuler, Berzon, Nussbaum, Berzon and Rubin, where she has been a partner since 1990.

She specializes in appellate litigation, a practice that has made her quite familiar with Federal appellate courts. She has appeared numerous times before the circuit courts, the district courts, and all levels of California State courts. She has argued four cases before the U.S. Supreme Court and has filed dozens of briefs on a wide variety of cases before the Supreme Court. Her client list is varied and she has been chosen to represent the governments of the States of California and Hawaii, the city of Oakland, CA, in major court cases.

Her nomination enjoys the support, as my friend and colleague, Senator Boxer, pointed out, of law enforcement as well as broad bipartisan support.

Senator Boxer quoted from the Correctional Peace Officers Association and I want you to know that these kinds of commendations by this particular association generally fall toward Republicans, and I would just like to read the full statement because I think, indeed, it is quite remarkable.

As the peace officers who walk the toughest beat in the State, inside our State prisons, we have been and continue to be strong supporters of the death penalty. With this background, we have examined the abilities, career, and reputation of Marsha Berzon. We know that her talents as a lawyer place her among the best legal practitioners in the country. We believe that Ms. Berzon will rigorously enforce our Federal criminal laws and will review our State's criminal laws if they are challenged by criminal defendants with a perspective of the needs of law enforcement and of the working peace officer.

She enjoys the bipartisan support of a wide range of practitioners, including many attorneys whom she has opposed in litigation. Former Idaho Senator James McClure and three of his law partners wrote, "Ms. Berzon's intellect, experience, and unquestioned integrity have led to strong and bipartisan support for appointment. She is a consensus nominee."

W.J. Usery, Jr., former head of the Federal Mediation and Conciliation Service under Presidents Nixon and Ford and Secretary of Labor under President Ford wrote,

She has all the qualifications needed as well as the honesty and integrity that we need and deserve in our court system today. I know she will be dedicated to the principles of fairness and impartiality in all of her judicial activities.

Doug Barton of the San Francisco law firm of Hanson, Brigit, Marcus, Blahos and Rudy wrote, "She is, in my opinion, not only a person of extraordinary intellect and proven legal ability, but also one who is highly principled, objective, and fair minded."

Even though she has represented clients and interests which are often adverse to the clients and interests I have represented, I have never found her to be doctrinaire or ideological in her approach to legal issues. I think that is an important statement.

Dennis McQuaid, an active Republican—as a matter of fact, he ran against Senator Boxer once—and partner at the San Francisco law firm of McQuaid, McQuaid, Metzler, McCormick, and Van Zant, wrote, “Marsha Berzon has generally represented clients and organizations to which my clients almost invariably would be opposed or with whom they would be in conflict. Nevertheless, I can recommend Marsha for confirmation without reservation. She enjoys a reputation that is devoid of any remotely partisan agenda and that her service on the court will be marked by decisions demonstrating great legal acumen, fairness, and equanimity.”

So I am very pleased to join with my friend and colleague, Senator Boxer, in introducing Marsha Berzon to this committee today, and heartily recommend her for confirmation to the U.S. Court of Appeals for the Ninth Circuit. I thank the chair.

Senator SESSIONS. Thank you very much, Senator Feinstein.

Are there any other opening statements?

#### STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. I just have a brief one, if I could, Mr. Chairman.

Senator SESSIONS. All right.

Senator KENNEDY. I welcome this hearing to consider the distinguished nominees for the Federal courts and I also welcome this sign that the logjam may finally be breaking. Many of us continue to be deeply concerned about the slow pace of Senate action on judicial nominees in this Congress. So far in this session, the Senate has confirmed only 33 nominees to a Federal bench that now has 76 vacancies. That is only eight fewer vacancies than we started with, in January. So even though we have confirmed more than 30 judges this session, the net benefit to the Federal Judiciary is just eight judges.

Some of my colleagues claim it is the President's fault that he is not sending up nominees fast enough, but he has sent up 40 nominations so far this year and we have confirmed eight of them. At the rate we are going, we will end this session with the same number of vacancies we started with. That is not fair to the nominees, the Federal judiciary, or the American people. We can and must do better.

Only a few weeks remain in the session. I hope that we do what we can to act on as many of the pending nominees as possible. As you know, some of them have waited 2½ years for confirmation.

Today's hearing is a step in the right direction. We have before us six exceptional nominees, Mr. Hellerstein, Mr. Pauley, Judge Frank, and Judge Berman are accomplished attorneys and jurists. I am confident that they will serve our country with distinction.

I am particularly pleased that two highly qualified women, Marsha Berzon and Colleen McMahon, are on today's agenda. Ms. Berzon, as others have pointed out, is an outstanding attorney. She has written more than 100 briefs and petitions in the Supreme Court, has argued 4 cases before the Supreme Court, and comes before us today with a bipartisan list of supporters which includes our former colleague Jim McClure and Fred Alvarez as the Com-



missioner of the Equal Employment Opportunity Commission and Assistant Secretary of Labor under President Reagan.

Judge McMahon was Phi Beta Kappa at Ohio State University and cum laude of Harvard Law School. For the past 3 years, she has served as a judge in the U.S. Court of Claims.

I hope that Ms. Berzon and Judge McMahon's nominations will move swiftly through the nomination process. Sadly, it is taking the Senate more than three times as long to confirm women and minority judges than other judges. Of the nine nominees pending for more than 1 year, seven are women or minorities. All three of the nominees who have been pending for 2 years or more are women or minorities. By delaying action on so many obviously well-qualified nominees, we do a disservice to the judiciary and to the American people.

Ms. Berzon, Judge McMahon, and Mr. Hellerstein have all been nominated to fill seats in districts declared judicial emergencies by the Judicial Conference of the United States. Empty seats on the Federal courts mean long delays for the citizens seeking protection for their rights. As we all know, justice delayed is justice denied.

I look forward to the testimony of our nominees today and to sending these nominations to the Senate for confirmation as quickly as possible. I thank the chair.

Senator SESSIONS. Thank you, Senator Kennedy.

Senator Specter, do you have any opening remarks?

Senator SPECTER. I do not have an opening statement.

Senator SESSIONS. We do have a problem. I hoped that we could finish by 2 p.m. We are going to have a series of votes stacked at 2 o'clock, which means probably 5, 6, or 7 votes, 45 minutes to 1 hour, so it would be my hope that we could finish by 2 o'clock.

Ms. Berzon, the court of appeals nominee, if you would come forward, we could perhaps begin with you and then we could take the District Court nominees perhaps individually. I should administer the oath.

If you would raise your right hand, do you swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. BERZON. I do.

Senator SESSIONS. Thank you. First of all, I would just like to congratulate all the nominees. This is a panel of extraordinary academic skill and great professional experience. We have no information that indicates any lack of ethical standards or academic ability or temperament or those kinds of things that would raise any questions about the nominees.

Ms. Berzon, I have expressed, and you have probably heard, a concern about the Ninth Circuit Court of Appeals. Recently, the New York Times reported that a majority of the Supreme Court consider the ninth circuit a rogue circuit. They reversed 27 out of 28 cases last year that the Supreme Court reviewed. Do you have any sense that there is a problem with the judicial philosophy of the ninth circuit?



## TESTIMONY OF MARSHA L. BERZON, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Ms. BERZON. Senator, I share your concern about the reversal rate in the ninth circuit. I note that it is better this year than it was last year. And until I am confirmed, if I am fortunate enough to do so, I am somewhat reluctant to make any comments about what might be contributing to the reversal rate.

But I do have some observations as a litigant before this court and many other courts of appeals, and that is that the ninth circuit seems to have fewer internal self-corrective measures than many other circuits do, and I have practiced, for example, before the third circuit, before the seventh circuit, where there seem to be means for panels which think that other panels' opinions are in legal error to, in an expeditious fashion, ask the court as a whole to review those precedents.

On the ninth circuit, whether it is because of the size or the culture or what, it is sort of hard to say, but those self-corrective measures do not happen, and I have some particular experience with this as a contributor to this year's reversal rate in the sense that I reversed a ninth circuit decision in the Supreme Court this year as a litigant, and it was a case which, frankly, had no business being in the Supreme Court. That is, it seems to me it was—while the statute was complex, the legal issue was, I think, fairly clear.

Judge Trott concurred in the ninth circuit, noting that the D.C. Circuit's resolution of the same result was a better one. The Supreme Court was more or less forced to take the case because of the conflict, took the case, and reversed unanimously 3 weeks after the oral argument. Frankly, there was no reason why that should not have been corrected by the ninth circuit itself.

Senator SESSIONS. And it is an expensive process when you have to go to the Supreme Court to reverse a circuit court opinion.

Ms. BERZON. Extremely, and time consuming for the parties and for the court.

### QUESTIONS BY SENATOR SESSIONS

Senator SESSIONS. Based on your experience and observations, do you feel like, for whatever reasons, the ninth circuit has failed to remain sufficiently consistent with the Supreme Court over the years, that that is a valid criticism of the circuit?

Ms. BERZON. I have not done any general survey. I can look at the reversal rates and I can say that they are unusual.

Senator SESSIONS. And it has been a pattern for many years, as I recall, and as a Federal prosecutor throughout the 1980's with regard to criminal law cases, the ninth circuit cases were consistently cited by defense lawyers when they could not find a case from any other circuit. It was sort of a joke among the U.S. attorneys around the country that the ninth circuit cases were not well respected in their districts.

I say that to you to say that I have indicated under the advise and consent authority or power given this body that I would be giving a heightened scrutiny to the nominees for the ninth circuit, and I wanted to share that with you.

Let me ask you a few brief questions. I know you have been a member of the ACLU, the American Civil Liberties Union, and were a member of the board of directors from 1985 to 1991 of the northern California branch, and from 1995 to 1997, and vice president, I believe, of that branch from 1989 to 1991. There are a number of lawsuits, some of which I think maybe I can just ask you about in writing, if you have not already responded, that that agency and board filed that I think are not in the mainstream of legal thought.

First, let me ask you, to what extent did you as a board member or vice president participate in the review of litigation that was filed by the ACLU during that period?

Ms. BERZON. I was never a lawyer for any ACLU case. When I was on the legal committee, and for 2 years, I was chair of the legal committee, and it is for that reason that I was vice president. In other words, there were four vice presidents. In fact, my role was as chair of the legal committee, and that was essentially simply running the meetings of the legal committee.

In that capacity, we reviewed cases that were brought to us by the fairly large legal staff of the northern California ACLU. The northern California ACLU is somewhat different from some others in the fact that it has a large legal staff. The clients come to the legal staff. The legal staff determines which cases they want to bring forward. They bring those cases to the legal committee essentially to determine whether there are colorable legal theories. It is a consultation role of simply outside lawyers who meet once a month, 10 or 11 months a year, for this purpose, for 1 hour or so.

The board only votes on litigation if there is a dispute in the legal committee or if someone specifically asks that there be a vote. So otherwise, there is a report of the legal committee to the board, but there is no vote.

Senator SESSIONS. During this period, do you recall any cases, litigation filings, in which you either opposed the filing or did not agree with the position taken by the ACLU?

Ms. BERZON. I can think more clearly more generally. That is, there are two instances in which I have, on behalf of clients, represented interests that were directly opposed to the ACLU's position in the same case.

One was in a Hawaii case in which the Hawaii ACLU was challenging Good Friday as a holiday under the establishment clause, and I represented parties supporting the statute in the U.S. Supreme Court in opposing certiorari.

The second occasion was when there was a case in the U.S. Supreme Court—

Senator SESSIONS. You were retained on that?

Ms. BERZON. I was retained in both of these instances, that is right. There was a case in the U.S. Supreme Court concerning abortion protests, or protests in front of abortion clinics in which the ACLU took a position that I regarded as insufficiently protective of the first amendment and my clients did, as well, and that is an instance in which I feel, although I was retained, I feel quite strongly that the ACLU's position was insufficiently supportive of the first amendment.

Senator SESSIONS. Are any of those while you were on the board that were filed that you specifically recall?

Ms. BERZON. Probably both. I am not sure about that, but probably both.

Senator SESSIONS. Both——

Ms. BERZON. I think both of those were instances while I was on the ACLU board, but I would have to check that. I am not sure of the dates.

Senator SESSIONS. All right. Senator Feinstein.

#### QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. If I may, Mr. Chairman, do you, Ms. Berzon, feel in any way bound by positions the ACLU has taken?

Ms. BERZON. I absolutely do not. Moreover, if I am confirmed as a judge, not only will the ACLU's positions be irrelevant but the positions of my former clients and, indeed, my own positions on any policy matters will be quite irrelevant and I will be required to and I commit to look at the statutes, the constitutional provisions, and the precedents only in deciding the case.

Senator FEINSTEIN. I would like to clear the record on one other thing, if I might. Ms. Berzon, among your pro bono cases, you successfully appealed the death sentence of an inmate. In that case, I understand that the California Supreme Court agreed that the defendant had been unconstitutionally denied counsel with regard to a prior conviction, and as a result, the California Supreme Court reversed the death penalty but left the underlying conviction standing.

If your nomination is confirmed, you will, no doubt, face death penalty cases on the ninth circuit. In the last Congress, the number of Federal death penalty acts was increased from approximately a half-dozen to over 50. I would like to ask you, and perhaps you could answer, do you feel the Constitution permits the imposition of a death penalty sentence and would you be willing to fully implement a death penalty sentence?

Ms. BERZON. Senator Feinstein, the Supreme Court has held that the death penalty does not violate the eighth amendment to the U.S. Constitution and I would have absolutely no problem following that precedent.

Senator FEINSTEIN. Thank you very much.

That completes my questions, Mr. Chairman.

Senator SESSIONS. All right. Senator Specter.

#### QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

Ms. Berzon, there is a lot of discussion about jurists legislating as opposed to interpreting the law. How would you articulate assurances for this committee and the Senate that you will not legislate but will interpret the law?

Ms. BERZON. I am, of course, quite aware of the proper role of the Federal judiciary. I think in my legal career that I have taken great pains to stress that role and to give courts an opportunity to decide cases as narrowly as possible by sharpening the issues and telling them quite clearly what is before them and what they really need to decide.



I, as a judge, would, of course, refrain from any legislation-like activity, from any pronouncements of broad social policy, and, indeed, in one of the writings that I submitted to this committee, which I wrote to a nonlegal audience, I took some effort to explain to that audience what the role of the judiciary was and why it was that judges do not pronounce broad social policy.

Senator SPECTER. Senator Sessions has referred to the high reversal rate in the Court of Appeals for the Ninth Circuit. Like you, I have not surveyed the cases. I do not know if they are reversed because of flying in the face of precedents or because of on matters of first impression they were wide of what the Supreme Court thought ought to be done.

What assurances can you give the committee and the full Senate about your activities to try to do something about that high reversal rate?

Ms. BERZON. I can only say that it has been a point of pride in my legal career that I read statutes carefully, that I am attentive to language, that I read precedents carefully, and that I take a traditional and narrow view of the role of the courts. As I said, I am somewhat interested in judicial administration issues and whether there is anything about the precise way in which the ninth circuit operates that contributes to this reversal rate and I will be quite attentive to that problem, as well, if I am confirmed.

Senator SPECTER. I will not ask you if you will follow Supreme Court decisions because you have already stated your view there, but when confronted with constitutional issues, matters of first impression, what can you tell us about the guidelines that you will use where there is no binding precedent by the Supreme Court?

Ms. BERZON. In deciding a constitutional case, I would, of course, begin with an extremely strong presumption that any statute that is involved is constitutional, if that is the kind of constitutional issue that we had before us. I would read the words of the Constitution very carefully, just as I read words of statutes very carefully. I would look to other circuits if there were no precedents in our circuit, and I understand that that was your question, to see how other circuits have handled the matter. And then I would look to analogous cases, similar issues, either in my circuit or in other circuits or in the Supreme Court.

Senator SPECTER. There has been some comment about your being hostile to ballot initiatives. You have represented a number of clients who have challenged the legality of ballot initiatives. Are you hostile to ballot initiatives or were you an advocate of trying to achieve a result within the confines of the law?

Ms. BERZON. Well, first of all, I am a Californian. Californians vote on a lot of ballot initiatives. We like to vote on ballot initiatives, and generally, I think it is a good process.

Senator SPECTER. Why do you so like ballot initiatives?

Senator FEINSTEIN. That is a long story. [Laughter.]

Ms. BERZON. It is a long historical story, but it does make the populus in general think about matters of public policy that they might not otherwise do.

I was, on one occasion, represented the parties, and in another an amicus curiae, on cases in which the challenge to the ballot initiative in both instances was strictly procedural. In other words,

the question was whether this was a proper initiative. That is all. There were not substantive attacks on the initiative.

Senator SPECTER. Aside from the one case which Senator Feinstein asked you about involving the death penalty, have you had any other experience as a lawyer with the death penalty?

Ms. BERZON. No, I have not. Well, no, I have not. I was going to say something about clerkships, but, in fact, in my clerkships, we did not have any death penalty issues.

Senator SPECTER. This may be a little broad, but I would be interested in your answer if you care to answer. Do you have any conscientious scruple against the death penalty?

Ms. BERZON. I would, of course, enforce the law as written. My personal views are of no matter and I would have no problem at all enforcing the death penalty.

Senator SPECTER. OK. I will take that as a declination and a statement that you will uphold the law. You have a very distinguished record, Ms. Berzon, with your clerkship with the court of appeals and with Justice Brennan and your academic record.

Those conclude my questions. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I am interested, you have appeared before the Supreme Court four different times. That is rather unique. What do you draw from that? Did you reach any lessons from that sort of experience? What could you share with us in terms of that aspect of your own professional kind of development?

Ms. BERZON. Yes. The main lesson is that on every occasion, I have prepared as carefully as I possibly know how. I have known my case inside out and backward. I have consulted with a great many people and the Supreme Court always understood something about that case that I did not. They are remarkable people. They do an amazing job and it has always been a wonderful experience to appear before them.

Senator KENNEDY. It is really an extraordinary background, both the practice there and the variety of your own kind of practice. You specialized in the area of law, did you not, and spent a good deal of time in terms of labor law?

Ms. BERZON. I have spent a great deal of time doing labor law in a very broad sense, that is labor management law, as well as employment discrimination law, as well as a wide variety of other issues that may affect labor and employees but are not traditionally called labor law as such.

Senator KENNEDY. I find that it is a remarkable background and experience you have. I think you are enormously well qualified to serve on the court and I look forward to voting in your favor.

Ms. BERZON. Thank you, Senator.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator SESSIONS. Ms. Berzon, I did have some questions I would like to pursue with you and just discuss it lawyer to lawyer, so to speak, and get some insight into your thinking on a number of important issues, but we do have these other nominees. I would think that we would be out of there within the hour and be able to come back. Would you be able to stay?



Ms. BERZON. Certainly, I would. What time would you like me to be here?

Senator SESSIONS. I would say we would not be back sooner than a quarter until. Let me just suggest this. If you would allow us to do these other nominees now, maybe we will have time before we are called over there, but I doubt it.

Ms. BERZON. OK.

Senator SESSIONS. I understand there is a room over there next to the chambers that we might utilize and it has been suggested we could utilize. So maybe if we could do these other nominees, we could take care of that right now, as soon as we finish.

Ms. BERZON. Thank you very much, Senator Sessions.

Senator SESSIONS. Thank you.

If the other nominees would come forward. I want to say that you have had excellent references. You know that you have been checked out by the FBI. Remain standing and we will do the oath. Raise your right hand.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Judge BERMAN. I do.

Judge FRANK. I do.

Mr. HELLERSTEIN. I do.

Judge MCMAHON. I do.

Mr. PAULEY. I do.

#### QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. Please be seated. You have gotten good references. You have come well recommended on a bipartisan basis from the Members of this body and have excellent academic records. We found no indications of lack of diligence or integrity or ethical standards, all of which are very fitting for you to be nominated to the Federal bench.

Let me ask a few questions and then I will be delighted to turn it over to the others. Judge Frank and Judge McMahon and Judge Berman, you are all on the bench now, is that right? What qualities do you think are critical, I will just say one of the critical qualities that you think are essential for the bench? Judge Berman, do you want to start first?

#### TESTIMONY OF HON. RICHARD M. BERMAN, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Judge BERMAN. I think several, Senator. I try to take one case at a time. I try to read carefully the statute. I try to be fair and patient and I try to move cases along expeditiously.

Senator SESSIONS. Judge Frank.

#### TESTIMONY OF HON. DONOVAN W. FRANK, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA

Judge FRANK. I would echo those remarks and add to them a willingness to day-to-day be patient, not forget some humility, so that courtesy, dignity, and respect is the rule of your courtroom, trying never to forget each day that no matter what the litigant is

there for, what the citizen is, there is no such thing as a small case and they deserve your preparation and your time.

Senator SESSIONS. Judge McMahon.

**TESTIMONY OF HON. COLLEEN McMAHON, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK**

Judge McMAHON. Senator, fairness, integrity, hard work, courtesy, patience, firmness, and above all, a sense that you are, in fact, a public servant, you are a servant of the people doing an important job for and on behalf of the people.

Senator SESSIONS. Thank you. Those are good comments.

Mr. Hellerstein, do you have any thoughts as a practitioner about what you look for in a judge.

**TESTIMONY OF ALVIN K. HELLERSTEIN, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK**

Mr. HELLERSTEIN. It is very hard to add to the comments that my colleagues have made, and if I could be as good a judge as they have already shown to be, that would be a great honor.

I think one word that Judge Frank said, respect, may sum it all up, respect for the case, respect for the people, respect for the law. I think that may sum it.

Senator SESSIONS. You are appointed but not anointed, as they have been wont to say.

Mr. HELLERSTEIN. That is very true. I hope I never forget that.

Senator SESSIONS. It is Judge Pauley, too, right?

**TESTIMONY OF WILLIAM H. PAULEY III, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK**

Mr. PAULEY. No; it is not, Mr. Chairman. It is Mr. Pauley. I am not.

Senator SESSIONS. I thought it was. What are your observations on characteristics of a good judge?

Mr. PAULEY. Like Mr. Hellerstein, I find it difficult to add to the comments except to say that I think, as a litigant who is frequently in the well representing people, accessibility to the court is very important, apart from fairness.

Senator SESSIONS. You think on some occasions, a judge should be there at 3 o'clock on Friday afternoon?

Mr. PAULEY. I do; and many, many of them are. But in today's world, sometimes accessibility is the ability to send a telecopy or to communicate with the chambers in the same way that you can communicate with your adversaries.

Senator SESSIONS. I would just say this, though. The work of the Federal judge has become more work than it used to be. Caseloads are high. Judge Frank, you, like Alabama, have some very high caseloads. The judges have a lot of demands on them. Let me ask this. Judge Frank, do you believe that management of your docket is an important factor in a good judge?

Judge FRANK. I think it is a key factor and I think there are certain issues that work everywhere in the country. Early management, early control by the judge, continuous control, access by the lawyers to the judge, and I think studies show across the country that setting firm trial dates, firm hearing dates, and a willingness



to keep control of a case but honor the options of the lawyer in terms of letting them represent their client. The public expects us to control and move the cases and that balance and knowing what that balance is between staying in control and letting the lawyers handle their work in an evenhanded way is the difference, in my view, of the best judges from the ones that are not considered the best.

Senator SESSIONS. Judge Berman, do you have any comment on that?

Judge BERMAN. I agree with that, Mr. Chairman. This is one area where I think being a family court judge will actually be a plus, if I am fortunate enough to be confirmed. In 1997, I presided over 11,221 appearances. So case management skills in the family court is of the first order and it is a matter of survival and being able to move the cases along. One really must be, first and foremost, a good manager, and I think those same skills would carry over to the Federal district court, as well.

Senator SESSIONS. I agree with that fundamentally, and I think there is a growing concern within the judiciary that we ought not to expand too rapidly the number of Federal judges, and so they have over the years been developing better ways to manage dockets and increase their caseloads. There is a limit to how far we can go. Some of the criticism of the ninth circuit has been the circuit is so large, it is hard to keep collegiality and the kinds of conferencing that are necessary.

I believe that being a Federal district judge is a tremendous office. It is a great position. I had the pleasure of practicing before great district judges for 15 years full time as a Federal prosecutor off and on through those years and I have seen them on a daily basis, and going to work before a good judge is a pleasure. Going to work before a judge that is unpredictable and not courteous and not respectful is a nightmare. I am sure you practicing lawyers have seen that. So I hope you will be that kind of judge. From what I have heard so far, I believe you will.

Senator Feinstein.

#### QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you, Mr. Chairman.

I would like to ask each of the nominees the death penalty question, if I might. Just to repeat it, do you believe that it is constitutional? Would you be in favor of opposing it? And if you choose to answer, I would be interested in what your personal beliefs are.

Judge BERMAN. I believe it is clearly constitutional. I believe it is clear from the cases and from the Constitution itself, which refers to the death penalty in several instances. I would have no hesitation in imposing the death penalty, and as a personal matter, I am actually in favor of the death penalty.

Judge FRANK. The death penalty has been deemed constitutional by the Supreme Court and I would not have any hesitation to follow my oath of office, which would clearly include imposing the death penalty if I was called upon to do so.

Mr. HELLERSTEIN. I agree with the sentiments. The law is constitutional. It should be implemented in appropriate situations. A judge has to be extremely careful because there is a life at hand,

but in appropriate situations, I think it is proper to do that. I also believe in that way that the death penalty is, in a way, the reflection of the dearth and special quality of life. If, in appropriate circumstances, a life is taken, the person who did that with the requisite intent has to forfeit his own. That is our biblical teaching. I think it applies and is relevant to our current life.

Judge MCMAHON. Senator Feinstein, I have no difficulty in upholding the law. I adopt Judge Berman's answer in toto.

Mr. PAULEY. Senator, I agree that it is constitutional and I would have no hesitation in enforcing it.

Senator SESSIONS. That must be us. We have a few more moments.

Senator FEINSTEIN. Thank you. If you, each one of you, as well, would quickly address the question of judicial activism. I think this question becomes permanent because, I must say, I think, in a sense, this is one of the problems of the ninth circuit. Therefore, it is reasonable to ask these questions based on your view of the law.

Judge BERMAN. Senator, we are so busy in family court doing the cases that are before us that there is no time to do any other cases. But seriously, I take the view that both in family court and in State court and in Federal court, those are both courts of limited jurisdiction. The predicate for that jurisdiction is article 3, in the case of Federal courts. In family court, the predicate is the New York State Family Court Act. We are called upon and it is our job to apply those statutes, the Constitution and applicable statutes. I do that.

In all of those appearances I referred to before, I do not think I have ever had a situation where—you know, I always have handy the Family Court Act and the penal law and the Rules of Civil Procedure and I have never had a case where the answer was not found in that text or in some interpretation of the text by the higher court, the appellate division or the court of appeals. So I would not propose or plan to be a judicial activist as a Federal district judge.

Senator FEINSTEIN. Thanks, Mr. Berman.

Judge FRANK. The most important thing that I did, Senator, 13 years ago as a lawyer was take an oath to be a judge, and that oath for State judgeships but also Federal is to follow the law, not make the law, and actually, it is more than that. It is to do that consistently 1 week to the next based upon the plain language of the rules and understand your proper role with the separation of powers, because citizens rely on a judge to not just follow that law but to do it consistently in similar cases so the different judges are not doing different things with a statute or a rule of law.

Senator FEINSTEIN. Thank you.

Mr. HELLERSTEIN. I agree with that, Senator Feinstein. Two of the greatest judges of the 20th century, Learned Hand and Henry Friendly, are judges of the second circuit, and I think more than most others, they established the rules of limited jurisdiction and how that should be followed in cases and I would subscribe to that wholeheartedly.

Senator FEINSTEIN. Thank you.



Judge McMAHON. Senator, I take my oath of office very seriously, as Judge Frank does. It is a sacred thing to take an oath and an oath to uphold the law. As a sitting State judge, as a justice of the New York State Supreme Court, which is our trial level court, I have felt from time to time the tug between what a precedent requires and what I would do if I were sitting in the legislature, and I know what the right thing is to do and I have done it every time and I never intend to do anything else.

Senator FEINSTEIN. Thank you very much.

Mr. PAULEY. Senator, I think that Judge Frank's simple comment, follow the law, really sums up the whole issue because a judge is required really to narrow the issue, and with using such devices as standing and case in controversy, not to wander into a province that is clearly that of the legislature, and that is what makes our form of government so remarkable and I think judges are absolutely bound to recognize that separation of powers.

Senator FEINSTEIN. My thanks to all of you.

Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

I would like to run one more round. We just had hearings yesterday on litigation abuse, excessive verdicts, and that sort of thing with regard to what some called a sanctity of the jury verdict. I am not sure what that means, but I guess my question to you is, do you believe there are verdicts that are excessive, and if you so found it, would you be willing to reduce a verdict you found to be excessive, or increase one if the law allowed you to, that was insufficient?

Judge BERMAN. Mr. Chairman, I certainly would. One of the most rewarding cases that I was involved in was in the Federal court in Texas, and then it was affirmed by the fifth circuit and certiorari was denied. It was a case in which my client, a cable company, had been found liable for \$3.5 million by the jury, and we believed, I certainly did as an attorney, that that was clearly erroneous. We filed a motion for a judgment notwithstanding the verdict and the District Court Judge Fitzwater did reverse. That reversal was upheld by the fifth circuit, and as I say, certiorari was denied, so absolutely an appropriate circumstance.

Senator SESSIONS. I am sure Phil Gramm would have been proud of Judge Fitzwater on that. We came through this place together another lifetime ago.

Judge Frank.

Judge FRANK. Prefacing my response by stating that I think it is clear that citizens daily choose to pick a jury trial over a court trial and there is that significant priority and value placed by the taxpayer on a trial by their peers. As a sitting judge, of course, you are called upon also to make sure both sides get a fair trial, and in my capacity as a State trial judge, even though your discretion is used sparingly, on approximately six occasions, I have been obligated, I felt, in order to have a fair verdict, to render a fair trial, reduce jury verdicts, and in one of those six, I had to dismiss the case entirely.

But I think a judge should be very careful in evaluating that, but once you have made the decision that the jury verdict is excessive, which should mean that one of the parties did not receive a fair



trial based upon the evidence, then it is your oath to step in and modify the verdict.

Senator SESSIONS. I think so. The Supreme Court and the law allows for that and I think some judges have an aversion to that. Do you agree with that, Mr. Hellerstein?

Mr. HELLERSTEIN. I agree with your comments, sir, and with Judge Frank's comments. There is a developed law of remittitur in New York State and there is a notion in the Federal courts of shocking the conscience of the court that are both used to reduce jury verdicts and to vacate jury verdicts that are excessive and I would have no trouble to follow those rules.

Senator SESSIONS. Judge McMahon.

Judge MCMAHON. I would have no problem at all. As Mr. Hellerstein said, there is a well-developed law of remittitur in civil matters in the State of New York. We are accustomed to doing it and we do it all the time.

Senator SESSIONS. Have you done it personally?

Judge MCMAHON. I have not because I sit only on criminal trial matters.

Senator SESSIONS. Mr. Pauley.

Mr. PAULEY. Mr. Chairman, I would have no problem reviewing a jury verdict. I have great respect for the jury system, but I recognize that there are times when a jury can run afoul.

Senator SESSIONS. I think it was in the *BMW* case, Justice Breyer, when he was not getting a very straight answer asked, "What would be an excessive verdict?" Finally he asked, "What about one-half the gross domestic product of the United States? Would that be excessive?" The Supreme Court in the *BMW* case, which came out of Alabama, did set some objective standards, because without it, I think we do have a due process issue. If we just simply say, 12 people can decide whatever they want without any control, I think that does raise due process considerations.

The record will remain open for questions until next Friday, unless you have anything now.

Senator FEINSTEIN. No. Mr. Chairman, is it the Vice President's room where we will be meeting to continue with Ms. Berzon?

Senator SESSIONS. Yes, and I will ask the staff people if they will meet with Mr. Berzon and help her find her way there. It is room 219. It is off the Senate Chamber, and hopefully, we will be able to finish up before too long on that subject. It is open to the public, of course, but we would look forward to continuing that.

As to those of you for the district court, we congratulate you. I think you indicate to me you have the ability and the temperament to be outstanding jurists. I wish you the best in your lifetime careers.

Judge MCMAHON. Thank you, Senator.

Senator SESSIONS. This is the only time you have to be questioned by anyone.

Mr. HELLERSTEIN. May we express our gratitude for the kind considerations and very thoughtful and deliberate reviews that this committee has had.

Senator SESSIONS. Thank you very much.

[Whereupon, at 2:19 p.m., the committee moved to the Capitol Building, room 219, reconvening at 2:50 p.m.]

Senator SESSIONS. Ms. Berzon, I understand you had some other family members that you did not get to introduce. Would you honor us with that?

Ms. BERZON. I think that everyone was introduced that was here, my father, my sister, my other sister, my brother, my nephew, my children, my husband, and my partner, Fred Altshuler, was also here from California, and I also wanted to mention that my mother, Sylvia Siegel, is home in New York. She could not join us because of her health, but she wishes that she could, and my mother-in-law, Ethel Spitzen, is home in Florida, also unable to come.

I would also like to take this chance to thank you for holding this hearing, which I did not have a chance to do before.

Senator SESSIONS. I am glad we are making some progress. I am a little reluctant to start before Senator Feinstein gets here. I told her we would wait for her. I think she wanted to vote on this next vote and then come on over.

[Recess.]

#### QUESTIONING BY SENATOR SESSIONS

Senator SESSIONS. I wanted to ask a few questions about some issues I think are important. While you were on the board of directors of the ACLU of Northern California, that group filed a lawsuit challenging proposition 209, the California civil rights initiative. Did you agree with that filing, and in particular, do you believe proposition 209 is unconstitutional?

Ms. BERZON. Again, I was not the lawyer in the case, but I think you understand that. I believe that proposition 209 was held constitutional, of course, by the ninth circuit, and I have read that opinion and I think it is a well-written opinion.

On the other hand, what the ACLU was doing, of course, was bringing a challenge, and the real question, at least to me as a board member was, was it a colorable challenge. It seemed to me that there was sufficient confusion in the authority, the one line of cases being the *Adarand* and *Croson* line of cases, which made clear that there is the strictest of scrutiny with regard to affirmative action policies, and on the other hand, these older decisions in the ninth circuit with regard to procedural equal protection or of political process equal protection.

I, myself, have found the ninth circuit opinion well reasoned and would have absolutely no problem applying it.

Senator SESSIONS. I know they concluded, "There is no doubt that proposition 209 was constitutional," and, in fact, it seems to me that it is perfectly harmonious with the Constitution. Wherein would you find that it would be unconstitutional? What colorable argument would you make?

Ms. BERZON. I can explain the argument. I did not make the argument, and as I say, I have no quarrel at all with the ninth circuit's conclusion on the subject.

Senator SESSIONS. Did you have occasion to vote on whether or not to file the lawsuit?

Ms. BERZON. I do not recall doing so. I probably could check that, but my attendance at those board and Legal Committee meetings—first, I think it was before I was on the Legal Committee, and my



attendance on those board meetings was not terrific and I do not remember voting on it.

Senator SESSIONS. California is sort of this confrontation with the people's right to express their political desires and conflict with a lifetime appointed, unelected, unanswerable, really, Federal judge with the power to eliminate that with the stroke of a pen. Did you feel any hesitation about filing a lawsuit?

Ms. BERZON. I, as I said, did not file that lawsuit. I was not a lawyer on that lawsuit and I do not recollect that I had any role at all in filing that lawsuit, and I would be happy to check that, but—

Senator SESSIONS. Was that during the period you were vice president?

Ms. BERZON. No, it was not.

Senator SESSIONS. It was not.

Ms. BERZON. And I was not on the Legal Committee at the time, either.

Senator SESSIONS. The lawsuit alleged that America's core principles of equality under the law "are deeply degraded by Proposition 209." Do you agree with that?

Ms. BERZON. I have never seen those pleadings. I have not read them. I do not agree with the statement as I heard you make it, but I certainly—again, to go back to the role, I never would have seen those pleadings and I did not see the pleadings.

Senator SESSIONS. Proposition 209 said the State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin. Do you see how anything in that could degrade, deeply degrade, America's principles of equality?

Ms. BERZON. The Supreme Court, as I say, has held quite firmly in *Adarand* and in *Croson* that as a statement of constitutional law, that appears to be an accurate statement. For that reason, the only colorable issue, it seemed to me, was whether the older cases, *Seattle* and so on, set up a different standard when you had different roles of government. Frankly, it is an argument that I do not know very well, I have not thought about very hard, and is not an area of the law that I have worked in very long.

Substantively, I think that it is clear that the statement is consistent with *Adarand* and with *Croson*. The issue that was the interesting one and that had some measure of, at least, reconciliation of different lines of authority was the procedural process one, the one that was in the Supreme Court a few years ago in *Romer v. Evans*, the issue that was analogous to that.

Senator SESSIONS. Would you share any thoughts you might have about equality of opportunity and access with equality of results?

Ms. BERZON. Could you explain that a little more?

Senator SESSIONS. Well, some seem to believe that a lack of equality in results is per se proof of a lack of equality in opportunity. Would you have any thoughts about that comment? The attack on proposition 209, I think, reflects that, to a degree. It is a suggestion that equality of opportunity is not enough.

Ms. BERZON. The Federal courts have made quite clear that that is not the case. In narrow circumstances, there may be—the statis-

tics may be of some relevance in a title VII case, for example, but certainly, they are—the fact that there is an outcome that does not show the statistical division of people, a relevant group, is no proof that there has been constitutional discrimination. Indeed, the Court has made clear many years ago that that is the case.

Senator SESSIONS. All right. Let me ask a question with regard to proposition 227, the one that was passed last month in California to end bilingual education in the public schools. Proponents of 227 argue that bilingual education harms immigrant children by discouraging them from learning English. A day after proposition 227 was passed, your ACLU chapter filed a class action lawsuit in Federal court challenging 227, arguing that proposition 227 is unconstitutional and violates the Civil Rights Act of 1964. Do you agree with that lawsuit?

Ms. BERZON. First of all, I was not on the board any longer at that time. Second of all, I do not know the issues in that lawsuit. I know that the proposition involves difficult educational questions. I know that if I were a judge and I was considering the constitutionality of a proposition such as that, I would go to it with an extremely strong presumption that it is valid, as for any other law, and I would carefully read the precedents in the law. In this particular incidence, I do not really know the precedents on which this case was based, and as I said, I was not on the board at that point.

Senator SESSIONS. I think most of us do not tend to know all of these constitutional issues, and I certainly do not expect you to cite the case authorities and all of that, but when you are active in an organization that is filing lawsuits, I think it is fair to inquire whether you affirm that view, are indifferent to it, or oppose it. Are you a believer, a nonbeliever, or an agnostic on that lawsuit?

Ms. BERZON. On which? I am sorry.

Senator SESSIONS. On that lawsuit, the proposition 227 lawsuit.

Ms. BERZON. I really know literally nothing about the legal issues in that case, and as I said, I was not on the board at that time. I can say as a policy matter that I thought it was a close question because, on the one hand, the concern for children learning English is a real one. But on the other hand, I was disturbed about making curriculum laws for the whole State of California. So as a policy matter, that is one issue. But the constitutional issues are, of course, entirely separate and I really in this instance have virtually no understanding of what they are and I was not on the board at the time.

Senator SESSIONS. That whole issue, concerns me. I guess the question is, does the Constitution require a State to offer bilingual education and to how many different language groups must it do so?

Ms. BERZON. I—

Senator SESSIONS. Now, I understand, I will admit to you, here is a legitimate public policy, the education issue, the social issue, that the legislature and the school board must address. I want to focus on the Constitutional issue. Activist judges and people who advocate certain policy and social positions somehow find a way to have the Constitution interpreted to implement their agenda.

Ms. BERZON. I—I am sorry.



Senator SESSIONS. Would you discuss that with me, because that is the concern.

Ms. BERZON. I understand the concern and I understand that it is sometimes difficult to look into other people's mindsets and the way they operate to know what they are going to do when they become judges. I guess what I can offer to you is my own firm belief and knowledge of the way that I think, but more than that, I would hope that you would read carefully the letters that were submitted on my behalf because they were, as Senator Feinstein and others noted, by opponents and, very gratifyingly to me, by many, many prominent members of the management bar, even though I have largely represented the employees of unions and employees. One of those letters, from Fred Alvarez, who was an Assistant Secretary of Labor in the Reagan administration, said that I was virtually the only union lawyer for whom he would have taken this support.

It is a fact that I have, in some sense, succeeded in what I have tried to do in my legal career, that is, to litigate on the facts and on the law and making my best effort to clarify for the courts and for the litigants what the issues are and provide as much information to deciding the question as they can while representing my clients is the best evidence that I can give.

Senator SESSIONS. I probably want to do some more, but please.

#### QUESTIONING BY SENATOR FEINSTEIN

Senator FEINSTEIN. If I may, let me, first of all, as a Californian for over 60 years and as a Democratic candidate for governor of the State and a mayor and a public official in the State for better than a quarter of a century, I want to just put something on the record about Californians and initiatives.

There are a number of reasons why Californians bring initiatives to bear, many times, out of frustration with the legislative body, as well as other reasons. Very often, they are not legally carefully thought out. So initiatives will be challenged in the future. For example, there is one coming up for the November ballot that I believe will be challenged constitutionally based on the way it is drawn.

So I do not think that a constitutional challenge brought by anybody, we would regard in California as anything really unusual, and I would just say that for the record.

Ms. Berzon, let me ask you this question. Did you have any involvement with proposition 209?

Ms. BERZON. I had no role at all in the litigation whatever.

Senator FEINSTEIN. Now, let me go to something that one circuit judge has said about ignorance of the people and talk about a case called *Bennett v. Yoshina*, which was a ninth circuit case in 1998. I believe you had something to do with that case?

Ms. BERZON. Yes, I did. I was——

Senator FEINSTEIN. Would you tell us the circumstances of it and what the finding of the court was and who you represented?

Ms. BERZON. I represented the Hawaii State Federation of Labor and 40 or so voters on a constitutional convention ballot that was held in Hawaii a year or two earlier. There was a question under the Hawaii Constitution as to how the ballots should be counted in that case and there was a Hawaii Supreme Court case in which I



participated as essentially advisory attorney to the lawyers in the case concerning that issue, and the Hawaii Supreme Court concluded that the constitutional convention was not to be held under the—because it had failed to get the requisite number of votes.

At that point, a group of proponents of the constitutional convention brought a suit in Federal court claiming that because it had not been clear before the election how the votes were going to be counted, there was a failure of due process and the whole election had to either be held again or there had to be a ratification of the conclusion that the constitutional convention had, in fact, passed, and a three-member panel of the ninth circuit, Judges Wiggins, Newman, and Tashima, held that that was not the case and that there was no failure of due process. So those are the circumstances.

Senator FEINSTEIN. Thank you very much.

Ms. BERZON. I guess the interesting thing about that case is that the issue in it was whether there was any due process—

Senator FEINSTEIN. So, in other words, your representation sustained the initiative.

Ms. BERZON. Sustained the Hawaii Supreme Court's conclusion about who had won the initiative.

Senator FEINSTEIN. Right. You earlier stated that you also are concerned about the reversal rate on the ninth circuit, and you mentioned a little bit about this correction committee. Do you have any thoughts on how you would see or the kind of judge you might be in terms of being able to reverse this, in addition to the correction committee?

Ms. BERZON. Do you mean, if I understand the question, if I were a judge, would I take an active role in the administrative issues?

Senator FEINSTEIN. You said it better than I did, in my unartful way.

Ms. BERZON. I thought you said it very well, but I wanted to make sure I was answering the right question. Yes, as I said, I was a law clerk in the ninth circuit. I appeared before the ninth circuit. I was also a law clerk in the supreme court. Those were two very different institutions. I do have thoughts and interests in the way that courts operate internally and a belief that the kinds of mechanisms one sets up have a real effect on the outcome and how the litigants feel about whether justice has been done.

I might mention that one of my mentors in this regard was Judge Alvin Rubin, who was on the fifth circuit at one time and for whom my husband was a law clerk. He spent a lot of time thinking about these issues and we would talk about them. I was sad when I was nominated to know that he had died a few years ago and would not be around to offer me advice, but I noted that the Federal Judicial Center seemed to think as highly of his advice as I do and the tape that I will watch if I am nominated will be Judge Rubin telling me how to be a good ninth circuit judge. But they are issues I am interested in and I do think they matter.

Senator FEINSTEIN. What would you do?

Ms. BERZON. As I start—well, first of all, the ninth circuit has recently started a mediation project. I have been very active in alternative dispute resolution for the Northern District of California. I have been an early neutral evaluator and a mediator and I am a great believer in those processes. I do not know too much about

how the mediation process on the ninth circuit is working out, and it is somewhat unusual to have mediation at a court of appeals level as opposed to at a district court level.

Before the mediators were there, I remember sitting through a few oral arguments in which the judges were essentially promoting negotiations from the bench and I think they became frustrated with that and, therefore, decided to find a staff, so there is now a staff and I would certainly want to work with that staff and with questions about whether it is possible through alternative dispute resolution mechanisms at the court of appeals level to do some serious expedition of the litigation.

Additionally, there are the kinds of questions that I was alluding to before. It seems to me that there are self-corrective mechanisms that other circuits have in place, such as circulating to the court as a whole proposed opinions that might in some way infringe on earlier precedents where the panel feels strongly that those precedents are incorrect or undermined by later supreme court opinions and inviting any judges who want to call for an en banc instead to do so.

The ninth circuit, to my knowledge, has never had such a policy, and the result is a kind of a wiggly law where the—which is very hard to provide guidance to litigants because the second panel thinks that the first panel's result has to be followed but is really a little foolish, so they wiggle around it in a way, or even foolish in a major way.

As I said before, my recent experience with this bay area pension fund case is a good example. That is a case that was not a big issue and it was enormously expensive, as Senator Sessions mentioned before, for the parties to straighten out a mistake that really mattered but did not deserve the supreme court's attention.

Senator FEINSTEIN. I think you stated that you felt that proposition 209 was really consistent with the *City of Richmond* and *Adarand*. Would you find yourself with any difficulty in enforcing those laws as litigated by the supreme court?

Ms. BERZON. I would have no difficulty applying those precedents. I understand that the court has said that affirmative action policies are to be upheld only in the narrowest—only in narrow circumstances, at least, circumstances—I am sorry.

Senator FEINSTEIN. Yes, if you would go into that strict scrutiny doctrine a little bit, too, please.

Ms. BERZON. Yes. The strict scrutiny doctrine, as I understand it, has two pieces. The first is that the need has to be compelling. That means not a strong reason or a significant reason but a compelling reason. The supreme court has not had occasion since *Adarand* to explicate further exactly what—which interests reach that. The only one so far that has been indicated at all is severe past discrimination, and whether there were any others was an issue that the court granted certiorari on the *Piscataway* case this past year, but that case was later settled and, therefore, the court is not available—is not deciding that question right now.

The second piece of the strict scrutiny standard is that any such policy has to be narrowly tailored, and that, again, has not been explicated further by the court since *Adarand*. There are some indi-



cations that it may include things like time limits or other efforts to make the policy limited.

So there are certainly open and serious issues of law, and, indeed, ones that may well come before the court, and I think it would be inappropriate, really, to go into it much further.

Senator FEINSTEIN. Let us say we took a snapshot of you, say, 5 years into your tenure as a circuit court judge. How would you like to be looked at and regarded? What would you hope your accomplishments will have been?

Ms. BERZON. I would like to be regarded as someone who works extremely hard to gather all of the appropriate legal materials, who listens really hard to the litigants, and in the case of the court of appeals, sometimes that means reading hard because there is not that much talking that goes on, and gives credence to the arguments on both sides and thinks about them hard and then comes to the best possible solution that I can about where the statutes, the precedents, the constitutional language, lead us with regard to the result.

And also, in a vein that we were discussing earlier, I would like to be known as someone who participates in the life of the circuit. It is, after all, a collegial corps who works well with the upper judges, who is not adamant, who has some humility about my own views and a real willingness to listen, and I must say that this is an area in which I do have a fair amount of confidence that I will be able to fulfill my goals because I have a habit of opening up the opposing brief in every case, and if it is at all well done, reading it and saying, they have to be right. I do not see how I could possibly be right.

I think that that is the kind of frame of mind that I want to bring to the court.

Senator FEINSTEIN. How do you feel about the en banc sitting of the court, which in the ninth circuit is a little different from the other circuits?

Ms. BERZON. I, as I said before, really hesitate to get too far into that kind of issue unless I am, in fact, confirmed and confer with other members of the court. I know that this court is one that has shied away from having en bancs and I fully understand why. What I am curious about is whether there are any other mechanisms that could be set up to deal with questions of where there would actually be a major consensus that things have taken a wrong turn, but procedurally, it is difficult to get to that consensus.

Senator FEINSTEIN. I want to ask you one last question, and this is on the question of habeas. I think there has been a lot of real concern in the citizenry at large, and I am not a lawyer, so I am not asking this from a lawyer's perspective, but the habeas proceedings are so very lengthy. You had cases like *Robert Alton Harris*, a terrible murder case, a death penalty case where the habeas situation went on for 12, 13 years, 14 years, both State and Federal. In the last session of the Congress, we corrected that so that the habeas, the Federal habeas portion is very much truncated. How do you feel about that?

Ms. BERZON. I should say, first, that my criminal experience is somewhat limited, and I certainly would intend when I—if I am

confirmed, to spend a lot of time on a learning curve to learn more about criminal law than I know now.

In general, of course, I think that delays are to be avoided and that anything that can be done to accomplish that end consistently with the Constitution is an appropriate legislative task and one that I would uphold, applying the same constitutionality standards that I articulated earlier.

Senator FEINSTEIN. And I am going to say this. In California, many of us, and I am one of them, feel that, in many respects, the courts sometimes stand as a block to justice being carried out, and that it is one thing to have an appellate process, but there has to be a reasonable process and it has to be reasoned in the term of time. I think when you get over 10 years, nobody thinks it is either of the above. I think anything that you could say to this committee in that regard of how you would view this would be useful.

Ms. BERZON. As you noted, I did do one death penalty appeal, which I was specifically asked to do by the California Supreme Court organization that was recruiting lawyers. They were recruiting lawyers because they did not have enough lawyers and they came to me as a civil appellant lawyer and asked me as a public service to do that case, and at a considerable sacrifice, I did so, or actually, my law firm did so. I did a part of it and one of my partners had principal responsibility.

That case took a long time, but if one looked into the record of why it took a long time, and these are the kinds of things that are sometimes buried below the surface, we had a terrible problem getting the transcript certified. We wrote letters—because there was an earlier conviction in Chicago, we had an unofficial transcript from Chicago. We offered it right at the outset and said, put this in the record and let us go forward, and the court insisted that they had to get the official transcript from Chicago 15 or 20 years ago and that took years. We kept writing letters, saying why are we doing this, but that is where it was. In that instance, the reason for the delay was one that one does not necessarily think of and was not attributable to the litigants at all.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Senator SESSIONS. Senator Specter.

#### QUESTIONING BY SENATOR SPECTER

Senator SPECTER. Ms. Berzon, I think the critical question you have answered, that you would be prepared to follow *Adarand* or whatever supreme court decision was involved. It is not unusual on the most highly contested cases for opinions to be written saying there is no doubt, et cetera, about whoever is writing the opinion, or for very strong language to be used, like degrading. Stronger language is even sometimes used on the floor of the Senate, although not lately, from the delays in the last vote that went on and on.

I think it would be useful if you took a look at the statute which limits appeals—there has already been one interpretation by the supreme court—and respond in writing whether you have any problem upholding the statute which puts a time limit on it.

With respect to these California procedures, it would not be beyond my expectation to see the lawyers challenge them. Thank you.



Ms. BERZON. Was that a question?

Senator SPECTER. I do not think there is a question.

Ms. BERZON. Thank you. Thank you, Senator.

Senator SESSIONS. Well, I guess the problem is, and our concern is, and what I have said publicly is that I am not voting to, not that it makes any difference what I do with 99 others around here, but my own personal view is that I am not going to vote for a person for the ninth circuit that I do not think is going to improve that circuit and bring it closer to the mainstream of American law. Some might say that the ninth circuit is not out of it, but I think it is. I have seen the circuits opinions over the 15 to 20 years when I was a prosecutor. I believe the circuit has somehow, some way, gotten out of the mainstream and I want to be fair to you and ask you some questions in that regard.

Let us take the death penalty cases. I understand that the ninth circuit, uses about half of the total Federal funds for death penalty appeals. This is attributed to so many hearings and so many appeals and other matters that the judge approves. But at any rate, half of the moneys allocated for death penalty appeals in the entire United States are going to the ninth circuit. Have you heard that and if you have, does that cause you any pause?

Ms. BERZON. I really do not—it is not an issue that I am familiar with, the expenditure on—I assume you meant habeas corpus, and I am just really not familiar with it.

Senator SESSIONS. My basic view is that the circuit encourages too much death penalty litigation. The State has a supreme court and an appellate court system and a trial court system, and O.J. Simpson gets acquitted by a jury and that is it. He cannot be tried again. With regard to being convicted, you have got your appeals and maybe one appeal in Federal court, for which some reform has been done. But some people, particularly when a death penalty case is involved, are just obsessive as to every possibility on a possibility on a possibility needs to be litigated and the taxpayers should pay an attorney to litigate it for the defendant and pay an attorney to defend the verdict and decades go by. Are you concerned about that at all?

Ms. BERZON. Senator, I well understand that the Senate has an enormous concern about that and has passed a statute, or perhaps more than one, that is intended to deal with that. In addressing any application of that statute, I would certainly read every title of it extremely carefully and apply it, again, unless this quite high standard for a constitutional challenge is met. I do not know whether there will be further constitutional challenges in the ninth circuit. I believe there have been some.

If I were confirmed and approached with any of those, or faced with any of those challenges, I would approach the constitutional issues as I articulated earlier I would approach constitutional issues in general, that is, with a strong, strong presumption of constitutionality and a very careful consideration of any arguments about constitutionality.

Senator SESSIONS. I guess I am thinking more of the routine death penalty appeals and how they are handled. I think it has a tendency to undermine respect for law, undermine public confidence in the court system. When I was attorney general in Ala-



bama, it was 12, 14 years routinely if somebody ever got executed, and usually the appeals had long since ceased to focus on guilt or innocence but on the composition of the jury or evidentiary ruling or something of that nature.

I just feel like that we have got to have the ninth circuit get back into the mainstream and recognize the legitimate concerns of guilt and innocence and having fair trial but not allow the system to be virtually destroyed in a multiplicity of appeals, particularly in the death cases. Do you share any concern like that, just from your observations?

Ms. BERZON. My sole observation in a criminal appeal is the one that I articulated earlier, the single death penalty case that I have done. In that case, we did obtain a reversal of the death penalty, but not of the underlying conviction, from the current California Supreme Court in 1996. Those reversals are quite rare, but I thought we got a fair hearing and they were able, in a case in which there was a seriously unconstitutional prior conviction from Illinois many years ago, to perceive that that was the case.

Senator SESSIONS. So they got the conviction reversed?

Ms. BERZON. No, not the conviction, the death penalty.

Senator SESSIONS. The death penalty?

Ms. BERZON. Because the death penalty was based on a—it was only valid because of a prior conviction of many years before.

Senator SESSIONS. That was a big gimmick. A lot of them have—never mind. You should use every tool when you are defending a client that you could, but that is typical, to me, where you have got a legitimate conviction that perhaps there was not a lawyer, some defect in it, and it comes up and it can be used in another prosecution.

Ms. BERZON. I think my point was that I thought we got a completely fair hearing from the California courts, that they ultimately did a good job with it, and at least in that instance, while I believe there was a habeas pending on the underlying conviction, which one of my partners was handling, the California Supreme Court dealt with the case and gave it a great deal of careful attention.

Senator SESSIONS. Let me ask this. You clerked for Justice Brennan, who certainly was one of the most able members of the Supreme Court. It is a high honor, to be selected to clerk for the Supreme Court of the United States. Justice Brennan adhered to the belief that the death penalty was unconstitutional. He and Justice Marshall and, I think, some other Justices before them that adhered to the view that the death penalty was unconstitutional and dissented in every death penalty case. Had Justice Brennan, taken his position on the death penalty when you clerked for him?

Ms. BERZON. I think he had, but there were no death penalty cases decided the year that I clerked for him.

Senator SESSIONS. Do you agree with that position?

Ms. BERZON. The Supreme Court has definitively held that there is no unconstitutionality of the death penalty, and as a ninth circuit judge, I would, of course, apply that precedent.

Senator SESSIONS. But I want to ask you on that question, did you agree with Justice Brennan that the death penalty was unconstitutional as being cruel and unusual punishment?

Ms. BERZON. I, in fact, had no opportunity to agree or disagree with him, first of all, because I was his law clerk, I was not the Justice, and second of all, because the issue did not come before the Court the year that I was there. And again, it is not in the area of my expertise. I have—I understand the competing considerations, that is, that the Constitution has many provisions which seem to contemplate the death penalty and Justice Brennan and others articulated a belief, however, that there were some indications to the contrary.

Death penalty law, except for this one case I did, is not a specialty. I did not raise the constitutionality issue in the case that we did, and that really—the best assurance I can give you is that I would have no problem applying the law as it exists.

Senator SESSIONS. I guess since circuit judges, more than initial judges, rule on cases that never are reviewed beyond them, and they have to make constitutional decisions, I guess I am trying to understand your method of thinking about the Constitution. Since there are about four, or I think it is six or more references to capital crimes, taking a life, only with due process, in the Constitution, are you able to say one way or the other that you personally believe that the death penalty is or is not cruel or unusual punishment?

Ms. BERZON. I have a tendency to regard textual evidence of that kind extremely highly, both with regard to the Constitution and with regard to statutes and to take it extremely seriously. It is hard to predict oneself how one is going to decide as a judge and I would suppose that I would be extremely attentive to those kinds of evidence. It would really be inappropriate for me to go any further, except to say that if the precedent remains what it is, I will apply it. If the precedent changes, I will apply that.

Senator SESSIONS. Well, that one, to me, is a real issue. I suppose we can have differences of opinion, but I think it sort of represents the high water mark of judicial activism, that opinion. It was an opinion that basically said, we have evolved and standards of decency have changed and now we believe the death penalty is cruel and unusual when perhaps the Founding Fathers did not.

But I think that is a very dangerous philosophy for a judge. I think that when you get to the point where you have multiple references within the document itself to the legality of the death penalty, to say that one clause in it, by reinterpreting its traditional meaning, invitiates those other clauses is not a close question. So in that regard, to me, that is a pretty pivotal opinion.

Did you want to comment? I will not ask you too many more.

Ms. BERZON. No. I mean, I absolutely see the force of your argument. It is not particularly relevant right now since the issue has been decided by the Court, and again, it would not be my role as a court of appeals judge for me to determine that question and I have no intention of doing so.

Senator SESSIONS. I wish you could say you agree with me.

Ms. BERZON. I hesitate, primarily because I do not like to say what I agree with and what I do not agree with when I have not thought about it—

Senator SESSIONS. I can understand.

Ms. BERZON [continuing]. As a legal matter.



Senator SESSIONS. I think you have answered Senator Feinstein that you would enforce the law. I think the real problem with the death penalty is that some judges in their hearts are really systematically, I think, trying to block it, but very, very, very few. I think most judges, if anything, are just too reluctant to carry out the settled will of the State where a death penalty has been imposed and allow too many discretionary decisions which prolongs these cases too long.

Do you have anything else?

Senator FEINSTEIN. No. I think I have asked my questions. Thank you.

Senator SESSIONS. Senator Specter.

Senator SPECTER. A comment or two here, Ms. Berzon. When you talk about valid prior convictions, the cases are all over the lot and you have got to have due process and proper representation. We are relying a tremendous amount on prior convictions now with career criminals, a great many statutes which rely on prior convictions, so that is Hornbook law, to see to it that the prior conviction is constitutionally obtained. I am looking forward to Senator Sessions' close questioning of you when you are nominated for the Supreme Court. [Laughter.]

I think we will not get an answer because the nominees to the Supreme Court do not give answers to questions on the ground that the case is going to come before them. They answer as many questions as they feel they have to for confirmation.

I asked you the question this morning in the context of conscientious scruples. That is a question which is asked of jurors. You chose not to answer it and I did not press you on it. I think Justice Brennan was wrong in his interpretation. I happen to agree with Senator Sessions about the death penalty and intent, and even under *Cardoza*, we have not come to the point in my judgment.

But I would expect you to apply the law, as you said, and Strom and Senator Sessions and I will question you very closely when you come before us for the Supreme Court.

Senator SESSIONS. The ninth circuit is just one step from the Supreme Court. [Laughter.]

I will not pursue the question of the Prison Litigation Reform Act, which was struck down and ruled unconstitutional by the ninth circuit. I think they are the only one of about six circuits that have considered it who have done so.

Let me just ask these questions, and I will finish, and I just do it for the record. You have been a longtime member of the ACLU and they adhere to a number of positions, one of which is that they believe the death penalty is unconstitutional, I believe. Certainly, they oppose the death penalty. Do you know precisely what their position is on the death penalty?

Ms. BERZON. I do not know whether they continue to take the position that the death penalty is unconstitutional. As I said, that position on that issue as a general matter is really not a relevant one at this point. That issue has been settled by the U.S. Supreme Court, and if confirmed, I would, of course, apply it.

Senator SESSIONS. Well, I think at, at least at one time, they argued it was unconstitutional and cruel and unusual punishment.

They opposed three strikes sentencing laws and they opposed school vouchers for sectarian schools, arguing that that is unconstitutional. Have you any thoughts about that? Do you agree with that or not?

Ms. BERZON. The school voucher question is obviously a complicated one—

Senator SESSIONS. It is.

Ms. BERZON [continuing]. Because the Supreme Court law in the area of the Establishment Clause and schools in particular has been changing recently. The questions obviously involve some balance between the interests of parents in determining where their children go to school against the establishment clause, concerns that have been raised in earlier Supreme Court cases. This is an issue that really could come before the ninth circuit and I really would hesitate to mention anything further about it.

Senator SESSIONS. The ACLU supports decriminalization of drugs. Do you favor that?

Ms. BERZON. I am not aware whether the ACLU does favor decriminalization of drugs. It is not an issue—

Senator SESSIONS. It is on their website.

Ms. BERZON. It is not an issue, as such, that I recall the board of directors dealing with while I was on it, the California board of directors.

Senator SESSIONS. Would you agree with that or disagree with it?

Ms. BERZON. I do not agree with the decriminalization of drugs as a personal matter.

Senator FEINSTEIN. Would you repeat that again?

Ms. BERZON. I do not agree with that. As a parent, I have had obvious concerns, but fortunately, no problems, with respect to drug issues, and I, certainly as a legal matter, I regard those questions as within the province of the legislature.

Senator SESSIONS. Well, I thank you for your patience. This has been a delightful constitutional discussion of sorts. I am sure probably you might not have felt it that way, but I have learned a lot and I thank you for your courtesy and I appreciate that.

Senator Feinstein.

Senator FEINSTEIN. Thank you very, very much.

Ms. BERZON. Thank you very much, Mr. Chairman..

Senator FEINSTEIN. I know it was quite an ordeal.

Senator SESSIONS. You are an able lawyer and have a lot of good references.

The committee is adjourned.

[Whereupon, at 3:40 p.m., the committee was adjourned.]

## SUBMISSIONS FOR THE RECORD

## SENATE JUDICIARY COMMITTEE

Questionnaire for Judicial Nominees

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name:** (Include any former names used.)

MARSHA SIEGEL BERZON

Also: Marsha Lee Berzon; prior to marriage, Marsha Lee Siegel

2. **Address:** List current place of residence and office address(es).Current Place of Residence

Berkeley, California

Office

Altshuler, Berzon, Nussbaum, Berzon &amp; Rubin

177 Post Street, Suite 300

San Francisco, CA 94108

3. **Date and place of birth:**

Cincinnati, Ohio, April 17, 1945

4. **Marital Status:** (Include maiden name of wife, or husband's name.) List spouse's occupation, employer's name and business address(es).

Married to:

Stephen Paul Berzon

Attorney

Altshuler, Berzon, Nussbaum, Berzon &amp; Rubin

177 Post Street, Suite 300

San Francisco, CA 94108

5. **Education:** List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.Harvard/Radcliffe Colleges, 1962-66, B.A. cum laude 1966

University of California, Berkeley, summer, 1964 (no degree)



Columbia University, 1966-67, Master's program in History (no degree)

University of California, Berkeley, Boalt Hall School of Law, 1970-73,  
J.D. 1973

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

**Paid Employment**

1966

United States  
Office of Economic Opportunity  
Washington, D.C.  
Public relations specialist for the Job Corps program

1967-68

Abt Associates  
55 Wheeler Street  
Cambridge, MA  
Research Associate

1968-69

Total Community Action  
1420 S. Jefferson Davis Parkway  
New Orleans, LA 70125  
Research specialist

1970

Far West Laboratory for Educational Research & Development  
730 Harrison St.  
San Francisco, CA  
Editor

1971-72

National Housing Law Project  
2201 Broadway  
Oakland, CA  
Law Clerk

1973-74

Judge James R. Browning  
United States Court of Appeals for the Ninth Circuit  
San Francisco, CA  
Law Clerk

1974-75

Justice William J. Brennan, Jr.  
United States Supreme Court  
Washington, D.C.  
Law Clerk

1975-77

Woll & Mayer  
815 15th Street, N.W.  
Washington, D.C.  
Associate

1978 - present:

Altshuler, Berzon, Nussbaum, Berzon, & Rubin  
177 Post Street, Suite 300  
San Francisco, CA 94108  
(The firm was known as Altshuler & Berzon until 1990.)  
Of counsel, 1978 - 1990  
Partner, 1990 - present

1982-88

Marsha S. Berzon, A Professional Corporation  
177 Post Street  
San Francisco, CA  
Employee, officer

1992

School of Social Welfare  
Haviland Hall  
University of California, Berkeley  
Faculty Lecturer

1994

Cornell Law School  
Myron Taylor Hall  
Ithaca, New York 14853  
Practitioner-in-Residence

**Unpaid**

- 1976-77, Member, Board of Directors and Secretary, Capitol East Children's Center, Washington, D.C.
- 1984-present, Member, Board of Directors, AFL-CIO Lawyers Coordinating Committee
- 1984-present, Member, Board of Directors, Legal Aid Society of San Francisco
- 1985-91, 1995-97, Member, Board of Directors, American Civil Liberties Union of Northern California; Vice President 1989-91
- 1993-94, Member, Foundation Committee, William J. Brennan, Jr. Center for Justice
- 1993-95, Member, Board of Directors, Berkeley High Development Group

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

National Merit Scholar, Radcliffe College; graduated cum laude

Order of the Coif, Boalt Hall School of Law; Articles Editor, California Law Review

Fellow, American Bar Foundation

California Women Lawyers 1987 Fay Stender Award

California Law Review Alumni of the Year, 1992

Listed, Steven Naifeh and Gregory White Smith, Best Lawyers in America (current and previous editions)

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

State Bar of California, 1973-present; Member of the California Commission on the Future of the Profession and the State Bar, 1993-95; Member of the Executive Board (1992 -1995) and Treasurer (1993-95) of the Labor and Employment Law Section.

Bar Association of San Francisco; Member of the Executive Committee of the Labor and Employment Section, 1990 - present; Co-Chair, 1989-92, Appellate Courts Committee.

California Women Lawyers.

San Francisco Women Lawyers' Alliance.

American Bar Association (Member, Labor and Employment Section).

Fellow, American Bar Foundation.

Delegate, Ninth Circuit Judicial Conference, 1985, and Judicial Conference for the Northern District of California, c.1989-90.

Advisory Committee, Los Angeles Bar Association Labor Law Forum, 1986-89.

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations that lobby:

State Bar of California

American Civil Liberties Union of Northern California

Other organizations:

Temple Beth-El, Berkeley, California

Berkeley YMCA

Radcliffe College Alumni Association

California Alumni Association

11. **Court Admissions:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

California Bar -- 12/73

D.C. Bar -- 12/75

U.S. Supreme Court - 1/25/81

U.S. Court of Appeals for the D.C. Circuit -- 9/9/75

U.S. Court of Appeals for the 4th Circuit -- 11/3/88

U.S. Court of Appeals for the 5th Circuit -- 6/28/82

U.S. Court of Appeals for the 6th Circuit -- 1/92

U.S. Court of Appeals for the 7th Circuit -- 4/10/92

U.S. Court of Appeals for the 9th Circuit -- 11/8/79

U.S. Court of Appeals for the 10th Circuit -- 10/90

U.S. District Court for the Northern District of California -- 12/73

U.S. District Court for the Central District of California -- 2/83

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

**Publications:**

(Please see the Attachments to this questionnaire for copies of these materials at the Tab noted, except for B and P below, separately submitted.)

- A. California Lawyer, August, 1996, Book Comment on Kingsolver, Holding the Line.
- B. California Commission on the Future of the Profession and the State Bar, The Future of the California Bar (1995). (I was a member of the Commission.)



- C. "Postscript: Impact of Northeast Utilities Service Corp.," The Labor Law Exchange, Number 14 (1995).
- D. Dunlop, Grodin, Berzon, and Keyes, Employment Litigation and Dispute Resolution: The Dunlop Commission Report, in Arbitration 1995. New Challenges and Expanding Responsibilities, Proceedings of the Forty-eighth Annual Meeting, National Academy of Arbitrators, Joyce M. Najita, Ed.
- E. Testimony of Marsha S. Berzon, Commission on the Future of Worker-Management Relations (the Dunlop Commission), April 6, 1994.
- F. "Employer Evasion of Collective Bargaining and Employee Protective Statutes Through Independent Contractor Status," The Labor Law Exchange, Number Thirteen (1994).
- G. Bertin, Berzon & Meyerhoff, Friend-of-the-Court Brief on the Issue of Scientific Evidence: Filed with the Court in Daubert v. Merrell Dow Pharmaceuticals, 4 New Solutions 68 (1993).
- H. Clauss, Bertin, & Berzon, Litigating Reproductive and Developmental Health in the Aftermath of UAW v. Johnson Controls, 101 Environmental Health Perspectives 205 (1993).
- I. "An Outline of ERISA Preemption: Is There Need for a Legislative Solution?" Eleventh Annual Labor Law Symposium (Course Manual), The Labor Law Section of the Los Angeles County Bar Association, February 1991.
- J. Zerger, Berzon, Bogue, et al., California Public Sector Labor Relations, Matthew Bender (1989) & 1990, 1991 & 1992 Cumulative Supplements, Chapter on Organizational Security.
- K. "Bargaining About Drug Testing: Law and Strategy," The Labor Law Exchange, Number 6 (1987).
- L. "The Rights of the Pregnant Worker," 11th National Conference on Women and the Law, Sourcebook, February 28 - March 2, 1980 (member of panel).
- M. Note, People v. Barksdale, 61 California Law Review 272 (1973).

- N. The San Francisco Bay Guardian, February 26, 1971, "There's No Room in the Skyscrapers".
- O. The San Francisco Bay Guardian, April 17, 1970, "Yerba Buena, A Case Study in How SF Development Went Wrong".
- P. Gordon, Berzon, Gregg, et al., The Promise of America (Science Research Associates, c. 1970).
- Q. The Nation, June 23, 1969, "What The Blacks Found Out".

(b) **Speeches on Issues Involving Constitutional Law or Legal Policy:**

(1) I do not routinely keep a record of speeches I have given, nor do I routinely retain the notes I use to give them. I have included in the Attachments the one published report of a speech I gave of which I am aware, as well as one speech which was formally drafted and is to appear in print in the future. (I have not included here or below presentations made on behalf of a client at meetings or conferences open only to lawyers affiliated with the client.):

- R. Presentation on the state of legal scholarship from the perspective of an appellate and Supreme Court practitioner, Cornell Law School Faculty Forum, January, 1985.
- S. Presentation in memory of Justice William J. Brennan, Loyola Law School, Los Angeles, California, December 5, 1997.

(2) Other public speeches or panel presentations, for which I have no written materials but have been able to ascertain the place and actual or approximate date, are:

Panel discussion in June, 1991, Twenty-fifth Harvard Reunion, about women in the workplace, which was recorded. (I am supplying a copy of the recording.)

Speech to the Michigan State Bar Association Labor and Employment Law Section in 1991 in Ann Arbor, Michigan on UAW v. Johnson Controls, 499 U.S. 187 (1991).

Speech at New York Law Forum, New York University Law School, June, 1991, on UAW v. Johnson Controls, 499 U.S. 187 (1991).

Speech at the Bar Association of San Francisco Labor and Employment Law Section Yosemite Conference, February 23, 1991, on "Current Issues Involving the National Center Labor Relations Act and the NLRB"

Speech at the Bar Association of San Francisco Labor and Employment Law Section Yosemite Conference February 20, 1993, on "New Models of Labor Management Cooperation"

Panel Discussion, National Labor Relations Board Region 32 Regional Conference, Oakland, California, May 10, 1995, on appellate review of National Labor Relations Board decisions.

Panel discussion at the ABA Annual Conference Labor and Employment Law Section in Chicago in August, 1995 on the legal aspects of affirmative action.

Speech at the Labor Law Group conference, Tucson, Arizona, December, 1995, on labor law practitioner perspectives on labor law scholarship.

Speech at the National Legal Aid and Defenders Association in Las Vegas, Nevada, November, 1996, on Blessing v. Freestone, 117 S. Ct. 1353 (1997).

Talk, Temple Beth El Communiversity, Berkeley California, February, 1997, on understanding the Supreme Court.

Panel discussion at the Association of American Law Schools, Section of Deans, January 9, 1998, on the relationship between lawyers and law professors. (There may be a tape of this panel, but I do not have it and have not heard it.)

(3) Additionally, for the Committee's information, I am listing the other public talks I have given fairly recently -- in the last ten years -- that I can remember but as to which I have neither notes nor any record of the dates and/or locations:

ABA Labor and Employment Section, Napa, California, on the proposed Uniform Employment Termination Act.

Bar Association of San Francisco Labor and Employment Section Yosemite Conference on Labor Law Preemption and Contingent Workers (various years).

State Bar of California Labor and Employment Law Section, San Francisco, on Alternative Dispute Resolution.

San Francisco Business Roundtable on UAW v. Johnson Controls, 499 U.S. 187.

Boalt Hall School of Law on persuasive writing.

(4) Additionally, I have lectured in classes at Stanford, Cornell, McGeorge and Hastings Law Schools, in the Sociology Department and Social Work School of the University of California, Berkeley, and in the Government Department at Cornell on labor and employment law, gender discrimination, Supreme Court practice, and law as a career.

13. **Health:** What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical examination was on January 19, 1997.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was an appointed member of a Berkeley School District Special Committee on Redistricting in c. 1982. I was also an appointed member of the California Commission on the Future of the Profession and the State Bar in 1993-95. Otherwise, I have not held public office.

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk to Judge James R. Browning, United States Court of Appeals for the Ninth Circuit, September, 1973 to June, 1974.

Law Clerk to Justice William J. Brennan, United States Supreme Court, July, 1974 to June, 1975.

2. whether you practiced alone, and if so, the addresses and dates;

While Of Counsel to Altshuler & Berzon I practiced part of the time as a sole proprietorship and part of the time as Marsha S. Berzon, a Professional Corporation, and had separate clients and financial income from the firm.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I have been connected with the following firms:



- (i) Woll & Mayer  
815 15th St. N.W.  
Washington, D.C.  
Associate, 1975 - 77; contract attorney c. 1977 - 1980.  
(The firm is no longer in existence.)
- (ii) Altshuler, Berzon, Nussbaum, Berzon, & Rubin  
177 Post St. Suite 300  
San Francisco, CA 94108  
415-421-7151  
Of counsel, 1978 - 1990  
Partner, 1990 - present  
(The firm was previously known as Altshuler & Berzon)
- (iii) Marsha S. Berzon, A Professional Corporation  
177 Post Street  
San Francisco, CA  
Employee, Officer, 1982 - 1988
- (iv) School of Social Welfare  
Haviland Hall  
University of California, Berkeley  
Faculty Lecturer, 1992
- (v) Cornell University Law School  
Myron Taylor Hall  
Ithaca, New York 14853  
as practitioner-in-residence, 1994

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years.**

See answer to (2), below.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

My practice is primarily, but not exclusively, appellate, and involves representing labor unions, public interest organizations, public agencies in California and Hawaii, and individuals in a wide range of cases. I have had extensive experience in both traditional labor law and employment law, as well as in First Amendment law, women's rights cases, and cases involving federalism and

federal courts issues. Supreme Court representation is a particular specialty; I have written more than one hundred party and amicus briefs and petitions in the Supreme Court and have argued four cases before the Court, two representing the United Auto Workers, one representing a class of individual custodial parents, and one representing a multiemployer pension fund.

I have also represented a number of individuals in employment discrimination disputes, primarily employees of academic institutions, and have provided day-to-day legal advice to labor unions, primarily international unions. Additionally, I serve as an Early Neutral Evaluator and mediator for the United States District Court for the Northern District of California, usually on a pro bono basis, and have evaluated and mediated about ten cases in the last few years, covering employment and commercial issues.

My practice has not changed significantly since my clerkships, despite a move from Washington, D.C. to San Francisco. From the outset of my law practice an important client has been the national AFL-CIO. I have since 1975 devoted a substantial part of my practice to aiding labor organizations that are affiliated with the AFL-CIO in Supreme Court and other appellate litigation, and since 1987 have been a part-time associate general counsel of the AFL-CIO.

I did more advice practice with national unions in the early years of my practice than I do now, and more state law appellate litigation in the past than I do now. Since 1977, I have done some individual representation, and some representation of nonprofit organizations and, occasionally, businesses. And as time went on I served more often as lead counsel rather than co-counsel on the cases that I work on.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appear regularly in court. Because I have a largely appellate practice, many of my appearances are in the form of written briefs rather than in person. I have, in the last five years, for example, been chief counsel in five United States Supreme Court cases, two on the merits and three on petitions for certiorari; co-counsel on the merits in three Supreme Court cases and co-counsel on petitions for certiorari in several others; co-counsel for amicus curiae in approximately thirteen Supreme Court cases; lead counsel in at least nine federal court of appeals cases and co-counsel or counsel for amicus curiae in more than a dozen others; and counsel in several appellate cases in state supreme and appellate courts, in Hawaii, and California. In most of these cases I have been primarily responsible for the briefing; I have during that time orally argued two Supreme Court cases, six

federal appellate cases, and one state Supreme Court case. Additionally, I have, in the last five years, been counsel in trial courts in six cases, preparing motions and briefs and, in three cases, presenting oral argument in the trial court. That record is fairly typical of the last twenty years.

**2. What percentage of these appearances was in:**

- (a) federal courts;**
- (b) state courts of record;**
- (c) other courts.**

In recent years, ninety to ninety-five percent of my appearances have been in federal courts and between five and ten percent in state courts of record. At times in the past this percentage has varied so that state courts have been as much as twenty-five percent of my work.

**3. What percentage of your litigation was:**

- (a) civil;**
- (b) criminal.**

More than ninety-five percent of my work has been civil, and less than five percent criminal.

**4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

I have not personally examined or cross-examined witnesses in any trial. Rather, the cases in which I have participated in trial courts typically are resolved, before or after discovery, on legal issues alone. I have in the last five years, for example, been chief counsel in four cases that went to judgment without an evidentiary hearing in trial courts, and joint counsel with other members of my firm in another such case. That number of trial court cases pursued to judgment without a trial is fairly typical of my practice for the last twenty years. Additionally, I have occasionally been involved in pretrial proceedings, including drafting and advising on pleadings, pretrial motions and discovery, in cases that later went to trial, including one in the last year.

**5. What percentage of these trials was:**

- (a) jury;**
- (b) non-jury.**

As noted, I have not tried any cases myself, jury or non-jury.

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") v. Johnson Controls, 499 U.S. 187 (1991).

I represented the UAW and seven women workers, and was the attorney chiefly responsible for preparing both the Petition for Writ of Certiorari and the merits Brief and Reply Brief. I also presented oral argument for the plaintiffs/petitioners before the Supreme Court. The primary issue was whether an employer can exclude all fertile female workers from a category of jobs because of concerns about potential fetal injuries.

The Supreme Court, with Justice Blackmun writing the opinion, held that such discrimination violates Title VII of the 1964 Civil Rights Act. The case is extremely significant as a matter of employment discrimination legal doctrine, since it elucidated the reach of the Pregnancy Discrimination Act of 1978, limited the bona fide occupational qualification exception to Title VII, and clarified the prohibition on intentional gender-based discrimination under Title VII.

My co-counsel were Laurence Gold, currently at Bredhoff & Kaiser, 1000 Connecticut Avenue, N.W., Suite 1300, Washington, DC 20036, (202) 833-9340; Jordan Rossen and Ralph Jones, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214, (313) 926-5216; and Carin Ann Clauss, University of Wisconsin, 975 Bascom Mail, Madison, Wisconsin, 53706, (608) 233-8316/8374. Opposing counsel were Stanley Jaspan and Charles Curtis of Foley & Lardner, First Star Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202, (414) 271-2400.

2. Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar, U. S. Supreme Court No. 96-370 (Dec. 15, 1997).

I represented the Trust Fund, and was the attorney chiefly responsible for preparing the petition for writ of certiorari and the briefs on the merits, and for presenting oral argument. The issues in the case concerned the statute of limitations applicable to causes of action under ERISA for collection multiemployer pension plan withdrawal liability.

Reversing the Ninth Circuit, the Supreme Court, with Justice Ginsburg writing for the Court, unanimously agreed with the Trust Fund that the statute of limitations for each unpaid periodic withdrawal liability payment runs from the date that payment was due, not from the statutory date of complete withdrawal or from the date of the first missed payment. The case is significant to multiemployer trust fund trustees, the fund beneficiaries, and the employers who contribute to such funds because it settles a three-way circuit split concerning the statute of limitations for withdrawal liability payments, providing clarification to the affected parties and their attorneys concerning a critical aspect of an exceedingly complex statutory scheme.

My co-counsel were Scott Kronland and Lowell Finley, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 177 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151; and Geoffrey V. White, 351 California Street, Suite 650, San Francisco, CA, (415) 362-5658. Edwin S. Kneedler, Lisa Schiavo Blatt, and Edward Dumont of the Office of the Solicitor General, Department of Justice, Washington, D.C. 20350-0001, (202) 514-2201, represented the United States as Amicus Curiae supporting the Trust Fund. Opposing counsel were William F. Terheyden, James D. Baker and John C. Corcoran, Littler Mendelson, 650 California Street, 20th Floor, San Francisco, CA 94108-2693, (415) 433-1940.

3. Blessing v. Freestone, 117 U.S. 1353 (1997).

I was the chief attorney for the five plaintiffs/respondents on the merits, responsible for drafting the merits brief and presenting oral argument. The principal issues in the case were: whether, under existing precedents, the plaintiffs, custodial parents seeking state assistance in enforcing child support obligations, had a cause of action under 42 U.S.C. § 1983 to enforce Title IV-D of the Social Security Act, providing for such assistance; whether longstanding precedent recognizing that federal statutory rights may be enforced under § 1983 should be limited or overruled; and whether the Eleventh Amendment bars such a suit.

With Justice O'Connor writing the opinion, the Court reaffirmed its previous standards for determining when there is a cause of action under 42 U.S.C.



§ 1983 for violation of a federal statute. The Court reversed the Ninth Circuit's determination that these standards were met, holding that the court of appeals had taken too broad an approach in making that determination. At the same time, the Court held that there may be individual causes of action for the enforcement of some provisions of Title IV-D, and rejected the contention that the availability of administrative enforcement mechanisms under Title IV-D itself precludes litigation under § 1983. The Court then remanded to the District Court to construe the complaint in order to determine exactly what rights the plaintiffs seek to litigate.

Blessing is significant because the Court clarified both the general rules applicable to determining whether a claim based on a federal statute is cognizable under § 1983 and, more specifically, the standards for determining when the enforcement scheme incorporated in a particular federal statute precludes a suit under § 1983.

My co-counsel was Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 177 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151. Edwin S. Kneedler and Patricia Millett of the United States Office of the Solicitor General, Department of Justice, Washington, D.C. 20530-0001, (202) 514-2201, represented the United States as amicus curiae in support of respondents, presenting briefs and oral argument. Opposing counsel representing Arizona officials were C. Tim Delaney, Solicitor General of Arizona, Paula S. Bickett, Kim D. Gillespie, Steven J. Silver and Kathleen P. Sweeney, Assistant Attorneys General, 1275 West Washington, Phoenix, Arizona, 85006, (602) 542-3333; and Carter G. Phillips, Richard D. Bernstein and Adam D. Hirsh, Sidley & Austin, 1722 Eye St., N.W., Washington, D.C. 20006, (202) 736-8000.

4. International Union. United Automobile. Aerospace & Agricultural Implement Workers of America ("UAW") v. Brock, 477 U.S. 274 (1986).

I represented the UAW as petitioner in a case concerning the validity of the Department of Labor's rules for determining whether employees laid off due to foreign competition were eligible for Trade Act benefits. I was primarily responsible for the briefing and oral argument in this case before the United States Supreme Court (and also, later, on remand to the United States Court of Appeals for the District of Columbia Circuit).

The issues before the Supreme Court were a complex of procedural questions, including, most prominently, whether the UAW had standing to bring the case. One of the questions raised by the United States as respondent was whether the Supreme Court should overrule entirely the Court's recognition of associational or representational standing, pursuant to which organizations under certain circumstances may bring suit on behalf of their members if one or more

members would have had standing; we therefore briefed that broad question in our Reply Brief. The Supreme Court, with Justice Marshall writing for the Court, reaffirmed the associational standing doctrine. Additionally, the Court held that an organization has standing to represent its members where the ultimate goal is a monetary payment, as long as the federal court will not itself have to determine the amount of money due each individual.

My co-counsel were Stephen P. Berzon and George C. Harris, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 177 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151; and Jordan Rossen and Leonard Page, UAW, 8000 East Jefferson Avenue, Detroit, MI 48214, (313) 926-5216. Opposing counsel was Carolyn B. Kuhl, then of the United States Office of the Solicitor General and present Judge, Superior Court, 210 W. Temple Street, Los Angeles, CA 90012, (213) 974-5749.

5. Washington Service Contractors v. District of Columbia, 54 F.2d 811 (D.C. Cir. 1995), cert. denied 116 S. Ct. 1105 (1996).

Judges Wald, Rogers, and Sentelle

In this case, I represented intervenors, the Service Employees International Union ("SEIU"), on appeal and in opposing a Petition for Writ of Certiorari. I was chief counsel in writing a joint brief and a joint opposition to certiorari for the SEIU and the District of Columbia, and presented argument for both parties before the D.C. Circuit. (In the district court proceedings, I did not appear as counsel, but did briefly consult with the attorneys for the SEIU.)

The case concerned a newly-enacted District of Columbia statute providing that where one service contractor (such as a janitorial or food services contractor) is hired to replace another, the successor contractor has an obligation to choose its employees from among its predecessor's employees (with some exceptions). The statute was challenged by a group of service contractors as violative of the constitutional Supremacy and Contracts clauses. The central contention was that the D.C. statute is inconsistent with the National Labor Relations Act (NLRA), since under the NLRA successor employers are not required to hire their predecessor's employees and may incur an obligation to bargain with an incumbent union if they do so.

The D.C. Circuit held, 2-1, that the statute is valid, and the Supreme Court denied certiorari. The case is of significance because it clarifies when local and state governments may enact laws governing the hiring process without running afoul of the NLRA.

Co-counsel were Orrin Baird and Carol Golubock for the Service Employees International Union, 1313 L Street, Washington, D.C. 20005, (202) 898-3453; and, for the District of Columbia, Charles Ruff, presently Counsel to the President, The White House, Washington, D.C., (202)452-7901 and Charles Reischel, Deputy Corporate Counsel for the District of Columbia, One Judiciary Square, 441 Fourth Street, NW, Washington, D.C. 20001, (202) 727-6252. Opposing counsel were Anita Barondes, Peter Chatilovicz, and Ronald Lindsay, Seyfarth, Shaw, Fairweather & Geraldson, 815 Connecticut Ave., N.W., Suite 500, Washington, D.C. 20006, (202) 463-2400.

6. Pryner v. Tractor Supply Co., Inc., 109 F. 3d 354 (7th Cir.), cert. denied, 118 S. Ct. 294 (1997).

Judges Posner, Coffey, and Manion

I represented Mr. Pryner, an employee of Tractor Supply who brought an employment discrimination suit against the company, on appeal. (I was not involved in the district court proceedings). I was principally responsible for drafting the brief and for presenting argument before the United States Court of Appeals for the Seventh Circuit, and for filing a Brief in Opposition to a Petition for Certiorari and a Cross-Petition for Certiorari in the United State Supreme Court.

Tractor sought to have the suit dismissed on the basis that Mr. Pryner was obliged to arbitrate his statutory employment discrimination claims under a collective bargaining agreement covering his workplace, rather than litigating in federal court. The primary questions on appeal were two: first, whether the Federal Arbitration Act applies to agreements to arbitrate contained in contracts of employment, permitting an appeal of a district court's failure to order arbitration, and second, whether an employee covered by a collective bargaining agreement that bars discrimination and provides for arbitration is obliged to attempt to arbitrate under the collective bargaining agreement process and precluded from obtaining judicial relief. Both questions have excited a great deal of attention recently in the employment bar and in academia, generating both numerous published opinions, law review articles and conference panels.

On appeal, the Seventh Circuit held that the Federal Arbitration Act applies for some purposes (including permitting the appeal) to collective bargaining agreements, and that individual employees cannot be bound by a grievance/arbitration procedure negotiated by a union and an employer to forego their right to litigate individual employment discrimination claims in federal court. The issues decided are of significance both for the vindication of the employment

discrimination claims of union-represented employees and for the future development of the arbitration system developed under collective bargaining agreements.

(I was also lead counsel in the Supreme Court in a similar case, Austin v. Owens Brockway Glass, 78 F.3d. 875 (4th Cir. 1996), cert. denied, 117 S. Ct. 432 (1997). In Austin, I represented, unsuccessfully, an employee attempting to persuade the Supreme Court to grant review of and overturn the first appellate decision holding that employees can be precluded from court litigation of an employment discrimination claim and required instead to use arbitration procedures contained in a collective bargaining agreement.)

Co-counsel in Pryner were Mary Lynne Werlwas, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 177 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151; Bobby A. Potters, 2868 West Eugene Street, P.O. Box 22163, Indianapolis, Indiana, 46222, (317) 926-1028; Richard Jones, 1214 N. Rural Street, Indianapolis, IN 46201, (317) 637-4213; and William R. Groth, Fillenwarth, Dennerline, Groth & Towe, Suite 204, 1213 N. Arlington Ave., Indianapolis, Indiana 46219, (317) 353-9363. Opposing counsel were Charles Pautsch and Brian Price, Wessels & Pautsch, P.C., 330 East Kilbourn Avenue, Suite 1475, Milwaukee, Wisconsin 53202, (414) 291-0600 and David Swider and Scott Weathers, Bose McKinney & Evans, 135 North Pennsylvania Street, Suite 2700, Indianapolis, Indiana, 46204, (317) 684-5161.

7. San Mateo City School District v. Public Employment Relations Board, 33 Cal. 3d 850 (1983).

I represented the California Public Employment Relations Board (PERB), as special outside counsel, in defending before the California Court of Appeal and Supreme Court a set of decisions delineating for the first time the scope of bargaining under the California Educational Employment Relations Act. I was principally responsible for the briefs in both the Court of Appeal and the California Supreme Court and argued several related and consolidated cases in both fora. The seminal California Supreme Court labor law decision settled the basic standards that govern in deciding what issues are properly the subject of negotiation between public school employers and unions representing public school employees in California, and in determining when bargaining is precluded because substantive statutory provisions govern.

Co-counsel for PERB were Fred Altshuler, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 177 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151; Jeffrey Sloan, presently at McKenna & Cuneo, One Market Plaza, 2700 Stuart Street Tower, 94105, (415) 267-4000; Barry Winograd, presently at Lake



Merritt Plaza, 1999 Harrison Street, Suite 1900, Oakland, CA 94612, (510) 465-5000; Elaine Feingold, presently at 1524 Scenic Avenue, Berkeley, CA 94708, (510) 848-8125. Counsel for the union parties were Madalyn Frazzini and Maureen Whelan, California School Employees Association, 2045 Lundy Avenue, San Jose, CA, 95131, (408) 263-8000; Kirsten L. Zerger, presently at Chisolm Road Conflict Resolution, 1766 Chisolm Road, Mound Ridge, Kansas 67107, (316) 345-3275; and Diane Ross, California Teachers Association, 1705 Murchison Drive, Burlingame, CA, 94010, (415) 697-1400. Counsel for the school board parties were William Brown and Nancy Ozsogomonyan, Brown & Conradi, 400 S. El Camino Real #800, San Mateo, CA 94402, (650) 342-5797; and V.T. Hitchcock and Rene Chouteau, then of the Office of City Attorney, 100 Santa Rosa Ave., PO Box 1678, Santa Rosa, CA, 95404, (707) 543-3040.

8. American Dental Association v. Martin, 984 F.2d 823 (7th Cir. 1993).

Judges Posner, Coffey, and Easterbrook

This case concerned the validity of the Occupational Safety and Health Administration's blood-borne pathogen standard, intended to curb the transmission of blood-borne diseases to employees covered by OSHA. I represented two unions, the Service Employees International Union and the American Federation of State, County, and Municipal Employees, in helping to defend the standard; I wrote the brief and argued orally for the union parties. The case involved complicated scientific issues and questions of OSHA and of administrative law.

The Seventh Circuit decided, 2- 1, that the rule is generally valid but that OSHA in a single respect failed to meet its obligation to consider and address all relevant considerations; that aspect of the rule was vacated. The case is of significance both for its affirmation of the bulk of an important safety rule governing the workplace and for its explication of the basic standards governing review of OSHA standards.

Co-counsel were Laurence Gold, currently at Bredhoff & Kaiser, 1000 Connecticut Ave. N.W. Suite 1300, Washington, D.C. 20036, (202) 833-9340; Orrin Baird, and Carol Golubock, 1313 L Street, Washington, D.C. 20005, (202) 898-3453; and Mary Joyce Carlson, currently with the National Labor Relations Board Office of the General Counsel, 1099 14th Street, NW, Suite 10100, Washington, DC 20570, (202) 273-3700. Primary counsel for the Secretary of Labor was Bruce Justh, Department of Labor Appellate Litigation Section, 200 Constitution Avenue, N.W., Room S. 4004, Washington, D.C. 20210, (202) 219-7718. Counsel for the petitioners were James Pyles, Powers, Pyles, Sutter & Verville, 1875 Eye Street, NW, 12th Floor, Washington, DC 20006, (202) 466-6550; W. Scott Raitlon, Reed, Smith, Shaw & McClay, Suite 1100 - East Tower,



1301 K St., N.W., Washington D.C. 20005-3317, (202) 414-9200; and Donald Verilli, Jr. and Bruce Ennis, Jenner & Block, 601 Thirteenth St., N.W., 12th Floor, Washington, D.C. 20005, (202) 639-6000.

9. Hawaiian Airlines v. Norris, 512 U.S. 246 (1994).

This case concerned whether an employee covered by the Railway Labor Act is precluded from bringing a whistle blower action under state law. I was asked by Mr. Norris' local counsel to represent Mr. Norris in the Supreme Court, and was largely responsible for the brief. The case was argued orally by local counsel.

The Supreme Court, disapproving dicta in a much earlier case, held that the Railway Labor Act does not require the arbitration of cases concerning issues independent of the labor agreement, and does not preclude state law causes of action as long as the claim is not dependent upon an interpretation of such an agreement. The case clarified an area of railway labor law long in dispute.

Co-counsel were Laurence Gold, presently at Bredhoff & Kaiser, 1000 Connecticut Avenue, Suite 1300, Washington, D.C. 20036, (202) 833-9340; Mark Schneider, presently at Jenner & Block, 601 Thirteenth St., N.W., 12th Floor, Washington, D.C. 20005, (202) 639-6000; and Susan Mollway, Cades, Schutte, Fleming & Wright, 1000 Bishop St., 10th Floor, Honolulu, HI 96813, (808) 521-9200. Richard Seamon, presently at the University of South Carolina, School of Law, Columbia SC 29208, (803) 777-6963, argued for the United States as amicus curiae supporting Mr. Norris. Opposing counsel was Kenneth Hipp, currently a member of the federal National Mediation Board, 1301 K Street, NW, Suite 250 East, Washington DC 20005, (202) 523-5920.

10. Stache v. International Union of Bricklayers, 852 F.2d 1231 (9th Cir. 1988).

Judges O'Scannlain, Leavy, and King (Sr. Dist. Judge, D. HI)

In this case, the International Union of Bricklayers had been held liable in a sexual harassment case on the theory that it had an affirmative obligation to prevent an affiliated local union from engaging in employment discrimination, including sexual harassment. (The local union defendant did not appeal the judgment against it, based on the actions of its own officers.) I represented the International Union at the trial level (although not at the trial itself) and, together with my partner Fred Altshuler prepared the briefs on appeal, raising a number of procedural and substantive issues, I argued orally before the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the judgment against the International Union because the Union had not been directly involved in any of the circumstances alleged in the charges filed with the Equal Employment Opportunity Commission against the local union, and no charges had been filed against the International Union itself. The case has proved important in delineating the circumstances under which separate but affiliated entities can be held responsible under Title VII when charges were filed with the EEOC only against one of them.

Co-counsel for the defendant International Union were Fred Altshuler, Altshuler, Berzon, Nussbaum, Berzon & Rubin, 117 Post Street, Suite 300, San Francisco, CA 94108, (415) 421-7151, and George Harris, then of the same address and now at University of Utah College of Law, 332 South 1400 East, Front, Salt Lake City, Utah 84112-0730, (801) 581-6833. Counsel for the local union were Julius Reich and Alexander B. Cvitan, Reich, Adell, Crost & Cvitan, 501 Shatto Place, Suite 100, Los Angeles, CA 90020, (213) 386-3860. Opposing counsel were Joann Lach, presently with the Office of the District Attorney, 540 Hall of Records, 320 W Temple St., Los Angeles, CA 90012, (310) 491-6301, and William Bisset of Hughes, Hubbard & Reed, 350 S. Grand Ave. #3600, Los Angeles, CA 90071, (213) 613-2881.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation. In this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

(1) In addition to the representation of the parties to appellate and Supreme Court litigation, much of my work has involved the submission of briefs amicus curiae in the Supreme Court, usually but not always on behalf of the AFL-CIO, in a wide variety of cases in which that organization has some interest. In the last two years, for example, I have been the principal draftsman of AFL-CIO Supreme Court amicus briefs in: Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855 (1997); Allentown Mack Sales & Service v. National Labor Relations Board, No. 96-795 (January 26, 1998); and Faragher v. The City of Boca Raton, No. 97-282 (pending), as well as co-counsel on several others.

(2) In addition to the primary thrust of my legal practice, appellate and Supreme Court cases, described above, my legal activities have included representation of faculty members in disputes with universities. Only two of those

disputes have resulted in litigation; in the remainder, I represented clients in internal university dispute resolution procedures, and/or in settlement discussions that succeeded in resolving the dispute prior to litigation. In one case, along with other members of my firm I represented a class of faculty members at the University of California, Berkeley, who were promoted but not paid commensurately with their promotions; we succeeded in obtaining a substantial settlement for the class.

(3) Another major legal activity involves providing advice and counsel to attorneys representing unions in a wide range of labor and employment cases, including reviewing and editing draft briefs. Additionally, I am sometimes asked to consult for other attorneys as an expert in appellate practice, in cases in the California or United States Supreme Courts in particular, on a wide range of issues outside my usual substantive areas of expertise (including environmental and antitrust law, for example).

(4) Additionally, I have participated as Early Neutral Evaluator, mediator and, in one instance, arbitrator, in the United States District Court for the Northern District of California's Alternative Dispute Resolution program. In that capacity I have met with lawyers and their clients involved in litigation before the Northern District, provided neutral analyses and evaluations of the litigation, and, on several occasions, succeeded in fostering settlement of the litigation prior to trial. The cases have included a wide variety of employment discrimination and other employment disputes as well as a commercial contract dispute.

(5) A major activity between 1993 and 1995 was membership on the California Commission on the Future of the Legal Profession and the State Bar. The Commission, composed of practitioners, judges, and nonlawyers appointed by both the Bar and by other state officials, was brought together to investigate issues including the impact of current professional trends on the administration of justice, the services the Bar does and should provide, the structure of the Bar, and the impact of present trends on the work lives of lawyers. I was Vice-Chair of the Committee on Services To and For Lawyers. The Commission produced a lengthy report and made various recommendations which were referred to the State Bar for consideration. (I am supplying a copy of the Commission's Report in connection with the publications question above.)

(6) Finally, I was practitioner-in-residence at Cornell Law School for the fall term, 1994, and expect to be a scholar-in-residence at Indiana University Law School for a week this spring. At Cornell, I taught a weekly seminar for fifteen students on Supreme Court practice, in which the students studied (largely by role-playing) the Supreme Court's certiorari review and merits decision processes and wrote petitions for writs of certiorari and briefs which I reviewed before revision. In addition, I was a guest lecturer at classes taught by other faculty members; participated in weekly faculty discussions of scholarly work in progress; and gave a presentation to the faculty on contemporary legal scholarship from the viewpoint of a practitioner (an account of which is included above in connection with the question on speeches).

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I have an interest in the receivables of my law firm until they are collected, including some contingent fee cases. I will arrange for payment of any such interest as a sum certain to be paid out in no more than three years from the time of my confirmation. (My husband will remain a member of the firm.)

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I expect to resolve all conflicts, personal and financial, in accord with applicable codes of judicial conduct and the laws of the United States governing such conflicts, particularly 28 U.S.C. §455.

More specifically, I would of course expect to recuse myself during my initial service in any case in which I had any involvement whatever as a lawyer, and from any case in which my law firm or its clients is involved. To do the latter, I would check the parties to any cases assigned to me against the firm's client list, as periodically updated. Because of my husband's continuing financial interest in the firm, my own severance of all financial ties with the firm would not eliminate the conflict with regard to the firm and its clients, so I would continue to take the same steps outlined above as long as my husband is affiliated with the firm..

Additionally, I would devise a system to check for conflicts regarding any financial conflicts arising from stockholdings. I plan, however, as quickly as possible to divest myself of any stocks in individual companies so as to limit the possible conflicts.



3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

I am planning to serve as a scholar in residence at Indiana University Law School sometime this spring. Otherwise, I have no plans, commitments, or agreements to pursue outside employment, with or without compensation.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

See attached Financial Disclosure form, page 27-A.

5. **Please complete the attached financial net worth statement in detail (add schedules as called for).**

See attached Financial Net Worth Statement, page 27-H

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No.

AO-10 (w)  
Rev. 8/96**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1989, Pub L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial)		<b>2. Court or Organization</b>		<b>3. Date of Report</b>
Berzon, Marsha S.		Nominee, US Ct. App. 9th Cir.		01/19/1998
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)		<b>5. Report Type (check type)</b>		<b>6. Reporting Period</b>
		<input checked="" type="checkbox"/> Nomination, Date 01/27/1998		01/01/1997 to 01/19/1998
		Initial Annual Final		
<b>7. Chambers or Office Address</b>		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>		
Altshuler, Berzon, et. al 177 Post St. Suite 300 San Francisco, CA 94108		Reviewing Officer _____ Date _____		
<p><b>IMPORTANT NOTES:</b> The instructions accompanying this form must be followed. Complete all parts, checking the <b>NONE</b> box for each section where you have no reportable information. Sign on the last page.</p>				

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions)

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
<sup>1</sup> Partner	Altshuler, Berzon, Nussbaum, Berzon & Rubin
<sup>2</sup>	
<sup>3</sup>	

**II. AGREEMENTS** (Reporting individual only; see pp. 14-17 of Instructions.)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
<sup>1</sup>	
<sup>2</sup>	
<sup>3</sup>	

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 18-25 of Instructions.)

DATE	PARTIES AND TERMS	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
<sup>1</sup> 1998	Altshuler, Berzon, Nussbaum, Berzon & Rubin	\$ 5,625.00
<sup>2</sup> 1997	Altshuler, Berzon, Nussbaum, Berzon, & Rubin	\$ 383,074.00
<sup>3</sup> 1996	Altshuler, Berzon, Nussbaum, Berzon & Rubin	\$ 292,157.00
<sup>4</sup> 1998	Altshuler, Berzon, Nussbaum, Berzon & Rubin (S)	
<sup>5</sup> 1997	Altshuler, Berzon, Nussbaum, Berzon & Rubin (S)	

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Berzon, Marsha S.	Date of Report 01/19/1998
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**SECTION HEADING.** (Indicate part of report.)**SECTION 3. NON-INVESTMENT INCOME (cont'd.)**

Li. Date	Parties and Terms	Gross Income
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6 1996	Altshuler, Berzon, Nussbaum, Berzon & Rubin (S)	\$ 0.00
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FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Berzon, Marsha S.	01/19/1998

#### IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 26-29 of Instructions.)

	SOURCE	DESCRIPTION
<input checked="" type="checkbox"/>	NONE (No such reportable reimbursements or gifts)	
1		
2		
3		
4		
5		
6		
7		

#### V. OTHER GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 30-33 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/>	NONE (No such reportable gifts)		
1			
2			
3			
4			

#### VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 34-36 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE (No reportable liabilities)		
1			
2			
3			
4			
5			
6			
7			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Berzon, Marsha S.Date of Report  
01/19/1998

## VII. Page 1 INVESTMENTS and TRUSTS

— income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (no reportable income, assets, or transactions)									
1 Bank of America, San Francisco, CA - checking account	A	Interest	J	T					
2 Coca Cola Common Stock (J)	A	Dividend	L	T					
3 Galileo Common Stock (J)		None	K	T					
4 John H. Harland Common Stock (J)	A	Dividend	K	T					
5 Mattel Common Stock (J)	A	Dividend	J	T					
6 Quaker Oats Common Stock (J)	A	Dividend	J	T					
7 California State Anticipation Notes (J)	D	None		T					
8 Dreyfus Appreciation Fund (J)	A	Dividend	K	T					
9 Dreyfus Emerging Leader Fund (J)	C	Dividend	K	T					
10 Dreyfus New Leaders Fund (J)	D	Dividend	L	T					
11 Jurika & Voyles Mini Cap Fund (J)	F	Dividend	N	T					
12 Robertson Stephens Growth & Income Fund	E	Dividend	M	T					
13 Van Wagoner Emerging Growth Fund (J)		None	K	T					
14 Van Wagoner Micro Cap Fund (J)		None	K	T					
15 Fidelity Spartan California Muni Money Market Fund (J)	E	Dividend	O	T					
16 Schwab California Muni Money Fund (J)	B	Dividend	L	T					
17 Schwab Cal. Muni Money Fund Value Advantage Shares (J)	C	Dividend	M	T					
1 Ino/Gain Codes: A=\$1,000 or less (Col. B1, D4)	F=\$50,001-\$100,000	G=\$100,001-\$1,000,000	H=\$1,000,001-\$5,000,000	H2=\$5,000,001 or more					
2 Val Codes: J=\$15,000 or less (Col. C1, D3)	O=\$500,001-\$1,000,000	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more				
3 Val Mth Codes: Q=Appraisal (Col. C2)	U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market					



<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Berzon, Marsha S.	Date of Report 01/19/1998
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**VII. Page 2 INVESTMENTS and TRUSTS** — income, value, transactions (includes those of spouse and dependent children. See pp. 37-54 of instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period						
	(1) Amt. Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)				
					If not exempt from disclosure				
					(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
NONE (no reportable income, assets, or transactions)									
18 American Funds Inv. Co. of America Fund (IRA)	E	Dividend	N	T					
19 American Funds Europacific Growth Fund (IRA)	C	Dividend	L	T					
20 American Funds Small Cap World Fund (prof. shar. plan)	N	Dividend	J	T					
21 American Funds Washington Mutual Fund (IRA) (S)	D	Dividend	L	T					
22 AIM Weingarten Fund (Prof. Shar. Plan) (S)	D	Dividend	K	T					
23 AIM Constellation Fund (Prof. Shar. Plan) (S)	D	Dividend	L	T					
24 AIM International Equity Fund (prof. shar. plan) (S)	A	Dividend	J	T					
25 AIM Global Agg. Growth Fund (prof. shar. plan) (S)		None	J	T					
26 AIM Agg. Growth Fund (profit sharing plan) (S)	C	Dividend	L	T					
27 AIM Constellation Fund (money purch. plan) (S)	A	Dividend	J	T					
28 AIM Global Agg. Fund (money purch. plan) (S)		None	J	T					
29 American Funds Inv. Co. of America Fund (DC)	C	Dividend	K	T					
30 Jurika & Voyles (DC)	C	Dividend	K	T					
31 AT&T Common Stock (J)	A	Dividend	J	T					
32 Bell Atlantic Common Stock (J)	A	Dividend	J	T					
33 Bell South Common Stock (J)	N	Dividend	J	T					
34 AIM Weingarten Fund Money Purchase Plan (S)	M	Dividend	J	T					
1 Inc/Gain Codes: A=\$1,000 or less      B=\$1,001-\$2,500      C=\$2,501-\$5,000      D=\$5,001-\$15,000      E=\$15,001-\$50,000 (Col. B), D4)      F=\$50,001-\$100,000      G=\$100,001-\$1,000,000      H1=\$1,000,001-\$5,000,000      H2=\$5,000,001 or more									
2 Val Codes: J=\$15,000 or less      K=\$15,001-\$50,000      L=\$50,001-\$100,000      M=\$100,001-\$250,000      N=\$250,001-\$500,000 (Col. C1, D3)      O=\$500,001-\$1,000,000      P1=\$1,000,001-\$5,000,000      P2=\$5,000,001-\$25,000,000      P3=\$25,000,001-\$50,000,000      P4=\$50,000,001 or more									
3 Val Mth Codes: Q=Appraisal      R=Cost (real estate only)      S=Assessment      T=Cash/Market (Col. C2)      U=Book Value      V=Other      W=Estimated									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Berzon, Marsha S.	01/19/1998

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

☐

NONE (No additional information or explanations.)

SECTION 3: Date, continued ...  
hu1995

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Berzon, Marsha S.

Date of Report

01/19/1998

## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

1/30/98

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	\$	5,000.00	Notes payable to banks—secured		
U.S. Government securities—add schedule	—	—	Notes payable to banks—unsecured		
Listed securities—add schedule (Sch. A)	953,501.	00	Notes payable to relatives		
Unlisted securities—add schedule	—	—	Notes payable to others		
Accounts and notes receivable	—	—	Accounts and bills due		
Due from relatives and friends	—	—	Unpaid income tax		
Due from others	—	—	Other unpaid tax and interest		
Deferred	—	—	Real estate mortgages payable—add schedule See Sch. F	129,618.	00
Real estate owned—add schedule See Sch. F	700,	000.00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize		
Automobiles and other personal property	80,	000.00			
Cash value—life insurance					
Other assets—itemize					
Money Market Fund (Sch. B)	1,226,636.	00			
Retirement Funds (Sch. C)*	425,442.	00			
Spouse's Retirement Funds (Sch. D)*	339,782.	00	Total Liabilities	129,618.	00
Daughter's Accounts (Sch. E)	43,543.	00	Net Worth	3,644,386.	00
Total Assets	3,774,004.	00	Total Liabilities and net worth	3,774,004.	00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor			Are any assets pledged? (Add schedule)		No
On leases or contracts			Are you defendant in any suits or legal actions?		No
Legal Claims			Have you ever taken bankruptcy?		No
Provision for Federal Income Tax 4/15/98	75,	000.00			
Other special debt on 1997 income					

\* (Subject to tax)

Schedule A  
Listed Securities (value as of 1/19/98)

<u>Stocks</u>	<u>Shares</u>	<u>Value</u>
AT & T	23	1,495.00
Bell Atlantic	8	1,247.75
Bell South	18	1,050.75
Coca Cola	800	52,000.00
John H. Harland	2,000	35,625.00
Lucent Technologies	7	528.06
Mattel	97	3,819.38
Quaker Oats	200	10,500.00

<u>Mutual Funds</u>	<u>Shares</u>	<u>Value</u>
Dreyfus Appreciation Fund	648.92	21,070.43
Dreyfus Emerging Leaders Fund	1,369.278	32,410.81
Dreyfus New Leaders Fund	1,657.002	71,217.95
Jurika & Voyles Mini-Cap Fund	23,803.894	438,705.77
Robertson Stephens Growth & Income Fund	19,201.26	253,069.52
Van Wagoner Emergency Growth Fund	3,156.566	30,145.21
Van Wagoner Micro Cap Fund	3,498.95	32,715.18

Total Listed Securities: \$953,600.81



Schedule B  
Money Market Accounts

Fidelity Spartan California Municipal Money Market Fund	\$948,350.05
Schwab California Muni Money Fund	66,968.14
Schwab California Muni Money Fund (Value Advantage)	211,318.23
<u>Total Money Market Accounts:</u>	<u>\$1,226,636.42</u>

Schedule C  
Pension Accounts: Marsha S. Berzon

Marsha S. Berzon IRA:

<u>Funds</u>	<u>Shares</u>	<u>Value</u>
American Funds: Investment Co. of America	11,878.150	\$368,322.37
American Funds: Europacific Growth Fund	1,972.425	55,368.76

Altshuler Berzon et al Profit Sharing Plan

American Funds Smallcap World Fund	62.377	1,750.71
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<u>Total Retirement Accounts MSB:</u>	<u>\$425,441.84</u>
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Schedule D

Retirement Accounts: Stephen P. Berzon

Stephen P. Berzon IRA:

	<u>Shares</u>	<u>Value</u>
American Funds Washington Mutual Inv. Fund	3,100.952	\$99,794.67

Altshuler Berzon et al. Profit Sharing Plan

AIM Weingarten Fund	2,318.808	45,332.70
AIM Constellation Fund	3,488.681	88,961.37
AIM International Equity Fund	241.730	3,954.70
AIM Global Aggressive Growth Fund	481.078	7,783.84
AIM Aggressive Growth Fund	1,548.607	68,185.17

Altshuler Berzon et al. Money Purchase Plan

AIM Weingarten	469.112	9,171.14
AIM Constellation Fund	345.665	8,814.46
AIM Global Aggressive Growth Fund	481.078	7,783.84

Total Retirement Accounts SPB:

\$339,781.89

Schedule E

## Alexandra Berzon's Accounts (18 Year Old Daughter)

<u>Fund</u>	<u>Shares</u>	<u>Value</u>
American Funds Investment Co. of America	926.848	\$25,933.21
Jurika & Voyles Mini Cap Fund	949.628	17,501.64
Franklin Money Fund		108.38
<u>Total AEB Accounts:</u>		<u>\$43,543.23</u>

Schedule F

## Real Estate Owned/Mortgage Payable

<u>Real Estate</u>	<u>Value</u>	<u>Mortgage</u>
Residence	\$700,000	\$129,618.00
		GE Capital Mortgage Co.

### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

In addition to my regular legal practice, some of which is devoted to representing poor workers:

I serve on the Board of the Legal Aid Society of San Francisco, devoting about twenty hours a year to meetings and to consulting with staff members.

This past year, I represented five custodial parents who were having difficulty supporting their families because the noncustodial parent was not paying child support, before the Supreme Court in Blessing v. Freestone, discussed above. The case took hundreds of hours of work to brief and argue.

I served on the Board of the Berkeley High School Development Group which raised money to help fund Berkeley High School. During the time I was on that Board I spent about fifty hours at meetings and on fundraising. I was a Board Member and Secretary, in the 1970's, of the Capitol East Children's Center in Washington, D.C., a child care center serving both middle and low income children, spending about thirty hours per year at meetings and on secretarial duties.

I have volunteered in public school classrooms in Berkeley, spending perhaps twenty hours a year for five years. And I have participated in serving dinners to homeless people at my Temple.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership, what you have done to try to change these Policies?**

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There is no selection commission for the Ninth Circuit.

In the fall of 1994 I was contacted by a representative of Senator Diane Feinstein and asked to participate in an interview with several lawyers and other individuals with regard to the Ninth Circuit openings at the time. I did so, in San Francisco. Sometime thereafter I was called by Senator Barbara Boxer concerning a possible Ninth Circuit appointment.

In March, 1997 I was contacted by the Office of the Counsel to the President and asked about my interest in an appointment to the Ninth Circuit. In April, 1997, I was interviewed by representatives of the White House and the Justice Department in the Old Executive Office Building. I was then asked to, and did, complete American Bar Association, FBI, Senate Judicial Committee and Justice Department questionnaires.

In July, 1997, I met with Senator Feinstein and two staff members concerning my interest in a Ninth Circuit appointment.

In December, 1997, I was called again by the Office of the Counsel to the President and asked to update, complete and submit the required forms of which I had earlier submitted preliminary copies, which I did in December and January.

I was interviewed in early January by Charles Renfrew of the ABA Standing Committee on the Judiciary, and in mid-January by Mr. Tom Horrigan of the FBI.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.



**5. Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-revolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The Constitution imposes strict limits on the power and authority of the federal judiciary. Article III expressly requires that the federal courts decide cases only where there is an actual case or controversy between the litigants, and limit themselves to resolving that case or controversy rather than making broad pronouncements unnecessary to the decision. Consistent with those restrictions, the judiciary should not formulate social policy, oversee the workings of the other branches or levels of government, or decide issues or controversies not presented in the specific case before the court, by parties with a concrete stake in the controversy.

Judges exceed their authority when they decide cases on the basis of preconceived policy considerations rather than the wording of relevant constitutional and statutory provisions and the rulings of the Supreme Court and of relevant appellate precedents.

Additionally, limited rather than broad rulings best serve the implementation of judicial authority. As an appellate lawyer, I have often observed that broad doctrinal statements often prove, over time, poorly adapted to resolve issues that were not perceived to be even on the horizon at the time the statements were made. Courts faced with deciding a particular case on particular facts may make statements that seem to cover all future situations they can imagine, only to discover later that real life situations always outrun the imagination of judges.

## SENATE QUESTIONNAIRE FOR JUDICIAL NOMINEES

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Richard Miles Berman

2. Address: List current place of residence and office address(es).

Residence: New York, New York

Office: Queens County Family Court  
89-14 Parsons Boulevard  
Jamaica, New York 11432

3. Date and place of birth.

September 11, 1943  
New York City (Queens County)

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Divorced: Emily Krasna

5. Education: List each college and law school you have attended, including dates of attendance, degrees received and dates degrees were granted.

Cornell University School of Industrial & Labor Relations  
September 1960 - June 1964; B.S. (June 1964)

New York University School of Law  
September 1964 - June 1967; J.D. (June 1967)

University of Stockholm School of Law  
September 1967 - June 1970  
Diploma of Comparative Law (June 1968); Diploma of International Law (June 1970)

Fordham University Graduate School of Social Service  
September 1992 - May 1996; M.S.W. (May 1996)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
- (i) 1964 Granite Hotel and Country Club - athletic director, waiter.
  - (ii) 1965 Lew Ritter Clothing Store - salesman.
  - (iii) 1966 Everbreeze Restaurant - waiter.
  - (iv) 1968-1970 University of Stockholm School of Law - lecturer, graduate assistant.
  - (v) 1970-1974 Davis Polk and Wardwell - litigation associate.
  - (vi) 1974-1977 United States Senate (Senator Javits) - executive assistant.
  - (vii) 1977-1978 New York State Alliance To Save Energy - executive director.
  - (viii) 1978-1986 Warner Cable Corporation - General Counsel.
  - (ix) 1986-1995 LeBoeuf, Lamb, Greene & MacRae - partner.
  - (x) 1995-present Queens County Family Court - judge.
7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
- No.
8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
- (i) Cornell University -- Deans List; Donald Frank Sussman Memorial Scholarship.

- (ii) New York University Law School -- Moot Court Executive Board; American Jurisprudence Awards for Excellence in Torts, Commercial Law & Comparative Law; scholarships during each year.
- (iii) American Scandinavian Foundation Thord Gray Fellowship for Graduate Legal Studies at the University of Stockholm.
- (iv) 4.0 cumulative grade point average for MSW graduate studies at Fordham University.
- (v) National Conference of Hispanic Law Enforcement Officers Recognition Plaque (June 13, 1975).
- (vi) Citizens Committee for New York City, Inc. Recognition Proclamation (September 19, 1995).
- (vii) Citation of Honor from the Training Institute for Mental Health -- Asked to deliver Commencement Address, June 17, 1997.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- (i) New York State Permanent Commission on Justice for Children. The Commission's aim is to improve the well-being of children involved in the judicial system.
- (ii) New York State Family Court Judges Association.
- (iii) Family Court Curriculum Committee of the New York State Judicial Conference.
- (iv) Mayor Rudolph S. Giuliani's Task Force on Child Welfare (1995-1996).
- (v) New York County Lawyers Association.
- (vi) Association of the Bar of the City of New York.
- (vii) American Bar Association.



10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am not aware that any organization to which I belong is engaged in lobbying, with the possible exception of bar associations.

Other Organizations: Cornell University School of Industrial & Labor Relations  
Alumni Board of Directors.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

<u>State</u> :	New York; 2d Department	April 21, 1971
<u>Federal</u> :	United States District Court for the Southern District of New York	June 19, 1972
	United States Court of Appeals for the Second Circuit	June 18, 1971
	United States Court of Appeals for the Fifth Circuit (pro hac vice)	c. September, 1987
	United States Supreme Court	January 9, 1995

12. Published Writings: List the titles, publishers, and dates, of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Articles, etc.

- 1) Daily News, October 21, 1996, p. 30 (op-ed article), "Punishing Juveniles the Sensible Way" (copy enclosed).
- 2) Multichannel News, October 12, 1992, "Could Arbitration Aid Rate Changes?" (copy enclosed).

- 3) New York State Alliance to Save Energy (1978), "Energy on Film" (copy enclosed).
- 4) Svensk Juristtidning (1968), "Some American Ombudsmen" (copy enclosed).
- 5) Cablevision Magazine, January 4, 1988, "Making the Case Against Overbuilds" (copy enclosed).

Speeches, Panel discussions, etc.

- 1) Remarks entitled "Cable Industry Regulation," delivered on September 19, 1986 at a seminar sponsored by LeBoeuf Lamb Greene & MacRae in New York City and relating to cable television as a potential investment. The audience included representatives of the utilities industry (copy enclosed).
  - 2) Speech entitled "The Art of Negotiation in Corporate Transactions," given on April 15, 1987, at a symposium for young lawyers sponsored by the Association of the Bar of the City of New York (notes enclosed).
  - 3) Panel discussion about the cable television industry's First Amendment Rights, entitled "Debating Cable's Rights: Is There Merit to Adversaries' Claims," published in CableVision Magazine on May 18, 1987 (copy enclosed).
  - 4) Panel discussion of the expanding European telecommunications market, entitled "Confronting the Global Imperative," published in CableVision Magazine on November 6, 1989 (copy enclosed).
  - 5) Panel discussion of the paths to becoming a judge in New York City held on December 7, 1996, and sponsored by the Association of the Bar of the City of New York. Open to the public.
  - 6) Discussion of the Cable Television Policy Act on March 7, 1986, sponsored by Alexander & Associates and held at the Saddlebrook Resort in Tampa, Florida for representatives of the cable television industry.
13. Health: What is the present state of your health? List the date of your last physical examination.
- Good. April 1, 1998

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

New York State Family Court Judge: Appointed by Mayor Rudolph S. Giuliani in March of 1995

Jurisdiction in Family Court is both civil (*i.e.*, child protective, family offense, custody and visitation, paternity, and adoption proceedings) and criminal (*i.e.*, juvenile delinquency cases which involve acts which would be considered misdemeanors and felonies if committed by adults). Since becoming a judge in 1995, I have presided over a very substantial number of cases; literally hundreds of trials, suppression of evidence, identification and confession hearings, and pre-trial proceedings. On average, Family Court judges hear 40-50 cases per day (including requests for adjournment).

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Most Significant Opinions (copies enclosed)

- (i) In Re: Sean J., Docket No. D-15273/95
- (ii) In Re: Skinner, et al., Docket No. N-7617-20/95
- (iii) In Re: Shawna E., et al., Docket No. NA-11322-3/97
- (iv) In Re: James R., Docket No. N-12163/96
- (v) In Re: Pilios, Docket No. F 8297/87
- (vi) In Re: Brian D., et al., Docket No. D-9996/95
- (vii) In Re: Elishaba A., Docket No. NA-5674/96
- (viii) In Re: Randy N., Docket No. D-364/96

(ix) In Re: Daniel D., Docket No. D-8109/95

(x) In Re: Matter of Christopher B., Docket No. D8121/95

Reversals

Two cases in which I have been involved were reversed by the Appellate Division, Second Department.

In Re: Sheree K., a delinquency case transferred to me following a finding of delinquency and sentence imposed by a Family Court judge in another county, the Appellate Division reversed the underlying finding of delinquency which had not been before me for consideration. In Re: Sheree K., \_AD2d\_, June 16, 1997 (copy enclosed).

I in Vizcaino v. Butler, the Appellate Division ruled that the Family Court Hearing Examiner, whose ruling in a child support case I had affirmed, had not established a sound evidentiary record and had maintained inadequate financial records to support her ruling. Vizcaino v. Butler, \_AD2d\_, March 9, 1998 (copy enclosed).

Constitutional Issue Opinions

None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was appointed by United States Senator Jacob K. Javits as his Executive Assistant in December of 1973. I served in that capacity (*i.e.*, as an employee of the United States Senate) from January 1974 to August of 1977. I was primarily responsible for overseeing Senator Javits' New York City office; New York City issues; working with Federal, state, and municipal agencies; developing municipal initiatives; and serving as liaison to numerous community based groups and organizations.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;  
  
I did not clerk for a judge.
  2. whether you practiced alone, and if so, the addresses and dates;  
  
I have not practiced alone.
  3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- (i) Litigation Associate: Sept. 1970 - Jan. 1974  
Davis Polk & Wardwell  
450 Lexington Avenue  
New York, New York 10017

As an associate, I was involved in all phases of litigation on behalf of corporate clients, predominantly in Federal Court, including research, brief writing, pre-trial discovery, motions, and court appearances. I was fortunate to be selected to participate in the Davis Polk *pro bono* criminal defense program and gained valuable trial experience in criminal cases (1972-1973).

- (ii) Executive Assistant to U.S. Senator Jacob K. Javits: Jan. 1974 - Aug. 1977  
110 East 45th Street  
New York, New York 10017

I served as Senator Javits' representative and liaison to Federal, state and local government agencies, as well as to New York City civic organizations and community groups. I also helped develop municipal initiatives and legislation and helped supervise Senator Javits' New York City staff.



- (iii) Executive Director: Aug. 1977 - Aug. 1978  
 New York State Alliance To Save Energy, Inc.  
 36 West 44th Street  
 New York, New York 10036

This not-for-profit organization was formed and co-chaired by United States Senators Jacob K. Javits and Daniel Patrick Moynihan to develop programs, periodicals and a public service TV campaign to encourage energy conservation in New York State.

- (iv) General Counsel and Executive Vice President: Aug. 1978 - July 1986  
 Warner Cable Corporation  
 75 Rockefeller Plaza  
 New York, New York 10019

As the company's General Counsel (and also Secretary and Executive Vice President), I was responsible for all corporate legal affairs, including litigation, transactions, and administrative agency proceedings throughout the United States. I also supervised the Legal and Human Resources departments and personnel as well as all outside counsel. I was a member of the Company's senior management group and the Company's corporate "turnaround" team led by Chairman and Chief Executive Officer Drew Lewis.

- (v) Partner: July 1986 - December 1994  
 Of Counsel (pending judicial appointment): January - May 1995  
 LeBoeuf, Lamb, Greene & MacRae  
 125 West 55th Street  
 New York, New York 10019

As a member of the LeBoeuf Lamb corporate department, I represented telecommunications companies (e.g. Discovery Channel) in corporate, litigation, and administrative agency (regulatory) proceedings.

- (vi) Judge May 1995 - present  
 New York State Family Court (Queens County)  
 89-14 Parsons Boulevard  
 Jamaica, New York 11432

As a Family Court judge, I hear cases involving: (i) child abuse and neglect; (ii) domestic violence; (iii) juvenile crime; (iv) PINS (persons in need of supervision) proceedings; (v) child custody and visitation; (vi) paternity, and (vii) adoption.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Although initially trained in litigation, my practice prior to becoming a judge consisted, predominantly, of representation of corporate telecommunications clients in commercial transactions and regulatory (administrative agency) matters. I was, however, able to maintain an active involvement in corporate litigation throughout my career, regularly working with litigation partners and associates and/or outside counsel to help devise litigation strategy and draft and review legal briefs.

Litigation (Davis Polk) 1970-1974 -- I participated in diverse complex litigation matters, including antitrust, securities laws, contractual disputes, mergers and acquisitions, predominantly in Federal Court and on behalf of corporate clients. I gained criminal law experience representing defendants in Manhattan Criminal Court as part of Davis Polk's *pro bono* program.

Corporate work (Warner Cable) 1978-1986 -- I was responsible for all legal matters of Warner Cable Corporation (a division of Warner Communications, Inc. now Time Warner, Inc.), including transactions (acquisitions and dispositions), contracts, licensing, franchise negotiation, litigation, and administrative agency (regulatory) proceedings. Among other things, I supervised the public offering in 1984 of the stock of MTV Networks, Inc., which was then a sister company of Warner Cable.

Corporate work (LeBoeuf Lamb) 1986-1995 -- As a partner at LeBoeuf Lamb, I represented telecommunications companies in corporate transactions, litigation, and administrative agency proceedings.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

A representative transaction that I worked on as a partner at LeBoeuf Lamb was the "IDS/Jones Growth Partners" public offering of cable television system investment interests, which was registered with the United States Securities and Exchange Commission in June 1987.

Representative clients while I was a corporate/communications partner at LeBoeuf Lamb, included Discovery Communications, Time Warner Cable Corporation, the American Express Company, NBC Cable, Telecommunications, Inc., Scholastic, Inc., Comsat General Corporation, the Citizens Committee for New York City, Inc., Equitable Life Assurance Company, and IDS Cable Corporation.

Representative clients while I was a litigation associate at Davis Polk included Chubb Insurance Company, Drexel & Co., University Computing Company, J.P. Morgan & Co., General Mills, Allis-Chalmers, and Carrier Corporation.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

1970-1974	Regularly
1978-1986	Occasionally
1986-1995	Occasionally

2. What percentage of these appearances was in:

- (a) federal courts.
- (b) state courts of record.
- (c) other courts.

1970-1974	85% Federal courts; 15% state courts
1978-1986	65% Federal courts; 35% state courts
1986-1995	75% Federal courts; 25% state courts

3. What percentage of your litigation was:

- (a) civil.
- (b) criminal.

1970-1974	100% civil except for 6 month <i>pro bono</i> project which was 100% criminal
1978-1986	100% civil
1986-1995	100% civil

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

1970-1974 c. 8 at Davis Polk; associate counsel  
 (1972-1973) c. 12 *pro bono* criminal defense; sole counsel  
 1978-1986 c. 6 at Warner Cable; General (in-house) Counsel  
 1986-1995 c. 6 at LeBoeuf Lamb; associate counsel

5. What percentage of these trials was:

(a) jury;

2 cases in 1972; 1 case in 1986

(b) non-jury.

100% except for 3 cases

18. Litigation: Describe the ten most significant matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;  
 (b) the name of the court and the name of the judge or judges before whom the case was litigated; and  
 (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- 1) Nassau County Association of Insurance Agents, et al. v. Aetna Casualty & Surety Company, et al., 345 F. Supp. 645 (S.D.N.Y. 1972)

This was a private antitrust class action alleging violation of the United States antitrust laws (Clayton, Sherman and the McCarran-Ferguson Acts) by defendant insurance companies. Plaintiff associations of independent insurance agents sought treble damages for certain practices of defendants, including alleged cancellation of agency agreements for failure to maintain "balance" among types of insurance sold. Defendants were successful in arguing that plaintiff associations were not persons "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" -- and the matter was dismissed.

As the senior litigation associate on the matter, I worked closely with Davis Polk & Wardwell partner Henry L. King on behalf of our client, Chubb Insurance Company. I was an active participant in all phases of this matter, including conferences before the Hon. Milton Pollock and preparation of Defendants' Rule 12(b)(6) motion to dismiss. Because Davis Polk was also selected as lead counsel for the multiple insurance company defendants, I gained experience in coordinating complex multi-party litigation as well as substantive skills relating to the antitrust laws and class action suits. I had the opportunity to interact with the many co-counsel, including Taylor R. Briggs, who would later in my career become my partner at LeBoeuf Lamb Greene & MacRae.

Frederick Fogelson, Siben & Siben, 90 East Main Street, Bay Shore, NY 11706; Tel: (516) 665-3400, for Plaintiffs.

Henry L. King and myself, Davis Polk & Wardwell, 450 Lexington Avenue, New York, NY 10017; Tel: (212) 450-4000, for Defendant Chubb Insurance Company.

2) Lanza, et al. v. Drexel & Co., et al., 479 F.2d 1277 (2nd Cir. *in banc* 1973)

This was a securities laws case for compensatory and punitive damages brought by certain individual owners of the common stock of BarChris Construction Company. Plaintiffs alleged that material information about BarChris was not supplied to them by Defendants; BarChris filed for bankruptcy within one year after Plaintiffs acquired their shares. Ralph M. Carson, the senior litigation partner at Davis Polk & Wardwell, along with litigation associate Wallace Gossett and myself, represented BarChris "outside" directors Bertram D. Coleman and John Ames Ballard as well as Drexel & Co.

Southern District Court Judge Marvin E. Frankel dismissed plaintiffs' complaint as against Davis Polk & Wardwell clients Bertram D. Coleman, John Ames Ballard and Drexel & Co., while holding certain other defendants liable in October of 1970. On September 16, 1971 a panel composed of Circuit Court of Appeals Judges Moore, Smith and Hays heard oral argument on appeals from Judge Frankel's decision. Before any opinion was filed disposing of the appeals, the Second Circuit, *sua sponte*, set the appeal down for reargument before all judges then in active service (as well as Judges Moore and Smith) on the issue of "the effect of SEC Rule 10b-5 upon the duty of an independent director of a corporation which is about to issue securities in connection with an acquisition."

I researched and drafted sections of the Davis Polk brief dealing with the factual background of the case and the legislative history of the Securities



Acts of 1933 and 1934 -- in relation to Mr. Coleman's potential 10b-5 liability. These sections were central to the Court's decision to affirm the exoneration of Mr. Coleman. The Court found that Section 10(b) of the 1934 Act did not impose a duty to convey on directors.

Franklin S. Bonem, 1585 Broadway, New York, New York 10036; Tel: (212) 969-3405.

For Plaintiffs-Appellants Frank Lanza, Jr., et al.

Ralph M. Carson, Esq. (deceased), Wallace Gossett, Esq. and myself, Davis Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017; Tel: (212) 450-4000. Mr. Gossett's current telephone number is (718) 694-3860.

For Defendants-Appellees Bertram D. Coleman, et al.

3) Heyman v. Kline, 444 F.2d 65 (2d Cir. 1971)

This case involved an appeal from a civil contempt judgment entered by then District Court Judge William H. Timbers against Davis Polk & Wardwell client Mrs. Jeanne Kline. Mrs. Kline, a resident of Florida who was never served and who never appeared in the District of Connecticut proceeding brought against her husband, Robert S. Kline, was found by Judge Timbers to be in contempt for refusing to deed over to plaintiff certain real property located in Florida. Mr. Kline did appear in the Connecticut District Court and did execute a deed to his interest in the land in question as the Court had directed. He also advised the Court that his wife refused to do likewise.

Davis Polk & Wardwell partner S. Hazard Gillespie represented Mrs. Kline; I was the associate on the matter. I researched the legal issues and helped draft the brief on appeal.

The Court of Appeals adopted Davis Polk's arguments and exonerated Mrs. Kline. The Court found that by holding that defendant Mr. Kline was not in contempt -- *i.e.*, because he executed a deed as the Court had directed -- the District Court in effect held that Mr. Kline could not release Mrs. Kline's interest, *i.e.*, that Mrs. Kline was not a mere nominee.

Hon. Jon O. Newman for Plaintiff-Appellee Annette Heyman, U.S. Court of Appeals (2d Cir.), 40 Foley Square, New York, NY 10007; Tel: (212) 857-8595.

S. Hazard Gillespie and myself, Davis Polk & Wardwell, 450 Lexington Avenue, New York, NY 10017; Tel: (212) 450-4000.

- 4) **Warner Amex Cable Communications Inc. v. American Broadcasting Companies, Inc. & National Collegiate Athletic Association, et al., 499 F. Supp. 537 (S.D. Ohio 1980)**

This was a motion by Warner Amex Cable Communications for a preliminary injunction -- in the context of an antitrust complaint -- to restrain ABC and the NCAA from preventing Warner Amex' Columbus, Ohio cable television system (QUBE) from telecasting live broadcasts of Ohio State University football games. The motion was unsuccessful.

As (in-house) General Counsel to Warner Amex, I assisted outside counsel in analysing the factual background for the litigation. I also negotiated the cable television rights to five OSU games after the injunction was denied.

Bruce G. Lynn, Bricker & Eckler, 100 South 3rd Street, Columbus, Ohio 43215; tel: (614) 227-2300, for defendant NCAA; also Swanson, Midgley, Gangwere, Thurlo & Clarke, 922 Walnut, Kansas City, Missouri 64106; tel: (816) 842-6100.

William E. Knepper, Arter & Hadden, 10 West Broad Street, Columbus, Ohio 43215; tel: (614) 221-3155, for ABC.

Robert B. McAlister, Baker & Hostetler, Capital Square, 65 East State Street, Columbus, OH 43215; tel: (614) 462-2692; also Stuart Robinowitz, Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019-6064; tel: (212) 373-3000, for Warner Amex Cable Communications.

- 5) **In Re: Arbitration between Warner Cable Corp. & the City of Cincinnati, Ohio, Index No. 52144/0073-84**

On the eve of certain litigation brought by the City of Cincinnati over cable rate increases announced by Warner Cable Corporation, I helped structure -- together with then Cincinnati City Solicitor Richard A. Castellini -- a binding arbitration procedure to resolve the dispute. The City and Warner Cable agreed to employ "last offer" arbitration conducted by a panel of three arbitrators and to determine appropriate cable rates for a period of two years.

As (in-house) General Counsel, I presented the case (both oral argument and supporting brief) for Warner Cable. Cincinnati outside counsel Nicholas P. Miller presented the case for Cincinnati. Eric J. Schmertz served as the deciding (neutral) arbitration panel chairman.

The decision was favorable to Warner Cable, *i.e.*, Warner Cable's last offer was accepted. Under the procedures established, the arbitrators had to determine whether Warner Cable's proposed rates or those proposed by the

City were "reasonable"; the arbitration panel did not undertake to establish its own rates.

This matter was described in an American Arbitration Association journal (Vol. 4 No. 4, April 1996) as "the first time in the United States that binding arbitration has been used to settle the volatile issue of who's in charge of setting local television rates."

Eric J. Schmertz, Rivkin, Rodler & Kremer, 275 Madison Avenue, New York, NY 10016; tel: (212) 455-9555.

Richard A. Castellini is currently Executive Director for a non-profit organization called People Working Cooperatively, 7107 Shona Drive, Cincinnati, OH 45237; tel: (513) 351-7921.

Nicholas P. Miller, Miller & Van Eaton, 1155 Connecticut Avenue N.W., Suite 1000, Washington, D.C. 20036; tel: (202) 785-0600.

- 6) Video International Productions, Inc. v. Warner Amex Cable Communications, Inc., et al., 858 F.2d 1075 (5th Cir. 1988), cert. denied, 491 U.S. 906 (1989)

By denying the petition of Video International Productions, Inc. ("VIP") for a writ of certiorari, the United States Supreme Court left standing the decision of the United States Court of Appeals for the Fifth Circuit which, in turn, affirmed the decision of District Court Judge Sidney A. Fitzwater to exonerate Warner Amex Cable Communications, Inc. from all liability. Plaintiff's claim was that Warner Amex, the Dallas cable television franchisee, and the City of Dallas, the franchising authority, had conspired unlawfully to drive VIP, an apartment house microwave provider of "cable" service, out of business in violation of antitrust, civil rights, and tort laws.

I had been (in-house) General Counsel to Warner Amex when the acts complained about occurred. By the time the litigation was commenced, I was a member of LeBoeuf Lamb Greene & MacRae and became actively involved in Warner Amex' defense. Among other things, I helped prepare defense strategy and draft the briefs, including the Warner Amex brief in opposition to VIP's petition for a writ of certiorari.

LeBoeuf Lamb (together with local counsel) succeeded in obtaining in the District Court, a judgment notwithstanding the jury verdict against both Warner Amex and the City of Dallas -- even though the City defendant's liability was affirmed. Warner Amex' principal defense was based upon its First Amendment right to petition government for relief.

Brian E. Butler, Stafford, Rosenbaum, Rieser & Hansen, for Plaintiff VIP, 3 South Pinckney Street, Madison, Wisconsin 53701; tel: (608) 256-0226.

Grant Lewis (deceased), Charles C. Platt, and myself, LeBoeuf Lamb Greene & MacRae, for Defendant Warner Amex Cable, 125 West 55th Street, New York, New York 10019; tel: (212) 424-8000.

7) **Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), cert. denied, 111 S.Ct. 2839 (Mem) 1991**

By denying Warner Cable Communications, Inc.'s petition for a writ of certiorari, the Supreme Court left standing a decision of the United States Court of Appeals for the Eleventh Circuit which, in turn, had upheld District Court Judge C. Roger Vinson's ruling in favor of the City of Niceville, Florida. The litigation represented Warner Cable's challenge to the decision of the City of Niceville, Florida to commence financing arrangements for the purpose of constructing a municipal cable system which would compete with the Warner Cable system in Niceville.

Warner Cable's challenge raised First Amendment and 1984 Cable Act claims, *i.e.*, Warner argued that the City of Niceville would be able to offer lower prices to cable subscribers which, in turn, would create a press owned and controlled by the government, and silence the only private cable operator. The District Court rejected Warner Cable's challenge reasoning that Warner had no protected First Amendment interest in retaining its Niceville market undiminished by competition. I assisted my partners at LeBoeuf Lamb in developing the litigation strategy and preparing the briefs.

Gillis E. Powell, Sr., Powell, Powell & Powell, P.O. Box 277, Crestview, FL 32539; tel: (850) 682-2757, for the City of Niceville.

Grant Lewis (deceased) and Charles C. Platt, LeBoeuf Lamb Greene & MacRae, 125 West 55th Street, New York, NY 10019; tel: (212) 424-8000, for Warner Cable Communications, Inc.

Ralph A. Peterson, Beggs & Lane, 3 West Garden Street, Pensacola, FL 32501; tel: (850) 432-2451.

8) **In Re: Tax Appeal of Dutch Reformed Church (February 5, 1992)**

This matter involved an appeal from an adverse ruling of the New York City Tax Commission regarding the tax exempt status of the Citizens Committee for New York City, Inc. ("Citizens Committee"). The Citizens Committee had been founded in 1975 by United States Senator Jacob K. Javits and other leading New Yorkers to develop and implement "grass roots" programs -- such as neighborhood clean-up, parks beautification, and job training for



teenagers -- during New York City's fiscal crisis. At the time the Citizens Committee was founded, I was Senator Javits' Executive Assistant and, as such, very much involved in its formation and activities.

Shortly after I became a partner at LeBoeuf Lamb Greene & MacRae in 1986, LeBoeuf Lamb undertook representation of the Citizens Committee on a *pro bono* basis -- and I was the partner in charge. The Citizens Committee had by 1986 become an important and well regarded civic organization in New York City; its not-for-profit status was well established. Thus, it came as a surprise when the Committee received a notification from the City that its tax exemption was in jeopardy.

I worked with LeBoeuf Lamb associate Antjie Buelte to prepare a brief demonstrating the Citizens Committee's good works and entitlement to tax exemption. This position was sustained upon appeal.

Counsel's Office, Tax Commission, The City of New York, 936 Municipal Building, 1 Centre Street, New York, NY 10007; tel: (212) 669-4410.

Antjie A. Buelte, Co-Counsel, 675 Third Avenue, 23rd Floor, New York, NY 10017; tel: (212) 490-2222.

9) **Investigation of the Level of Regulation of Cable Television, 05-TI-108, Wisconsin Public Service Commission (1987)**

This was an administrative proceeding before the Public Service Commission of the State of Wisconsin ("PSC"). The Commission was seeking comments regarding the circumstances under which alternative telecommunications providers -- such as cable television operators -- might be allowed to enter potentially lucrative new service markets, *i.e.*, "private line and toll access communication services." LeBoeuf Lamb Greene & MacRae participated in these proceedings on behalf of Warner Cable Communications Inc. which operates the cable system in the City of Milwaukee and its surrounding suburbs. Warner Cable was interested in participating in the new service markets fully and, initially at least, free of regulatory constraints.

Paula Silberthau, an associate at LeBoeuf Lamb, and I prepared and submitted briefs to, and appeared before, the PSC in February of 1987, urging ease of entry for alternative telecommunications providers, but suggesting that the PSC retain regulatory authority to monitor marketplace developments. Specifically, Warner Cable proposed that if the market share of new entrants were to increase significantly, the Commission might revisit the question of whether further regulatory oversight was desirable. Until such time, Warner contended, regulation beyond monitoring was premature.



Ann K. Pfeifer (retired), Hearing Examiner, Wisconsin Public Service Commission, 610 North Whitney Way, P.O. Box 7854, Madison, Wisconsin 53707; tel: (608) 266-1261.

Paula Silberthau and myself, LeBoeuf, Lamb, Greene & MacRae, 125 West 55th Street, New York, NY 10019; tel: (212) 424-8000, for Warner Cable Communications, Inc.

Ms. Silberthau is currently at the Federal Communications Commission, Office of General Counsel, 1919 M. Street, N.W., Washington, D.C. 20554; tel: (202) 418-1720.

10) **Mallenbaum v. Adelphia Communications Corporation, 1994 WL 724981 (E.D. PA), aff'd 1996 U.S. App. Lexis 711 (3d Cir.)**

Plaintiff cable television subscribers, brought this class action suit against Adelphia Communications Corporation alleging that defendant charges subscribers for additional cable outlets a fee in excess of that permitted by the Cable Television Consumer Protection and Competition Act of 1992. The litigation was brought in the United States District Court, Eastern District of Pennsylvania before the Hon. Marjorie Rendell.

LeBoeuf Lamb was retained by Adelphia Cable as principal trial counsel. My litigation partner Geoffrey D. C. Best was primarily responsible for drafting the briefs and for oral argument. Mine was a more limited role of advising Mr. Best about the cable industry and the background and thrust of the 1992 Cable Act and of reviewing and commenting upon briefs. Adelphia (in-house) counsel Randall D. Fisher was also actively involved in all phases of this proceeding.

After pleadings had been filed, Adelphia Cable moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) and 56, arguing that plaintiffs had no right (standing) to bring the action. Judge Rendell agreed. She ruled that the regulations promulgated under the 1992 Cable Act "are rules to be enforced by local [franchising] authorities, they are not directives or orders requiring specific action by a specific party and, therefore, . . . are not 'orders' enforceable . . . against . . . Adelphia." There was no authority, Judge Rendell determined, for the proposition that Congress intended to confer an implied right upon cable subscribers to enforce provisions of the legislation or FCC regulations enacted pursuant to it. Judge Rendell's decision was affirmed by the Third Circuit Court of Appeals on January 22, 1996.

David B. Zlotnick, Zlotnick & Thomas, 1039 North Sixth Avenue, Tucson, AZ 85705; tel: (602) 798-3255 for Plaintiffs.

Geoffrey D. C. Best (retired), LeBoeuf, Lamb, Greene & MacRae, 125 West 55th Street, New York, NY 10019; tel: (212) 424-8000, for Defendant.

Randall D. Fisher, Adelphia Cable, 5 West Third Street, Coudersport, PA; Tel: (814) 274-9830.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)
- (i) I have helped to found and develop the Queens County Family Court community service program for juveniles charged with crimes. The objective of the program is to add a significant community service component to non-incarceration sentences. The program has been quite successful and is about to be replicated in the other boroughs of New York City.
  - (ii) As General Counsel to Warner Cable Corp., I helped avoid protracted litigation with the City of Cincinnati (over cable rates) by structuring an alternate dispute resolution mechanism involving binding ("last offer") arbitration.

The Cincinnati Post described this arbitration (which lasted several months) as "the first time in the United States that binding arbitration has been used to settle the volatile issue of who is in charge of setting local television rates." (Quotation is from Alternate Dispute Resolution article, dated April 1986).

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
  - Three self-directed IRA accounts (Fidelity, Vanguard and Merrill Lynch) invested in common stocks reflected in attached financial disclosure report ("AO-10 Report").
  - Deferred compensation from current employment invested in Janus and T. Rowe Price mutual funds reflected in AO-10 Report.
  - Possible future taxable gain(s) from limited partnerships reflected in AO-10 Report.
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I would fully disclose potential conflict situations. I would also seek counsels' input on the record, *i.e.* as to whether they perceive a conflict. Beyond that, I would recuse myself to avoid the appearance of unfairness and to comply with all ethical rules and the guidelines of the Code of Judicial Conduct. Matters involving past employment or companies in which I may have a stock ownership interest may give rise to potential conflicts.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Yes. I have been approved to teach (as adjunct professor) an evening course in Family Court issues at New York Law School commencing August 1998.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see attached AO-10 financial disclosure report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. I served, on a voluntary basis, as issues advisory committee co-chairman during the 1993 New York City mayoral campaign of Rudolph S. Giuliani. I also served as a member of (then) mayor-elect Giuliani's transition team (November - December 1993).

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
  - I have been actively involved in *pro bono* work throughout my career, including: (i) representation of indigent defendants in criminal proceedings full-time for approximately five months (1972-1973); (ii) Board member and as outside counsel for the (non-profit) Citizen's Committee for New York City, Inc. which supports block associations and self-help initiatives throughout New York City (1978-1995); and (iii) Board member and volunteer of the (non-profit) Center for Attitudinal Healing which helps children with life threatening and terminal illnesses (January - June 1992).
  - As part of my MSW studies at Fordham University, I worked extensively with homeless men and women at the St. Agnes Multi-Service Center in Manhattan throughout the 1994-95 academic year. My role was both clinical (working with individuals and groups) and administrative; I also enlisted LeBoeuf Lamb to serve as *pro bono* counsel to the Center.
  - I am a member of the New York State Permanent Commission on Justice for Children. The Commission's aim is to improve the well-being of children involved in the judicial system.
  - I am currently working with the (non-profit) Greater Jamaica Development Corporation to implement a community service program for juvenile offenders.
2. The American Bar Association's Commentary to Its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?
 

No.
3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please



describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. I submitted a "Candidate's Questionnaire" to the Committee on the Judiciary for Senator Daniel Patrick Moynihan on or about March 11, 1997. I appeared before Senator Moynihan's Committee on or about April 1, 1997. I was interviewed by Senator Moynihan on or about March 10, 1998. I was also interviewed by the U.S. Department of Justice, on or about April 7, 1998.

I submitted a "Personal Data Questionnaire" to the American Bar Association Committee on Federal Judiciary on or about April 11, 1998. I was interviewed by a Committee representative on May 6, 1998 and notified by letter dated May 22, 1998 that I was voted "qualified".

I submitted a "Uniform Judicial Questionnaire" to the Association of the Bar of the City of New York Committee on the Judiciary on or about April 16, 1998. I appeared before the Committee on May 13, 1998 and was notified by letter dated May 14, 1998 that I was voted "approved."

I submitted a "Questionnaire for National Security Positions" (FS-86) to the Federal Bureau of Investigations on or about April 4, 1998 and was interviewed by an FBI representative on April 10, 1998 and May 18, 1998.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

- b. A tendency by the judiciary to impose the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Article III, Section 1 of the Constitution provides, among other things, that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Federal District Courts are Article III courts, having been established by the first Congress (in 1789). Article III, Section 2 delimits the Federal judicial power to "cases" and "controversies" which, among other areas specified, arise "under this Constitution, the laws of the United States, and Treaties..."

The case or controversy prerequisite to Federal court jurisdiction is fundamental. It is a clear limitation on the court's jurisdiction. Indeed, it has been said that no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.

The key jurisdictional premise that informs the analysis of "cases and controversies" is the doctrine of standing. Standing, in turn, is based upon the concept of separation of powers among the legislative, executive and judicial branches of our government.

To establish a case or controversy, within the meaning of Article III, a litigant must demonstrate injury which is neither conjectural nor hypothetical. The litigant must also establish causation and redressability under Article III by showing that the injury fairly can be traced to the challenged action. The litigant must have standing.

Thus, the role of the Federal judge is a limited one. In dealing with the important matters that come before them, Federal judges must act within the Constitutional framework of separation of powers among distinct (checked and balanced) branches of government.

## AFFIDAVIT

I, Richard M. Berman, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

May 27, 1998  
(DATE)

Richard M. Berman  
(NAME)

Helen E. Moss  
(NOTARY)

HELEN E. MOSS  
Notary Public, State of New York  
No. 41-4825264  
Qualified in Queens County  
Commission Expires May 31 1998

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**  
**I. BIOGRAPHICAL INFORMATION (PUBLIC)**

1. **Full name (include any former names used.)**

Donovan Wayne Frank

2. **Address: (List current place of residence and office address(es).)**

Residence  
 Virginia, MN

Office  
 St. Louis County Courthouse  
 300 South Fifth Avenue  
 Virginia, MN 55792

3. **Date and place of birth.**

June 24, 1951, at Rochester, Minnesota

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Kathryn Anne Jacobson, Registered Nurse, Virginia Regional Medical Center, 901 Ninth Street North, Virginia, MN 55792

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Luther College, Decorah, Iowa (B.A. Magna Cum Laude, 1973); dates attended: 1969-1973. However, I studied abroad at the University of Durham, England from 1971-1972.

University of Durham, England, Institute of European Studies (1971-1972; studied abroad for one year in criminal law and political theory);

Hamline University School of Law (J.D. Magna Cum Laude, May of 1977). Graduated third out of a class of one hundred twenty-nine (3/129); dates attended: 1974-1977.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

1973-1974 Nurse's Aide/Orderly, Riverville Nursing Home, Minneapolis, MN;

- 1974-1977    **Research Assistant for Professor Robert McFarland, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104, and for Professor William Keppel, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.**
- 1977-1980    **St. Louis County Child Abuse Team;**
- 1978-1980    **Mesabi Family Center Advisory Board;**
- 1978-1980    **East Range Developmental Achievement Center, Board of Directors;**
- 1983-1985    **Arrowhead Center Incorporated, Board of Directors;**
- 1984-1986    **Advisory Board, Mesabi Community College, Virginia, Minnesota and Vermilion Community College, Ely, Minnesota, RE: Law Enforcement Training Curriculum**
- 1977-1985    **Assistant St. Louis County Attorney (equivalent of District Attorney in Minnesota)  
St. Louis County Courthouse  
300 South Fifth Avenue  
Virginia, MN 55792**
- 1985-present    **Judge of the District Court, Sixth Judicial District, State of Minnesota, St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, Minnesota 55792.**

7.    **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8.    **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

#### **UNDERGRADUATE HONORS AND AWARDS**

Recipient of partial scholarship for the Institute of European Studies for one year;

Appointed to Teacher's Assistant Program at Luther College in 1972-1973;

Recipient of Luther College Political Science Literary Award;

Recipient of Luther College Regent's Scholarship (1972-1973).



### **LAW SCHOOL HONORS AND AWARDS**

Recipient of Legal Research Scholarship (awarded to top ten individuals in the class);

Recipient of American Jurisprudence Award in Evidence;

Appointed to Research Assistant Program;

Elected to Silver Gavel's Society (Hamline University School of Law's current equivalent is Order of the Coif);

Research Assistant for Professor Douglas D. McFarland, Hamline University School of Law, specializing in the area of evidence (1975-1976);

Research Assistant for Professor Douglas D. McFarland and Professor William Keppel, consisting of research and writing for their four-volume treatise entitled, **McFarland and Keppel Minnesota Civil Practice 1979** (1975-1977).

### **HONORS AND AWARDS SINCE BECOMING A TRIAL JUDGE**

Minnesota Trial Judge of the Year, Conference of Chief Judges (1996);

Range Women's Advocates Annual Recognition Award, in recognition of contributions toward ending domestic violence (1995);

Alumni Association Distinguished Achievement Award, Hamline University School of Law (1986)

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association, Criminal Justice Section, 1980 - 1984, including a short appointment to the Ethical Considerations Committee;

Minnesota State Bar Association, Criminal Law Section, 1977 - 1985;

National District Attorneys Association, 1977 - 1985;

Minnesota District Judges Association, 1985 to present;

Range Bar Association (1985 to present);

**Minnesota State Bar Association Judicial Elections Task Force (1997);**

**Minnesota State Bar Association Family Law Section;**

**Minnesota State Bar Association Criminal Law Section;  
Chairperson, Sixth District Jury Management Task Force.**

**During my tenure as Chief Judge of the Sixth Judicial District, I established by Administrative Order the Sixth Judicial District Jury Management Task Force, which I chaired;**

**Minnesota Supreme Court Advisory Committee on Open Juvenile Protection Hearings (1998 to present);**

**Conference of Chief Judges Community Outreach Planning Committee (1997 to present),**

**Chairperson, Sixth Judicial District Community Outreach Committee (1997 to present);**

**Chairperson, East Range Council on Family Violence, established to eliminate family violence in our communities and to improve the response to victims (1995 to present);  
Chairperson, Systems Subcommittee (1997 to present);**

**Minnesota Supreme Court Implementation Committee on Multi-Cultural Diversity and Racial Fairness in the Courts (1994 to present);**

**Minnesota Supreme Court Criminal Rules Advisory Committee (1986 to present);**

**Minnesota District Judges Association Committee on Criminal Jury Instruction Guides (1994-1997);**

**Chairperson of the Conference of Chief Judges Judicial Resource Management Committee, one of two committees at the Conference of Chief Judges (1993-1996);**

**Minnesota Supreme Court Racial Bias Task Force (1991-1993);**

**Member, Minnesota Supreme Court Criminal Court Study Commission (1991-1992);**

**Minnesota Attorney General's Task Force on Prevention of Sexual Violence Against Women (1988-1989);**

**Judicial Faculty Member, Minnesota Supreme Court Continuing Education for Judges, including the Minnesota Judicial College.**

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies.

I belong to no such organizations.

Please list all other organizations to which you belong.

Virginia Rotary Club (1996-present);

Advisory Board, Northern St. Louis County Guardian ad Litem Program (1994-1998);

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State of Minnesota, October of 1977;

United States District Court for the District of Minnesota, April of 1978;

United States Court of Appeals for the Eighth Circuit, July of 1981.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

- 1) Administrative Order and Memorandum

In Re: Sixth District Jury Selection and Usage Plan

(In my capacity as Chief Judge of the Sixth Judicial District, because of a decision made by one of the trial judges in our District on October 1, 1993, it was necessary for me to evaluate our jury management plan, including the method used in the selection of jurors in St. Louis County, as the Order and Memorandum illustrate.)

- 2) Minnesota Trial Lawyers Association 1998 Mid-winter Meeting

Examples of the best and worst forms of communication with juries.

(This represents a short presentation that I made to the Minnesota Trial Lawyers Association in February of 1998 at their request.)

### 3) Components of Effective Caseload Management Summary

(As chairperson of the Judicial Resource Management Committee for the Conference of Chief Judges, this document was drafted and implemented in each of the ten judicial districts in the state of Minnesota.)

#### 4) Interacting With The Judge (This was a short presentation by me to a group of new civil litigators sponsored by the Minnesota Institute of Legal Education).

#### 5) Pretrial Release Protocols

Coauthored with Judge Gordon Shumaker

(This protocol and bench checklist was approved by the Conference of Chief Judges and implemented statewide.)

#### 6) Attorney General's Task Force on the Prevention of Sexual Violence Against Women, Final Report, February 15, 1989. (I was a member of this task force.)

#### 7) Minnesota Supreme Court, Criminal Courts Study Commission, Final Report, December 28, 1990. (I was a member of this commission.)

#### 8) Minnesota Supreme Court, Task Force On Closed Circuit Television, Final Report, December, 1991. (I was a member of this task force.)

#### 9) Minnesota Supreme Court Task Force on Racial Bias In The Judicial System, Final Report, May 1993. (I was a member of this task force.)

#### 10) Minnesota State Bar Association, Judicial Elections Task Force Report & Recommendations. (I was a member of this task force.)

#### 11) Minnesota Judicial College Sentencing Guidelines Presentation

(See Appendix A for copies of each writing.)

The speeches do not address constitutional law and do not, in any significant way, address legal policy issues, but I have included them. (A copy of each speech is attached as Appendix D.)

- 1) Fairness in the Courts and Equal Access to Justice
- 2) Are We Tough On Crime? The Revolving Door Syndrome
- 3) Article in Range Bar Association Newsletter, February 1998
- 4) Memorial Day Speech
- 5) Violence and Children

13. **Health:** What is the present state of your health?

Excellent

List the date of your last physical examination.

April 1998

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Currently, a Judge of the District Court, Sixth Judicial District, State of Minnesota for 13 years. I was appointed on February 1, 1985, by the Governor of Minnesota. We have a unified court in Minnesota, which means that as a district court judge you try all types of cases, including major felony, major civil, dissolution (divorce) cases, minor crimes and offenses, conciliation court, juvenile court -- including child abuse and neglect proceedings, and involuntary termination of parental rights -- probate court, and all controversies by the citizens of the state of Minnesota.

I was elected Assistant Chief Judge of the Sixth Judicial District by a unanimous vote twice from 1988 to 1991. In 1991, I was elected Chief Judge of the Sixth Judicial District and re-elected twice unanimously, serving a total period of five years through 1996 of the four-county, sixteen-judge district. During that time, I was not only the chief judge with supervisory authority and assignment authority over the entire district, but I carried a full caseload. In my capacity as chief judge, I was also elected Chairperson of the Conference of Chief Judges Judicial Resource Management Committee, which was one of two committees of the Conference of Chief Judges (1993-1996) that was responsible for directing state courts in Minnesota.

As the Chief Judge of the Sixth Judicial District for five years, which is the statutory maximum in Minnesota that a judge can serve as chief judge, I was also assigned conflict cases around the state of Minnesota by the Minnesota Supreme Court, as it was and is the Minnesota Supreme Court's policy to assign chief judges to cases in other districts from time to time. The cases I was assigned were all civil cases against court personnel, retired judges, etc.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.



See Appendix B, including Appendixes B-1 through B-11, for Opinions

1. **State v. Justin Bauer**, 471 N.W. 2d 363 (Minn. App. 1991). Court File No. 88-1167

This was a homicide prosecution involving not only the murder of a young teenage girl but one of the first prosecutions in Minnesota under the fetal homicide law because she was pregnant. Factually, it was a double suicide pact that resulted in the death of the fetus and the mother. Enclosed are three separate Orders which address evidentiary issues and trial issues that were before the Court, all of which were appealed and all of which were affirmed. The case involved an attack on the constitutionality of the fetal homicide law. The Defendant was convicted. The Appellate Court's opinion is attached as Appendix B-1.

The prosecuting attorney was Mr. James B. Florey, Assistant St. Louis County Attorney, St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, MN 55792 (218) 749-7101. The defense attorneys were Mr. J. Carver Richards, III, Attorney at Law, 1000 Lincoln Building, Virginia, MN 55792, (218) 749-1962, and Mr. Gordon Pineo, Attorney at Law, 230 First Street South, Suite 106, Virginia, MN 55792, (218) 741-0475.

2. **Dragisich v. Mesabi Daily News**, Court File No. C3-91-102249

Factually, this was a defamation action filed by the then city administrator for the city of Virginia against a major regional newspaper, the Mesabi Daily News and their owners. Enclosed is the Order granting summary judgment which was affirmed in an unpublished Court of Appeals' decision. The Order and the unpublished Appellate Court's opinion are attached as Appendix B-2.

The Plaintiff's attorney was Mr. Christopher J. Harristhal, Attorney at Law, 1500 Norwest Center, 7900 Xerxes Avenue South, Bloomington, MN 55431, (612) 835-3800. The attorney for the Defendant was Mr. Marcus M. Baukol, 4700 Wilshire Boulevard, Los Angeles, CA 90010 (no phone listing available).

3. **Hafdahl v. Toyota Motors Distributors, Inc., a California Corporation**, Court File No. 69-C7-94-100549

This case, which is still pending, is one of two such class actions in the United States. I have the Minnesota case, and the other is in the state of California. As the Order will indicate, even though I changed venue of the case to Minneapolis, I still remain on the case. This case, other than being an unusual case to be in state court, includes an analysis of state and federal consumer protection law and of the UCC. It also includes analysis and application of federal case law. The Order and Memorandum enclosed reflect my decision to deny summary judgment. The Discovery Order in this matter is part of the court's file but was not included in the appendix. The Discovery Order is unusual in its complexity for state court but is not unusual for federal court. The Orders are attached as Appendix B-3.

The attorneys for the Plaintiffs are Mr. Phillip A. Pfaffly, Robins, Kaplan, Miller & Ciresi, 800 LaSalle Avenue #2800, Minneapolis, MN 55402-2015, (612) 349-8500; Mr. Thomas T. Anderson, Attorney at Law, 45 - 926 Oasis Street, Indio, CA, (619) 347-3364; and Mr. Keiron Quinn, Quinn, Ward & Kershaw, 40 West Chesapeake Avenue, Suite 408, Baltimore, MD 21204, (410) 825-0066. The Defendant is represented by Mr. John French, Faegre & Benson, 90 South Seventh Street #2200, Minneapolis, MN 55402-3901, (612) 336-3000; and Ms. Elizabeth Grimes, Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071-3197, (213) 229-7000.

**4. State v. Hannuksela, 452 N.W. 2d 668 (Minn. 1990). Court File No. 88-508**

This was a first-degree, premeditated murder case two weeks in length, including jury selection. This case represented a case of first impression in Minnesota, holding that the marital communications privilege does not include observations by one spouse of another. That was my ruling at the time of trial. The Order is enclosed, denying a motion in limine based upon the marital communications privilege. The Minnesota Supreme Court affirmed my decision. My Order and the Minnesota Supreme Court's opinion are attached as Appendix B-4.

The prosecuting attorney was Mr. James B. Florey, Assistant St. Louis County Attorney, St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, MN 55792, (218) 749-7101. Counsel for the Defendant was Assistant District Public Defender, Gary J. Pagliaccetti, now Judge Gary J. Pagliaccetti, St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, MN 55792, (218) 749-7148.

**5. Iron Range Resources and Rehabilitation Board v. First National Bank of Chisholm, Court File No. C0-96-300757**

This is an example of a civil court trial where both parties waived a jury. The facts of the case involved a local political subdivision filing an action against a local bank. The case involved in excess of 300 exhibits documenting the financial transactions which was the focus of the law suit. The case was not appealed. My Order and Memorandum are attached as Appendix B-5.

The attorney for the Plaintiff was Ms. Janette K. Brimmer, Assistant Attorney General, 445 Minnesota Street #1100, St. Paul, MN 55101, (612) 282-5700. The attorney for the Defendant was Mr. John L. Devney, Briggs & Morgan, 332 Minnesota Street #2200, St. Paul, MN 55101, (612) 223-6459.

**6. Keith v. Keith, 429 N.W. 2d 276 (Minn. App. 1988). Court File No. F3-86-2069**

This case was factually and legally significant. The mother filed a motion to modify the shared physical custody that she had less than three years earlier stipulated to at the time she was

moving to the state of Florida from the state of Minnesota. The case involved a fully contested custody trial based upon the motion to change physical custody brought by the mother. Enclosed are two Orders, the second of which followed the court trial on the issue of the change in physical custody of the minor child. The decision was affirmed by the Minnesota Court of Appeals and is often cited because of the particular facts of the case involving shared physical custody. The Appellate Court opinion and my Orders and Memorandums are attached as part of Appendix B-6.

The Petitioner was represented by Mr. Robert H. Stephenson, Attorney at Law, 1000 Lincoln Building, Virginia, MN 55792, (218) 749-1962. The Respondent was represented by Mr. Louis J. Cianni, Attorney at Law, P.O. Box 586, Chisholm, MN 55719, (218) 254-3335.

**7. Kezele v. KMG Subway, Inc. Court File No. CS-94-100825**

In this case, the manager of a Subway store filed a civil action involving employment law issues and contract law issues, alleging wrongful termination. I granted the motion of Defendant Subway for summary judgment which resulted in a dismissal of the case against the Plaintiff. The case was never appealed. An agreement was reached by the Plaintiff and the Defendant in the context of my decision. The Order and Memorandum granting summary judgment are attached as Appendix B-7.

The Plaintiff was represented by Mr. John M. Colosimo, Attorney at Law, Law Center Building, 301 Chestnut Street, Virginia, MN 55792, (218) 741-4500. The Defendant was represented by Mr. Frank Vogl, Best & Flanagan, 4000 First Bank Place, 601 Second Avenue South, Minneapolis, MN 55402-4331, (612) 339-7121.

**8. State v. Mendoza and Crowley, Carlton County Court File Nos. Mendoza - K9-95-821 and Crowley - K6-95-822**

In my capacity as Chief Judge, I handled this case because the grounds alleged for dismissal of the grand jury indictments for the first-degree murder charges, in part, involved the conduct of another trial judge in the judicial district. The murder indictments were dismissed based upon a number of procedural irregularities as set forth in the Order and extensive Memorandum. Factually significant was the fact that the prosecution had failed to keep a record of all proceedings before it. Because the indictments were dismissed, the Court did not reach the issue at that time of sufficiency of the evidence. The prosecution, at all times, has had the option to return to the grand jury and reindict the Defendants or charge murder in the second degree which does not require an indictment. The prosecution has not sought a reindictment. My decision was affirmed by the Appellate Court in an unpublished opinion. The prosecution never sought to petition the Supreme Court to review the Appellate Court's decision. My Order and Memorandum as well as the unpublished Appellate Court's opinion are attached as Appendix B-8.

The State was represented by Mr. Marvin Ketola, Carlton County Attorney, 202 Carlton County Courthouse, P.O. Box 300, Carlton, MN 55718-0300, (218) 384-9166, and Mr. Thomas Pertler, Assistant Carlton County Attorney, 202 Carlton County Courthouse, P.O. Box 300,



Carlton, MN 55718-0300, (218) 384-9166. Defendant Mendoza was represented by Mr. Harry Newby, Newby, Lingren, Carlson & Skare, 1219 - 14th Street, P.O. Box 760, Cloquet, MN 55720-0760, (218) 879-3331. Defendant Crowley was represented by Mr. Richard Holmstrom, 306 West Superior Street #508, Duluth, MN 55802, (218) 727-8957.

9. **State v. James Moehlenbrock**, Court File No. K2-94-101382

This represents a significant criminal case because a car dealer was prosecuted for a variety of fraud charges, which by itself is unusual in Minnesota. Enclosed is an Omnibus Hearing Order denying the Defendant's motion to dismiss for lack of probable cause and for duplicative charges, as well as an Order denying a Schwartz hearing, which was a request to interview the 12 jurors after the Defendant was convicted. The case went up on appeal on a variety of issues, and I was affirmed in all respects in an unpublished opinion, which I have enclosed. My Omnibus Hearing Order and Memorandum and Findings of Fact, Conclusions of Law, and Order and Memorandum as well as the Appellate Court's opinion is attached as Appendix B-9.

The State was represented by Mr. James B. Florey, Assistant St. Louis County Attorney, St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, MN 55792, (218) 749-7101. The Defendant was represented by Mr. Steven A. Nelson, Attorney at Law, 210 Fourth Avenue, International Falls, MN 55649-2423, (218) 283-8402, and Mr. Charles L. Hawkins, Attorney at Law, 2890 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, (612) 339-6921.

10. **Nelson v. Murphy Oil**, Court File No. C0-94-101218

This was a major civil case by state court standards. Enclosed are two Orders, the first denying summary judgment. The second Order, including Findings of Fact and Conclusions of Law, followed the partial settlement of the case. The parties had agreed on liability, but were unable to agree on damages. I decided and apportioned damages, and also ordered the Minnesota Petroleum Tank Release Compensation Board to reimburse the three Plaintiffs, pursuant to the Board's rules and procedures. The Board complied in all respects, and neither decision was appealed by any of the parties. My Order and Memorandum and Findings of Fact, Conclusions of Law, and Order are attached as Appendix B-10.

Plaintiff Daniel Nelson was represented by Mr. Grant J. Merritt, Attorney at Law, 941 Hillwind Road Northeast #200, Minneapolis, MN 55432-5964, (612) 789-9000. Plaintiff Michael Nelson was represented by Mr. William D. Harper, Attorney at Law, 6043 Hudson Road #370, Woodbury, MN 55125-1014, (612) 738-8539. Plaintiff Nancy Nelson was represented by Mr. William R. Sieben, Schwebel, Goetz, Sieben & Moskal, 80 South Eighth Street #5120, Minneapolis, MN 55402-2246, (612) 333-8361.

Defendant Murphy Oil, U.S.A. Inc. was represented by Mr. John M. Anderson, Bassford, Lockhart, Truesdell & Briggs, 33 South Sixth Street #3550, Minneapolis, MN 55402-3787, (612) 333-3000. Defendant F.P. Troutwine d/b/a C&B Warehouse Distributing, Inc. was represented

by Mr. Gordon C. Pinco, Attorney at Law, 230 First Street South, Suite 106, Virginia, MN 55792, (218) 741-0475. Intervenor Edwards Oil, Inc. was represented by Mr. Kevin A. Spellacy, Quinlivan, Sherwood, Spellacy & Tarvestad, 400 South First Street #600, P.O. Box 1008, St. Cloud, MN 56302, (320) 251-1414.

**11 Skube v. Independent School District No. 692, Court File No. 88-2184**

This case includes analysis and application of federal law. It is also a case where I granted summary judgment to the Defendants, which resulted in dismissal of the case. The case was never appealed by the Defendants, so my decision was final. See Appendix B-11.

The Plaintiff was represented by Mr. Dennis J. Korman, Attorney at Law, 6 - 11th Street, Cloquet, MN 55720, (218) 879-1990. Defendant Independent School District No. 692 was represented by Mr. Scott C. Neff, Attorney at Law, 1000 Lincoln Building, Virginia, MN 55792, (218) 749-1962. Defendant Union was represented by Mr. William F. Garber, Attorney at Law, 41 Sherburne Avenue, St. Paul, MN 55103, (612) 292-4894.

### **REVERSALS**

I would like to first state that I have not had any case reversed by the Minnesota Supreme Court. Therefore, the cases that I will be discussing here were decisions by 3-judge panels of the 16-member Intermediate Court of Appeals. I will provide some comments and will note when the opinions were published and unpublished.

**1. State v. Gary Lee Graff, 510 N.W.2d 212 (Minn. Ct. App. 1993). Court File No. 69-K8-92-100765**

This was a Criminal Sexual Conduct in the First Degree case involving sexual penetration between the defendant, Gary Lee Graff, and his daughter who was 9 years old at the time of trial and 7 years old during the alleged criminal sexual conduct. This was a felony prosecution. Therefore, under Minnesota law, the Defendant was given standby counsel.

The primary issue in the case was the number of continuances I granted to the Defendant prior to trial, and the fact that on December 1, 1992, over the objection of the Defendant, I ordered that the matter proceed to trial balancing the affects on the 9-year-old victim and prejudice, if any, to the Defendant.

The Defendant was convicted after a two-to-three-day trial. Standby counsel was present at all times. The primary issue on appeal was whether I should have granted another continuance and permitted the Defendant to have a public defender when he had failed to ask for one at any prior court appearance; those four court appearances occurred more than three months prior to trial which commenced on December 1, 1992. The



Intermediate Appellate Court reversed indicating that I should have granted one more continuance to allow the Defendant to retain counsel or request a public defender. The Defendant did not request a public defender at any time prior to December 1, 1992.

This case was never retried because the Defendant returned to the court from prison, pled guilty to the charge, and received a lesser sentence. He has since served out that sentence and has been discharged from prison. (The Appellate Court's opinion is attached as Appendix C-1.)

2. **State v. Richard Ray Isaacson**, 409 N.W.2d 291 (Minn. Ct. App. 1987). Court File No. K86-2847

In this case, as the facts bear out, the Defendant pled guilty to a repeat offense for drunk driving (a gross misdemeanor under Minnesota law), a presentence investigation was ordered, and the Defendant returned to court for sentencing on January 29, 1987. The presentence investigation indicated that the Defendant was on probation for two counts of aggravated drunk driving. The probation officer recommended the maximum sentence, or one (1) year at the Northeast Regional Corrections Center, which is exactly what I sentenced the Defendant to on January 29, 1987.

The presentence report did not reveal that the Defendant had gone into court in another courthouse on the probation violation, on January 26, 1987, 3 days before he was to be sentenced by me on the underlying charge, and received an executed ten (10)-month sentence. This meant, as it turns out, he did two (2) months on my sentence, not counting reductions for good time.

When I was called by the Correctional Facility where the Defendant was incarcerated and asked why I had sentenced concurrently and not consecutively, my response was that there was no sentence to impose concurrently or consecutively because the Defendant had not yet been sentenced on the probation violation, which customarily would occur *after* the sentence on the new charge. I was then informed that the Defendant, without the knowledge of his lawyer in my case or the Probation Department in my court, had gone into court three (3) days earlier and had received the sentence executed of ten (10) months, which meant he would do a little more than thirty (30) days on my charge. I then, on my own motion, brought the Defendant back for resentencing and said, had I known or been told that they had gone forward with a revocation of probation (which was highly unusual) before my sentence, I would have specified consecutive because we do have a statute in Minnesota that states that if a judge does not specify, the sentences shall run concurrently. The Court found the three-judge panel ruled that the sentence should be served concurrently. (The Appellate Court's opinion is attached as Appendix C-2.)

3. **Margaret B. McBride f/k/a Margaret Staver v. John F. Staver**, (Minn. Ct. App., filed November 21, 1995; 1995 WL 687693). Court File No. 69-F4-71-017028

In this case, the parties were divorced pursuant to a stipulation in 1971. At that time, the stipulation provided that the Respondent would pay the membership dues at the country club, amounting to approximately \$1,200.00 per year, one half of which was \$600.00. The Petitioner/Appellant remarried in 1991. The Respondent claimed he should not have to pay any portion of the dues since his ex-wife and her husband were receiving the benefit together of the country club. I ordered that the Respondent pay one half of the annual dues or approximately \$600.00 on the basis that the Petitioner and her new husband were receiving a benefit from the dues which was not contemplated by the stipulation in 1971, and based upon general principles of equity, to the extent the Petitioner had received approximately \$250,000.00 in overpaid spousal maintenance. I was affirmed in that prior, separate appeal in *Staver v. Staver*, No. C2-93-2221 (Minn. App. Mar. 18, 1994).

In this unpublished opinion, the Appellate Court ruled that the Order for one half of the country club dues constituted a modification of the original decree, and that therefore the Respondent should pay the entire amount of \$1,200.00 per year and reversed on that basis. There was not any further court activity on this case, and the Respondent is now paying the full amount of country club dues. (The unpublished opinion is attached as Appendix C-3.)

4. **Chopp v. Independent School District 706 Virginia**, (Minn. Ct. App., filed February 5, 1991; 1991 WL 10213). Court File No. 86-2835

This is a civil case that proceeded to jury trial on the issue of primary estoppel and negligent representation involving a dispute between a public school teacher and a local school district. The case was complex factually because the law, at least at that time was in a state of flux with respect to the whole area of seniority rights in public school systems for school teachers. The parties waived a jury on the issue of the denial of Plaintiff's due process claim pursuant to 42 U.S.C. Section 1983.

This is an unpublished opinion. The jury verdict and a substantial portion of the case was affirmed by a three-judge intermediate court of appeals panel. The case was remanded to me for the limited purpose of determining attorney fees pursuant to Section 1983 as the opinion indicates. I made the decision on attorney fees. All parties accepted the decision. The case was concluded without further appeal. (The opinion is attached as Appendix C-4.)

5. **Matchefts v. Matchefts**, (Minn. Ct. App., filed August 1, 1989; 1989 WL 84172). Court File No. FX-88-1571

This was a temporary spousal maintenance case that was before me less than one year after the parties had stipulated to the terms of the dissolution of their marriage. My decision was appealed, and a three-judge panel remanded it to me with instructions to disregard the stipulation from a year earlier and start anew with the spousal maintenance request of the Petitioner. On a remand, the lawyers and I reached a stipulation, and the case was settled, and the file closed. (The unpublished opinion of the Court of Appeals is attached as Appendix C-5.)

See Appendix C, including Appendixes C-1 through C-5, for the Reversals.

- 15.(3) (Citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.)

1. **State v. Justin Bauer**, 471 N.W.2d 363 (Minn. App. 1991). Court File No. 88-1167 (See also, Section 15(1).)

This case involved a homicide prosecution, which involved not only the murder of a teenage girl, but was also one of the first prosecutions in Minnesota under the fetal homicide law because the victim was pregnant at the time of her death. The Defendant attacked the constitutionality of Minn. Stat. § 609.2662(1) and (2) with regard to the murder of an unborn child on the basis that it violated the Establishment Clause of the First Amendment. I upheld the constitutionality of the statute, and the Defendant appealed my decision upon his conviction. My Order upholding the constitutionality of the fetal homicide law was affirmed along with all other issues in the case.

The Order and Memorandum upholding the constitutionality of Minn. Stat. § 609.2662(1) and (2) is enclosed as Appendix B-12.

16. **Public Offices:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

No other public office held other than District Court Judge and Chief Judge of the Sixth Judicial District.

17. **Legal Career:**

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

I did not serve as a clerk.

2. **whether you practiced alone, and if so, the addresses and dates;**

I did not practice alone.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

Assistant St. Louis County Attorney (equivalent of District Attorney in Minnesota) (1977- January 1985). My responsibilities included working in all divisions of the St. Louis County Attorney's Office, including the civil division, juvenile/welfare division, and the criminal division, trying many cases in each division. St. Louis County Courthouse, 300 South Fifth Avenue, Virginia, Minnesota 55792.

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

From 1977 to 1980, I was assigned to the juvenile/welfare division with some responsibilities in the civil division, representing St. Louis County at County Board meetings from time to time.

My responsibilities during that time in the juvenile/welfare division included civil trial work, civil appellate work, and extensive juvenile/family court experience, including child abuse/neglect, dependency/delinquency cases, child support proceedings and child custody proceedings. My responsibilities also included extensive civil commitment litigation and experience, including inebriation (chemical dependency) and mental illness/deficiency proceedings. I represented the St. Louis County Department of Social Services and the State of Minnesota and served as Instructor of the Social Services In-Service Training Project and Supervisor of the branch offices in Virginia and Hibbing, Minnesota.

From 1980 to the time I was appointed to the bench on February 1, 1985, I was in the criminal division of the St. Louis County Attorney's Office. At that time my responsibilities included misdemeanor/gross misdemeanor/felony prosecutions; extensive criminal trial work; and criminal appellate work, including arguing cases before the Minnesota Supreme Court that I had tried as the prosecutor. My responsibilities also



included serving as Instructor for the law enforcement training project; Instructor for the Minnesota Alcohol Traffic Safety Association; and Supervisor of the branch offices in Virginia and Hibbing, Minnesota.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

From 1977 to 1980 my clients were the St. Louis County Department of Social Services, the St. Louis County Board, and the State of Minnesota. Because there were three branch offices of the County Attorney's Office, each located in a separate courthouse, I was in charge of representing the agencies located in Virginia. This meant that I not only tried many cases from 1977 to 1980 in the juvenile/welfare division, including civil jury trials, primarily in the area of paternity trials, as well as many, many court trials and highly sensitive child neglect and child abuse proceedings, I served in the capacity of general counsel to these agencies in addition to the fact that I represented these agencies in court.

In the criminal division from 1980 to January of 1985, I represented primarily the State of Minnesota, including the people of Minnesota, in criminal prosecutions, and from time to time, would represent a municipality in a criminal prosecution. I developed a reputation as a zealous but fair and evenhanded prosecutor in the prosecution of child sexual abuse cases, domestic assault cases, and major felony prosecution generally.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I was in court virtually every day and, if not every day, every week. I handled both high volume calendars and many, many court trials, as well as many jury trials, in civil court, juvenile court, civil commitment court, probate court, and criminal court. All cases were in state district court in Minnesota. The frequency of my appearances did not really vary. I appeared on a regular basis throughout the period of time I was in the St. Louis County Attorney's Office.

2. **What percentage of these appearances was in:**

- a) **federal courts - none.**
- b) **state courts of record - 100 percent**



c) other courts - None

**3. What percentage of your litigation was:**

a) civil - 1977 to 1980, 90 percent; 1980 to January of 1985, 10 percent

b) criminal - 1977 to 1980, 10 percent; 1980 to January of 1985, 90 percent

**4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

Twenty to thirty-five cases per year; sole counsel at all times.

**5. What percentage of these trials was:**

a) jury - 6 to 12 cases per year (10 to 20 percent)

b) non-jury - 15 to 25 (80 to 90 percent)

18 **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a) the date of representation;
- b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**1. State v. James Alan Myers, 359 N.W.2d 604 (Minn. 1984). Court File No. 5492**

This was a felony child sexual abuse prosecution. I was the first prosecuting attorney in the state of Minnesota to successfully introduce expert testimony in a child sexual abuse felony prosecution in the form of a clinical psychologist describing traits and characteristics typically found in sexually abused children and those that the psychologist observed in the 7-year-old victim. After the Defendant was convicted and sent to prison, the case was appealed to the Minnesota Supreme Court. I then prepared the appellate brief, and I personally argued the case at the Minnesota Supreme Court. The Minnesota

Supreme Court affirmed the trial judge's decision to receive into evidence the expert testimony.

I was the sole attorney on the case from start to finish, including the trial, preparation of the Minnesota Supreme Court brief, and the oral argument before the Minnesota Supreme Court. The Defendant was represented by Mr. John D. Rice, Attorney at Law, 109 East Howard Street, Hibbing, Minnesota 55746, (218) 262-5597. The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District, who now is retired. The Defense lawyer who handled the appeal was Mr. Mark F. Anderson, who, then and now, is the Assistant State Public Defender, 2829 University Avenue Southeast, Suite 600, Minneapolis, Minnesota 55414, (612) 627-6980.

2. **State v. Robert John Kivimaki**, 345 N.W.2d 759 (Minn. 1984). Court File No. 5545

This case was presented by me to a grand jury and proceeded by way of grand jury indictment. This was a first-degree murder case that was tried successfully to a conclusion before a 12-person jury. Much of the litigation focused on pretrial motions. The pretrial motions litigated the issues of the Defendant's Fifth and Sixth Amendment rights, regarding the custodial interrogation, the several statements taken while the Defendant was in custody, and the fact that a number of the custodial interrogations occurred in the state of Nevada before the Defendant was returned to the state of Minnesota by the Minnesota Bureau of Criminal Apprehension. In this case, the Defendant was represented by Mr. Jim Randall, who is now an intermediate appellate court judge here in the state of Minnesota. At the time he was the senior public defender for the Sixth Judicial District. His address is 305 Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, (612) 297-1004. I tried the case to a conclusion from start to finish, including four days of jury selection. In Minnesota, as in most states, you select jurors one at a time for a first-degree murder case. As sole counsel, I handled all aspects of the case, including the appeal. The case was affirmed by the Minnesota Supreme Court. The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District.

3. **State v. Grace Elaine Campbell**, 367 N.W.2d 454 (Minn. 1985). Court File No. 5544

This case was presented by me to a grand jury and proceeded by way of grand jury indictment. This is a murder trial that took approximately three weeks to try, including four days for jury selection. The Defendant had a very skilled defense lawyer, namely, Mr. David Keegan, Attorney at Law, 1400 Alworth Building, 306 West Superior Street, Duluth, Minnesota 55802, (218) 722-7813. Grace Campbell did not inflict the psychological terror which preceded the actual murder, nor did she physically administer the brutal injuries herself. Factually, the case was presented to the 12-person jury as an

aiding and abetting case with respect to Defendant Campbell, who was the girlfriend of Defendant Kivimaki.

The jury returned a verdict of Murder in the Second Degree rather than Murder in the First Degree. Consequently, I filed motion for a double durational sentencing departure, which the trial judge granted. The trial, including the conviction and sentence, was later affirmed by the Minnesota Supreme Court. I handled the entire trial by myself as sole counsel. I handled all issues contained in the appellate brief except for one issue which was handled by, then and now, Assistant St. Louis County Attorney Mr. Brian Simonson, St. Louis County Courthouse, 1810 - 12th Avenue East, Room 107D, Hibbing, Minnesota 55746. His telephone number is (218) 262-8157. The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District.

4. **State v. Michael Joseph Filippi**, 335 N.W.2d 739 (Minn. 1983). Court File No. 5376

This case, which went to a jury trial, was charged as a Felony Burglary and Felony Second-Degree Assault, which in Minnesota is assault with a dangerous weapon. However, the sole basis for liability of the defendant, Michael Joseph Filippi, was pursuant to the aiding and abetting statute in Minnesota. The Defendant, pursuant to my request, received consecutive sentences because there were two victims, each of whom were police officers. All aspects of the case were affirmed by the Minnesota Supreme Court. A significant evidentiary issue in the case, in addition to the aiding and abetting issue and a significant issue on appeal to the Minnesota Supreme Court, was the admission of Sprigle evidence, otherwise known as "other crime" evidence in Minnesota. Moreover, the principal in the case, who actually used a firearm, had previously pled guilty and was completely uncooperative in the prosecution of the case. The principal or accomplice's name was Robert Leisz.

By reputation, one of the finest defense lawyers, then and now, in the state of Minnesota, Mr. Joseph Friedberg, Friedberg Law Office, 250 Second Avenue South #205, Minneapolis, Minnesota 55401, (612) 339-8626, defended the case. The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District.

5. **State v. Robin Frost**, 342 N.W.2d 317 (Minn. 1983). Court File No. 5519

This case was presented by me to a grand jury in St. Louis County. The grand jury indicted on Second-Degree Manslaughter. This was a significant case in this region of the country because the Defendant was a woman whose defense was self-defense, alleging that she was the victim of domestic violence. After a careful review of the facts, I decided to proceed to the grand jury. The grand jury indicted on the lowest degree of homicide in Minnesota, namely, Manslaughter in the Second Degree.

The jury trial lasted approximately nine days including jury selection. I relied on expert testimony in the form of a ballistic's expert from the Minnesota Bureau of Criminal Apprehension to prove the case. I was the sole attorney on the case from beginning to end.

All aspects of the case were affirmed by the Minnesota Supreme Court. The defense lawyer was Mr. Jon D. Rice, 109 East Howard Street, Hibbing, Minnesota 55746, (218) 262-5597, privately retained. The trial judge was the Honorable Mitchell A. Dubow. This case was not completed even after long deliberations and a conviction because there was a sentencing hearing. I opposed the judge departing dispositionally from the guidelines, and, therefore, the Defendant went to prison. That was also upheld on appeal.

6. **State v. Douglas Miles Winchel**, 363 N.W.2d 747 (Minn. 1985). Court File No. 5855

This was a case that I handled from start to finish as the prosecutor, although the Minnesota Supreme Court affirmed the trial court's sentencing decision, which I requested, after I went on the bench. The attorney who handled the case for appeal purposes was the State Public Defender's Office, Mr. Mark F. Anderson, 2829 University Avenue Southeast, Suite 600, Minneapolis, Minnesota 55414, (612) 627-6980.

This case involved a plea of guilty "straight up" without a plea negotiation to the charge of armed or aggravated robbery. I was the sole prosecutor who argued for a double durational departure before the trial judge. The case has become a significant sentencing case in Minnesota, because the Minnesota Supreme Court held that the trial judge on this case properly accepted the plea of guilty, was not bound by the defendant's attempt to minimize the nature and extent of the robbery and was justified in doubling the sentence at the request of the prosecutor, who was myself. The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District. I also handled the appeal to the Minnesota Supreme Court.

7. **State v. Robert Stillwell**, (File No. 5228; date filed, 9/10/82) Court File No. 5699

This case was tried to a 12-person jury on two felony counts of Criminal Negligent Operation of a Motor Vehicle Resulting in Death. There were two people killed in this accident. I was the sole prosecutor from start to finish.

Two classmates were killed by a third classmate after a party where alcohol was served. The utilization of an accident reconstruction expert was vital to the case. The case resulted in a conviction on both counts.



The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District. The defense lawyer was Mr. Harry Eliason, who is now living in Hawaii, 155 Wailuku Drive, Hilo, Hawaii. His phone number is (808) 934-0461.

**8. State v. Larry Holm, (File No. 5138; date filed, 7/16/82) Court File No. 5669**

This was a felony criminal sexual conduct case where the allegation was that the Defendant, the fiancé of the victim and the father of the victim's child, raped and falsely imprisoned the victim, who had lived with the Defendant for over five years.

This was a significant case to me and to law enforcement and to the region, as well as to a number of sexual assault advocacy groups because it was an acquaintance rape case.

I was the sole prosecutor on the case. The defense lawyer was Mr. David Keegan, Attorney at Law, 1400 Alworth Building, 306 West Superior Street, Duluth, Minnesota 55802, (218) 722-7813.

The jury returned a verdict of not guilty on the Criminal Sexual Conduct in the Third Degree Charge but guilty on the Felony of False Imprisonment. That guilty verdict was based upon the fact that she was transported against her will in the Defendant's car to an area outside of the Virginia, Minnesota area where the rape allegedly occurred. I considered it a successful prosecution as did the victim and the law enforcement agencies in the area.

The trial judge was the Honorable Mitchell A. Dubow, District Court Judge of the Sixth Judicial District.

**9. Child Abuse/Child Neglect/Termination of Parental Rights Cases handled in Juvenile Court**

I tried many trials to the Court in my first four years in the St. Louis County Attorney's Office, involving a wide variety of allegations, mostly serious, of child neglect and child abuse. Many of these cases involved expert testimony of social workers, physicians, psychologists, emergency room personnel, police officers, and other child protection individuals. It would be difficult to single out one or more cases in this regard, except to say that it prepared me well for noncriminal matters as a judge, because many such cases are tried to the Court. I would call many of them very significant because they involved child protection issues and removing children from homes and all the issues that are associated with such drastic action.

Some of the lawyers involved back at that time, which would be between 1977 and 1981, would be Mr. John Cope, Attorney at Law, 415 South First Street, Virginia, Minnesota 55792, (218) 749-4470; Mr. Paul Wojciak, Attorney at Law, 522 East Howard Street #201, Hibbing, Minnesota 55746, (218) 262-5547; and Mr. Harry Eliason, 155



Wailuku Drive, Hilo, Hawaii, (808) 934-0461. The presiding judge at most of those cases was Gail Murray, who is now a practicing attorney, Cianni Law Offices, 301 East Howard Street #1, Hibbing, Minnesota 55746-1745, (218) 262-3891; or the Honorable Jeanne Sederberg, now retired, 2314 East Fifth Street, Duluth, Minnesota 55812. My client during the entire period of time, before I moved into major felony prosecution, was the St. Louis County Department of Social Services and its related agencies.

#### 10. Civil Paternity Cases (1977-1981)

I mentioned earlier in this document that while I would not consider the many civil paternity cases I tried to a jury individually significant (although the mother and father of the children involved would take strenuous issue with that), I learned many trial skills during these difficult cases when we tried them without blood tests or any other expert testimony. Ironically, because of the backlog that was in place when I started, I had immediate and early experience with civil jury trials long before I started trying criminal jury trials. I acquired trial skills in all of these trials. Even though one case standing by itself was not significant, it made me a well-rounded litigator and gave me a good foundation for being a good trial judge.

#### LAWYERS WHO HAVE APPEARED IN FRONT OF ME RECENTLY

Terrence Aronson  
Attorney at Law  
Law Center Building  
301 Chestnut Street  
Virginia, MN 55792  
(218) 741-4500

James B. Florey  
Assistant St. Louis County Attorney  
St. Louis County Attorney  
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Patrick G. Valentini  
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Paul Schweiger  
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Carver Richards  
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Chief Public Defender  
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(218) 879-1990

Bruce Williams  
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Box 705  
Eveleth, MN 55734  
(218) 744-1230

Sharon Chadwick  
 Attorney at Law  
 504 Second Avenue South  
 Suite 200  
 Virginia, MN 55792  
 (218) 749-2836

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Judicial Faculty Member, Minnesota Supreme Court Continuing Education for Judges. I have been a faculty member for the judicial college in Minnesota since it started in 1989. This year I am teaching a section on sentencing, and I am making a presentation on the Minnesota Sentencing Guidelines.

As I have noted earlier, in my capacity as Chief Judge, I was also elected Chairperson of the Conference of Chief Judges Judicial Resource Management Committee, which was one of two committees of the Conference of Chief Judges (1993-1996) that was responsible for directing the state courts in Minnesota. This committee prepared guidelines for the State Courts with respect to how to manage major civil, criminal, and all other cases in the state of Minnesota.

I also presently chair my judicial district's Community Outreach Planning Committee, and I am one of four trial judges on the statewide committee. The Community Outreach Committee is responsible for planning initiatives to heighten the public's awareness of the judiciary and its role. By way of background, seven overarching themes have been identified within the state court system's strategic plan. They are (1) judicial branch leadership, (2) access to justice, (3) accountability, (4) expanded use of alternative forums, (5) case management, (6) efficiency through sharing of resources, and (7) crime and the court system's role in promoting the rule of law. In the planning process, strategies were identified for advancing these themes, and a general time line of priorities was developed for execution over the next three years.

I presently chair the East Range Council on Family Violence, which was established to eliminate family violence in our communities and to improve the court's response to victims. I also chair the Systems Subcommittee of this same Council. This Council began as an initiative of the Minnesota Supreme Court, and I was one of five individuals that was sent to a nationwide conference in California, in 1993, for the purpose of returning with an action plan for the court system for the entire state of Minnesota. This initiative has significantly improved the public's perception of the court system and is an example of

how we can maintain the integrity and independence of the system, but yet have a presence in the community and truly make a difference in our community.

The Minnesota Supreme Court Racial Bias Task Force and my current service on the Minnesota Supreme Court Implementation Committee on Multi-Cultural Diversity and Racial Fairness in the Courts.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

Minnesota State Judges' Retirement Plan - full retirement benefits are available at the age of 65 if you have at least five or more years of service. A trial judge can earn up to 70 percent of his or her highest five years of salary.

State of Minnesota Deferred Compensation Plan - available at retirement or termination of employment with the State of Minnesota.

PaineWebber Investment Account, Alliance Stock Fund

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will follow affirmatively the Code of Judicial Conduct which obligates every judge to disclose any areas of either actual conflict, potential conflict of interest, or the appearance of a conflict, and then recuse myself if so required under the Code of Judicial Conduct. I know of no financial arrangements that are likely to present potential conflicts of interest.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in government Act of 1978, may be substituted here.)**

(See financial disclosure form.)

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

(See net worth statement.)

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No.

### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have volunteered as a Special Olympics Volunteer (1988-1992). I continue to be a volunteer at the YMCA, Humane Society, Girl Scouts of America.

I speak and participate in training for many public organizations for no fee. I have prepared a mock trial transcript for fifth and sixth graders that is being used in Minnesota and is part of the State Court Systems Community Outreach Program. I participate in Law Day.

I began a Random Act of Kindness Program in the community and in selected schools. I make numerous presentations to kindergarten through twelfth grade high school and college students.

In a year's time, I average four to six hours per month minimum. In serving individuals who are either disadvantaged or who need a role model, those individuals need to know that a public official, like a judge, is willing to participate in their activities in whatever



manner deemed appropriate, so long as it does not compromise the independence and integrity of the judiciary.

2. **The American Bar Association's Commentary to its Code of Judicial conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

The senior senator in our state, who presently is Senator Paul Wellstone, has a selection-screening committee made up of primarily attorneys who screen candidates for recommendation and nomination to the federal court. I was screened and interviewed two and a half to three years ago by that committee and was recommended by that committee to Senator Wellstone for the present position.

I was interviewed by the, approximately, ten-member commission approximately two and a half to three years ago. I provided background information, including educational background, legal background, and judicial experience. I believe that led, in large part, to my recommendation. I was then contacted by Senator Wellstone in March of 1998 and was informed that I had been selected for recommendation to the President. I was reviewed, evaluated, and screened by the American Bar Association, the Department of Justice, and the FBI.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

I have not been asked any questions at any time, directly or indirectly, about any specific case, any legal or political issue, or any other question that could be reasonably interpreted as asking how I would rule on such a case, issue, or question. Not only have I not been asked such questions recently, but I have never been asked those questions as a state trial judge at anytime during the last 13 years either.



5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.**

**Some of the characteristics of this "judicial activism" have been said to include:**

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

**A trial judge's responsibility is to follow the Constitution and follow state and federal statutes by reviewing their plain language and the applicable case law, with due regard to the principle of stare decisis. A trial judge who understands his or her oath of office must have a keen understanding of the separation of powers doctrine, which includes an understanding that a judge's responsibility is to apply the laws enacted by the legislature without imposition upon the separate and independent branches of government.**

**In addition, the trial court's decision must conform to the specific case that is before the court. A trial judge must not render a decision in a case that is not properly before the court, in accordance with the requirements of standing and ripeness.**

4010  
Rev. 1/93

# FINANCIAL DISCLOSURE REPORT

## FOR CALENDAR YEAR 1997

Report Required by the Ethics  
Reform Act of 1989 Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, 101-112)

1. Person Reporting (Last name, first, middle initial) <b>Frank, Donovan, W.</b>	2. Court or Organization <b>United States District Court for the State of Minnesota</b>	3. Date of Report <b>May 22, 1998</b>
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) <b>Nominee: United States District Court for the State of Minnesota</b>	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <b>5/21/98</b> ___ Initial ___ Annual ___ Final	6. Reporting Period <b>1/1/97 to 5/15/98</b>
7. Chambers or Office Address <b>St. Louis County Courthouse 300 South Fifth Avenue Virginia, MN 55792</b>	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

### I. POSITIONS. (Reporting individual only; see pp. 9-13 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions.)

1 personal representative for the estate of Lillian Jacobson (mother-  
2 in-law) August 10, 1997 to June 1, 1998  
3 \_\_\_\_\_

### II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements.)

1 \_\_\_\_\_  
2 Minnesota State Retirement Plan (when eligible)  
3 State of Minnesota Deferred Compensation Plan

### III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME  
(yours, not spouse's)
☐

NONE (No reportable non-investment income.)

1	<u>1996</u>	<u>Judicial Salary, State of Minnesota</u>	<u>\$85,209.06</u>
2	<u>1997</u>	<u>Judicial Salary, State of Minnesota</u>	<u>\$84,851.87</u>
3	<u>1/1/98 - 5/15/98</u>	<u>Judicial Salary, State of Minnesota</u>	<u>\$38,410.99</u>
4	<u>1996</u>	<u>Kathy Frank (spouse) nurse's salary - hospital</u>	<u>\$8,564.58</u>
5	<u>1997</u>	<u>Kathy Frank (spouse) nurse's salary - hospital</u>	<u>\$9,748.00</u>
	<u>1998</u>	<u>Kathy Frank (spouse) nurse's salary - hospital</u>	<u>3,400.00</u>

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Frank, Donovan, W.

Date of Report

May 22, 1998

## IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children, use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

SOURCE

DESCRIPTION

NONE (No such reportable reimbursements.)

1	exempt	
2		
3		
4		
5		
6		
7		

## V. GIFTS. (Includes those to spouse and dependent children, use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

SOURCE

DESCRIPTION

VALUE

NONE (No such reportable gifts.)

1	exempt	\$
2		\$
3		\$
4		\$

## VI. LIABILITIES. (Includes those of spouse and dependent children, indicate, where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

CREDITOR

DESCRIPTION

VALUE CODE\*

X

NONE (No reportable liabilities.)

1		
2		
3		
4		
5		
6		

Value Codes:	P1-\$15,000 or less	P2-\$15,001-\$50,000	L-\$50,001-\$100,000	M-\$100,001-\$250,000	N-\$250,001-\$500,000
	Q-\$500,001-\$1,000,000	P3-\$1,000,001-\$5,000,000	P4-\$5,000,001 or more		

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Date of Report

Frank, Donovan, W.

May 22., 1998

## VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp 36-54 of Instructions.)

A Description of Assets (including trust assets)  <i>Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse "IDC," for ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure</i>	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure:				
	Type (e.g., div., rent or int.)	Amt. Code1 (A-H)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Summary of Securities (if private transaction)
1 PaineWebber Alliance Stock Fund (J)	B div.	K	T						
2 U.S. Savings Bond (J)	A int.	J	T						
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									

1. Income/Gain Codes: (See Col. B1, D4)	A=\$1,000 or less F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 E=\$15,001-\$50,000	F=\$50,001-\$100,000 G=\$100,001-\$500,000
2. Value Codes: (See Col. C1, D3)	J=\$15,000 or less N=\$250,001-\$500,000 P3=\$25,000,001-\$50,000,000	K=\$15,001-\$50,000 O=\$50,001-\$1,000,000	L=\$50,001-\$100,000 P1=\$1,000,001-\$5,000,000 P4=More than \$5,000,000	M=\$100,001-\$250,000 P2=\$5,000,001-\$25,000,000	
3. Value Method Codes: (See Col. C2)	Q=Appraisal R=Cost (real estate only) S=Assessment W=Estimated	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash Market	

Name of Person Reporting

Date of Report

## FINANCIAL DISCLOSURE REPORT

Frank, Donovan, W.

May 22, 1998

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

## IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, § 301 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Date

May 22, 1998

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App. 4, § 104.)

## FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure  
Administrative Office of the  
United States Courts  
Suite 2-301  
One Columbus Circle, N.E.  
Washington, D.C. 20544



## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	3,000.00	Notes payable to banks—secured	
U.S. Government securities—add schedule (savings bonds)	5,000.00	Notes payable to banks—unsecured	
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	7,000.00
Real estate owned—add schedule (homestead)	145,000.00	Charged mortgages and other loans payable	13,000.00
Real estate mortgages receivable		Other debts—number	
Automobiles and other personal property	50,000.00		
Cash value—life insurance	11,000.00		
Other assets—itemize			
Alliance Credit Fund at Sioux Center	16,000.00		
Deferred Compensation (Great West Company with the State of Minnesota)	60,000.00	Total Liabilities	23,000.00
Total Assets	210,000.00	Net Worth	187,000.00
		Total Liabilities and net worth	187,000.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debts	None		

**Schedule**  
**Real estate mortgages payable**

Queen City Federal Savings & Loan Virginia, Minnesota	\$68,000.00
1st Nationwide Mortgage Company P.O. Box 7300 Gaithersburg, Maryland 20898	20,000.00

QUESTIONNAIRE FOR JUDICIAL NOMINEES  
SENATE JUDICIARY COMMITTEE

## I. BIOGRAPHICAL INFORMATION

1. *Full name.*

Colleen McMahon  
SS# 273-46-3746

2. *Address: List current place of residence and office address(es)*

Office: Supreme Court, New York County  
Criminal Term: Part 66  
111 Centre Street  
New York, New York 10013

Residence: Bronxville, New York

3. *Date and place of birth.*

July 18, 1951  
Columbus, Ohio

4. *Marital Status (include...husband's name). List spouse's occupation, employer's name and business address.*

Married on May 16, 1981 to Frank Vincent Sica, who is Managing Director for Private Equity Investment at Soros Fund Management, 888 Seventh Avenue, 33<sup>rd</sup> Floor, New York, New York 10106.

5. *List each college and law school you have attended, including dates of attendance, degrees received and dates degrees were granted.*

- (a) The Ohio State University  
September 1969 - June 1973

BA Summa Cum Laude and with distinction in Political Science (June 1973)  
Class Standing: 1st

Other Honors: Phi Beta Kappa and numerous academic honors and awards.

- (b) Harvard Law School  
September 1973 - June 1976

JD Cum Laude (June 1976)

6. *Employment Record. List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.*

(A) Employment History

1. Summer 1973: Behavioral Sciences Laboratory  
The Ohio State University  
404-B W. 11<sup>th</sup> Street  
Columbus, Ohio 43210  
Research Assistant
2. Summer 1974: Office of the Judge Advocate General  
Department of the Air Force  
Summer Intern – International Law Division
3. June-July 1975: Paul Weiss Rifkind Wharton & Garrison  
345 Park Avenue  
New York, New York 10022  
Summer Associate
4. July-Aug. 1975: Hale & Dorr  
28 State Street  
Boston, MA 02109  
Summer Associate

5. Sept. 1976-  
Nov. 1979 Paul Weiss Rifkind Wharton & Garrison  
345 Park Avenue  
New York, New York 10022  
Attorney-Associate
6. Nov. 1979-  
Sept. 1980 United States Mission to the United Nations  
866 U. N. Plaza  
New York, NY 10017  
Speechwriter/Special Assistant to the Hon. Donald F. McHenry  
Permanent Representative of the United States to the  
United Nations
7. Sept. 1980-  
June 1995 Paul Weiss Rifkind Wharton & Garrison  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Attorney (Associate Sept. 1980 - Sept. 1984)  
(Partner Sept. 1984 - June 1995)
8. July 1995-  
Current Judge, New York Court of Claims  
c/o New York State Supreme Court  
Criminal Term: New York County  
111 Centre Street  
New York, NY 10013  
Acting Justice, New York State Supreme Court

## (B) Other Affiliations

1. 1977- 1984 Board of Directors and General counsel  
Pentacle, Inc.  
106 Franklin Street  
New York, NY 10013
2. 1978-1984 Board of Directors  
Dance Theatre Workshop  
219 West 19<sup>th</sup> Street  
New York, NY 10011
3. 1978-1984 Board of Directors  
Volunteer Lawyers for the Arts  
One East 53<sup>rd</sup> Street  
New York, NY 10022



7. *Have you had any military service? If so, give dates, branch of service, rank or rate, serial number, present status, and type of discharge, if applicable.*

I have never served in the military.

8. *Honors and Awards: List all Scholarships, fellowships, honorary degrees and honor society memberships that you believe would be of interest to the Committee.*

Honor Societies: Phi Beta Kappa, Pi Sigma Alpha (Political Science), Mortar Board (Senior Women), Chimes (Junior Women)

Recipient of the Ohio State University Phi Beta Kappa Scholarship for Senior Research

9. *Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you have been a member and give titles and dates of any office which you have held in such groups.*

New York County Lawyers Association (1997 - Present)  
Chair, Committee on Changing Trends in the Profession (1997 - Present)

New York State Bar Association (1987 - 1990)  
Member, House of Delegates (1987-1990)

Association of the Bar of the City of New York (1978-present)  
Chair, Nominating Committee (1996)  
Chair, Committee on Women in the Profession (1992 - 1995)  
Chair, Committee on State Courts of Superior Jurisdiction (1984 - 1987)  
Member, Special Committee on Judicial Conduct (1996 - Present)  
Member, Committee on Women in the Profession (1989 - 1992)  
Member, Committee on State Courts of Superior Jurisdiction (1982 - 1984)  
Member, Council on Judicial Administration (1984 - 1987)  
Member, Criminal Justice Council (1984 - 1987)  
Member, Committee on the Judiciary (1984 - 1987)  
Member, Committee on the Requirements of the Court (1984 - 1987)  
Member, Nominating Committee (1986 - 1987)  
Member, Committee on Membership (1987 - 1989)

American Bar Association (1985(?) - Present)  
Section on Litigation  
Section on the Judiciary

Federal Bar Council (Mid 1980s - Present)

Westchester County Bar Association (1987 - Present)

American Law Institute (1993 - Present)

American Judicature Society (1993 - Present)

Jury Reform Guidebook Advisory Committee (current)

National Association of Women Judges (1995 - Present)

American Judges Association (1996 - Present)

Harvard Law School Society of New York (1992 - 1995)

Trustee (1992-1994)

Vice President (1994-1995)

Chair of the Anti-Bias Committee, New York County

Supreme Court, Criminal Term (June 1996 - current)

Second Circuit Gender Bias in the Courts Task Force (1994)

10. *List all organizations to which you belong that are active in lobbying before public bodies.*

None

*Please list all other organizations to which you belong.*

Christ Church, Bronxville, New York (1986 - Present)

Community Service Fellowship of Christ Church (1989 - 1998)

Christ Church Choir (1991 - Present)

Critical Differences for Women (National Association of The Ohio State

University Women) (1992 - Present)

Mortar Board National Alumni Council (1990 - Present)

The Bridge Fund Advisory Board (1993 - Present)

11. *Court Admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.*

New York (1 <sup>st</sup> Dept.):	April 25, 1977
United States District Court, Southern District of New York	1977
United States District Court, Eastern District of New York	1977
United States Court of Appeals, Second Circuit	1978
United States Court of Appeals, Fifth Circuit	1985
District of Columbia Court of Appeals	1985
United States Supreme Court	1980

I remain registered as a member of the District of Columbia Bar, but I have gone on inactive status since I stopped practicing law in 1995.

12. *Published Writings: List the titles, publisher and dates of books, articles, reports or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on the issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.*

#### **PUBLICATIONS:**

##### **Employment Law and Related Topics**

Foreword to "Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession," 64 Fordham Law Rev. (1995) at 295

"Recent Developments in the Law of Class Action Settlements," Paul, Weiss, Rifkind, Wharton & Garrison Client Memo Series, June 1995

"A Report on the Need for, Availability and Viability of Flexible Work Arrangements in the New York Legal Community," Committee on Women in the Profession, The Record of the Association of the Bar of the City of New York, Vol. 50, No. 5 (June 1995), p. 52 (edited only)

"Report of the Task Force on Clergy and Sexual Misconduct," Episcopal Diocese of New York, November 1993

"Family and Medical Leave Act," Paul, Weiss, Rifkind, Wharton & Garrison Client Memo Series, May 1993 (with Terri James)

"Employment Discrimination: U.S. Law in an International Business Arena," Corporate Counsel's International Adviser, Issue No. 87, August 1, 1992 (also published in the Paul, Weiss, Rifkind, Wharton & Garrison Client Memo Series, July 1991)

"Americans with Disabilities Act," Paul, Weiss, Rifkind, Wharton & Garrison Client Memo Series, July 1992 (with Theodore Haas)

"Civil Rights Act of 1991," Paul, Weiss, Rifkind, Wharton & Garrison Client Memo Series, January 1992 (also published in *New York Law Journal*, January 24, 1992)

### **Federal Civil Practice**

"Critics Turn Up Heat on Proposed Discovery Rules," *New York Law Journal*, July 19, 1993

"Analysis of Amendments to the Federal Rules of Civil Procedure," (as approved by the Judicial Conference and forwarded to the United States Supreme Court), paper prepared for ALI/ABA Seminar on Developments in Federal Civil Practice, January 21 - 22, 1993 (with Jordana Schwartz)

"Venue," Chapter 4 in *Federal Civil Procedure*, a publication of The New York State Bar Association, 1993 (with John O'Sullivan) (updated 1997 with John O'Sullivan and Roberto Finzi)

### **State Law**

"Legislature Amends Limitations Period," *New York Law Journal*, February 10, 1997

"The Jury Project: A Report to the Chief Judge of New York," April 1994

"Report of the First Judicial District Task Force on Reducing Litigation Cost and Delay," February 1998 (edited only)

### **Art Law**

"Art as Libel: The Case of Silberman v. Georges," Art and the Law, Vol. IX, No. 1 (1984) (with Harriette K. Dorsen)

"Choreography and Copyright," Art and the Law, Vol. III, No. 8 (January 1978)

### **Religion**

"Letting God Give You a New Heart," *The Episcopal New Yorker*, October/November 1997, p. 7

## Speeches

Keynote Address, Columbia Women's Alumni Association, Title: "Three Generations of Working Women: Chances and Challenges," Spring 1996 (no notes or copy of speech available)

Association of the Bar of the City of New York, Seminar on How to File a Lawsuit: New York Civil Practice. Panelist, Fall 1996 (delivered extemporaneously; no written notes available)

ALI/ABA Continuing Legal Education Videotape Series, "Discovery Strategies Under the Revised Federal Rules of Civil Procedure," (with the Hon. Richard Dollinger and Richard Rosen, Esq.), Winter 1994 (no notes available; I have a copy of the videotape)

The Woman Advocate II, Prentice-Hall Corporation Seminar (panelist), topic: Trial Practice, Spring 1994 (I commented on demonstrations of trial techniques by woman litigators; no notes available)

Association of the Bar of the City of New York: Panel Discussion on Developments in the Law of Sexual Harassment, Colleen McMahon, Moderator, 1994. (as moderator, I chaired the panel and made informal and summary remarks; I did not enter into the substantive discussion)

The Woman Advocate I, Prentice-Hall Corporation Seminar (panelist), topic: Trial Practice, Spring 1993 (I demonstrated cross-examination in a mock trial; no notes available)

ALI/ABA Seminar on Developments in Federal Civil Practice, topic: "Analysis of Amendments & Federal Rules of Civil Procedure," January 1993 (see paper published simultaneously and listed above)

Federal Bar Council Annual Meeting (Nevis, British West Indies) Panelist. Topic: Sexual Harassment in the Legal Workplace, February 1992 (delivered extemporaneously; no notes available)

ALI/ABA Seminar on Developments in the Law of Employment Discrimination, Los Angeles, California. Topic: Developments in the Law of Employment Discrimination. June (?) 1991 (delivered extemporaneously; no notes available)

The Woman Advocate I, Prentice-Hall Corporation Seminar (panelist), topic: Trial Practice, Spring 1993 (I demonstrated cross-examination in a mock trial; no notes available)

Association of the Bar of the City of New York: Panel Discussion on Legal Ethics and Trial Practice, topic: "The Ethics of Witness Preparation," (remarks attached)



Association of the Bar of the City of New York: Panel Discussion on Developments in the Law of Sexual Harassment, Bettina S. Plevan, Moderator, May 24, 1990 (remarks attached, reprinted from the Record of the Association of the Bar of the City of New York, Vol. 46, No. 7, November 1991 (p. 728))

Securities Industry of America Annual Meeting, Palm Springs, California, topic: "Securities Class Actions," spring 1990 (panelist, delivered extemporaneously; no notes available)

Yale Law School Symposium (panelist), "The Fair Housing Act After 20 Years," Topic: Responses to Housing Discrimination and Residential Segregation: Starrett City and Other Race-Conscious Methods of Achieving Integration, May 1988 (remarks attached)

#### **Letters to the Editor**

Letter to the Editor, New York Law Journal	December 10, 1997
Letter to the Editor, New York Law Journal	March 5, 1996
Letter to the Editor, New York Law Journal	April 20, 1994
Letter to the Editor, New York Law Journal	October 9, 1992
Letter to the Editor, Bronxville Review Press Reporter	March 19, 1997
Letter to the Editor, Bronxville Review Press Reporter	February 26, 1997

Copies of all articles, all available speeches and letters are attached as Exhibit A.

*13. Health: What is the present state of your health? List the date of your last physical examination.*

I am in excellent health. My last physical examination was on March 27, 1998.

*14. State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.*

Judge, New York Court of Claims (Appointment Title) (1995 - Present)  
 Acting Justice, New York State Supreme Court (Assignment Title) (1995 - Present)  
 Appointed (by Governor of New York) and confirmed (by New York State Senate)

The New York Court of Claims is a court of general jurisdiction that sits throughout the State of New York. By State statute, judges appointed to the New York Court of Claims may be designated by the Chief Judge of the State of New York as Acting Justices of the State Supreme Court, the court of general jurisdiction that is analogous to the United States District Court. I have been so designated, and I sit in Criminal Term in New York County and try felony cases. I also handle non-trial civil proceedings brought under Articles 75 (arbitration) and 78 (actions against public officers and bodies) of the Civil Practice Law and Rules.

15. *If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.*

(1) Citations to ten most significant decisions (citations to NYLJ are to decisions published in the *New York Law Journal*):

People v. Cesar Alfonso      Decided March 29, 1996  
Published: NYLJ    4/12/96    P. 26, Col. 5M

People v. Anonymous      Decided May 17, 1996  
Published: NYLJ    6/5/96    P. 26, Col. 4

People v. Grantley Hunte, Garth Robinson & Sheryl Dowling  
Decided December 14, 1995  
Reported: 168 Misc. 2d 466, 637 NY Supp 2d 996 (Sup. Ct. NY Co. 1995)

People v. Erick Rivera, Jean Rivera and Adalberto Rodriquez  
Decided September 24, 1996  
Published: NYLJ 10/3/96    P. 24, Col. 6

People v. Harry Morales      Decided November 25, 1997 and  
Corrected Decision December 9, 1997  
Published: NYLJ    12/8/97    P. 30, Col. 4

People v. David Weil      Decided May 24, 1996  
Published: NYLJ    6/6/96,    P. 31, Col. 4B

People v. William White Decided May 30, 1996  
Published: 169 Misc. 2d 295, 645 NY Supp. 2d 733 (Sup. Ct. NY Co. 1996)

Charles McQuillan v. Stephen Berliner Decided September 4, 1997  
Published: NYLJ 9/12/97 P. 26, Col. 4

Olde Discount Corp., et al. v. Arthur & Marilyn Dartley  
Decided November 20, 1997  
Published: NYLJ 12/12/97 P. 26, Col. 6

Application of Jessica Rose v. Scan Enterprises Corp.  
Decided August 5, 1997  
Published: NYLJ 8/18/97 P. 27, Col. 4

Copies of all the above opinions are attached as Exhibit B.

(2) I have not been reversed or subjected to significant criticism.

(3) The above ten opinions include all those where federal or state constitutional issues were arguably implicated.

16. *State (chronologically) any public office you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.*

I have not held any public office or run unsuccessfully for public office.

17. *Legal Career:*

(A) *Describe chronologically your law practice and experience after your graduation from law school and until you became a judge, including:*

1. *Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.*

I have never clerked for a judge.

2. *Whether you practiced alone, and if so, the addresses and the dates.*

I have never practiced alone.

3. *The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.*

- (1) Paul Weiss, Rifkind, Wharton & Garrison (General Practice)  
1285 Avenue of the Americas  
New York, New York 10019-6064

Associate: September 1976 - November 1979 and  
September 1980 - September 1984

Partner: October 1984 - June 1995

- (2) Judge, New York Court of Claims  
Acting Justice, New York State  
Supreme Court  
111 Centre Street  
New York, New York 10013

July 1995 - Current

Presiding Justice in Part 66, Criminal Term of Supreme Court, New York County

- (B) 1. *What has been the general character of your law practice, dividing it into periods with dates if its character changed over the years.*

I practiced as a litigator throughout my years at the Bar. I did civil litigation of all sorts. I have handled cases in the following areas (among others): contracts, commercial landlord/tenant, securities fraud, copyright and trademark, general commercial disputes and employment discrimination. In addition, beginning in 1990, I engaged in a great deal of litigation prevention by serving as an advisor to corporate employers on employment discrimination and pension issues.

2. *Describe your typical former clients, and mention the areas, if any, in which you specialized.*

My clients were typically large corporations, although I represented individuals and non-profit organizations as well. I worked more heavily in the areas of securities and general commercial law in the 1980s and employment discrimination in the 1990s.

- (C) *1. Did you appear in court regularly, occasionally or not at all? If the frequency or your appearances in court varied, describe each such variance, giving dates.*

Occasionally – I appeared as counsel of record in most of my matters whenever court appearances were required, but, as with most large firms, we did not handle a “volume practice” that required daily presence in court.

I had many more trials and court appearances prior to 1989, when I took a ten month leave of absence after the birth of my third child. I did a substantial amount of commercial landlord/tenant work, especially for the South Street Seaport Limited Partnership (The Rouse Company) and South Ferry Building Corporation. These cases involved frequent appearances in the Civil Court on evictions and in State Supreme Court on Yellowstone injunction applications and in fraudulent inducement actions. I handled numerous preliminary injunction applications; only one case (South Street Seaport Ltd. Partnership v. Bahr’s Restaurant Corp. et al.) actually went to trial. I also worked on significant number of corporate takeovers during this “deal” boom period. These included Pennzoil/Texaco, APL Johnson Controls and Consolidated Gold Fields/Newmont Mining/Minorco. Most of these cases were litigated in the Delaware Court of Chancery and the Southern District of New York. I tried two significant federal cases during this period, one in the area of employment law and the other in the securities field; my clients prevailed in both matters, and the Second Circuit affirmed.

From 1990 to 1995, my practice was entirely civil. As was always the case, my matters ran the gamut, but I handled much more employment litigation during this period (as that became a “growth” field) and did much less securities law due to the decline in major corporate transactions. I also developed an extensive practice as an adviser to employers on employment law issues; as a result, my practice became less court-oriented and more in the nature of litigation prevention. To the delight of my clients, only two of my employment cases went to trial (an administrative hearing and an arbitration). Through my work with the Episcopal Diocese of New York, I became a recognized authority on the civil and canonical aspects of sexual harassment and misconduct in religious institutions and by clergy. I continued to handle large commercial disputes; my last trial before ascending the bench was a breach of contract case involving a “busted” trade in the petroleum trading industry. When I left private practice, I was trying to prevent the termination of a commercial lease between the City of New York and the developer of a major Brooklyn redevelopment project. I was also working on copyright infringement litigation brought by ASCAP against over fifty cable system operators nationwide.



2. *What percentage of these appearances was in:*

- |    |                                       |     |   |
|----|---------------------------------------|-----|---|
| 1. | Federal courts                        | 50% | — |
| 2. | State courts of record                | 40% |   |
| 3. | Other courts (arbitrations, agencies) | 10% |   |

3. *What percentage of your litigation was:*

- |    |          |     |
|----|----------|-----|
| 4. | Civil    | 99% |
| 5. | Criminal | 1%  |

4. *State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.*

6 court of record cases tried to verdict of judgment in which I was sole or chief trial counsel.

2 cases tried to verdict in which I was associate counsel.

2 cases in which preliminary injunction hearings were tried to decision, both as associate counsel.

2 court of record cases settled after substantial periods on trial; in both I was chief trial counsel.

I have also been chief counsel at three arbitrations or administrative hearings that went to trial. Two were tried to decision; the third settled after I cross-examined the complainant.

5. *What percentage of these trials was:*

- |          |                         |
|----------|-------------------------|
| Jury     | Three jury trials (20%) |
| Non-Jury | The rest (80%)          |

18. Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the cases. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case a) the dates of the trial period or periods, b) the name of the court and the name of the judge before whom the case was tried, and c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.

1. January 1994

BAB Banking Corporation v. Northville Industries Corp.

Supreme Court, Suffolk County (Trial) (10622/87)

Judgment aff'd 232 A.D. 2d 349 (2d Dept. 1996), lv denied 89 NY2d 807 (1997)

Judge:

Alan D. Oshrin

Opponents:

Robert Crimmins, Esq. (Trial Counsel)

209 West Main Street

Riverhead, New York 11901

516-369-8448

Joseph Spain, Esq. (Pre-trial and Appellate Counsel) (Ret)

Rogers & Wells

200 Park Avenue

New York, New York 10166

212-878-8000

(Associate on Case: Chul Pak, still with firm)

Nature of Case:

Jury Trial followed by appeal (I went on the bench after briefing and before argument in the Second Department) This case was brought by a lending bank against an international petroleum trading corporation for alleged breach of contract and negligent misrepresentation arising out of a "busted" petroleum futures trade. The significant issues included whether the defendant, trading corporation (my client) actually entered into a contract, whether plaintiff substantially performed within the meaning of the Uniform Commercial Code, and whether the contract was void because the allegedly independent broker was in fact the owner of the contra party to the trade. The jury found for my client. The verdict was affirmed by the Appellate Division. I tried the case with a younger lawyer (Maria Vullo, now a partner at Paul Weiss) and was the principal author of the intermediate appellate brief.

2. April 1993

Anne C. Jones v. Gilman Paper Co.  
New York City Commission on Human Rights (06096365-EP)

Administrative Judge: Steven Presberg  
Hearings Division  
Commission on Human Rights  
52 Duane Street, 6th Floor  
New York, New York 10007

c/o Laufer, Halberstam & Karish  
One Liberty Plaza  
165 Broadway  
New York, New York 10006  
212-267-0600

Opponent: Lizabeth Schalet, Esq.  
New York City Commission on Human Rights  
40 Rector Street  
New York, New York 10006  
212-306-7560  
(Attorney is no longer with agency and not listed in  
Martindale Hubbell)

Nature of Case: Administrative Hearing  
Employment Discrimination

Case brought under the New York City Human Rights Law. The complainant, Jones, alleged that she had been discriminated against in the severance package offered to her when the company moved its operations from New York to Georgia. The case settled on terms favorable to my client (Gilman) after complainant testified at the hearing.

3. October 1992

John Maisano v. Revlon, Inc.  
American Arbitration Association (13T116 01323 91)

Chair of Arbitral Panel: Kenneth I. Schacter, Esq.  
Richards & O'Neill  
885 Third Avenue  
New York, New York 10022  
212-207-1200

Opponent: Frank Franzino, Esq.  
Franzino & Rosenberg  
300 East 42<sup>nd</sup> Street  
New York, New York 10017  
212-972-7878

## Nature of Case:

## Commercial Arbitration

The case involved my client (Revlon's) alleged breach of an executive's employment contract concerning payments under a termination agreement. The complainant claimed he was entitled to certain moneys; Revlon claimed that such payments were not contemplated by the contract and were barred by ERISA. I tried the case. The arbitrators found for the complainant.

4. February 1988

Mary Mayer v. Chesapeake Insurance Co., et al.

United States District Court for the Southern District of New York (85 Civ.7958) – 877 F. 2D 1154 (2d Cir. 1989)

United States Court of Appeals for the Second Circuit (Docket No. 88-7905)–698 F. Supp 52 (SDNY 1988)

## Judge:

John F. Keenan (Trial)

Kearse and Winter, CJJ, and Sweet, DJ (Appeal)

## Opponent:

Richard Meyer, Esq.

Milberg, Weiss, Bershad, Hynes & Lerach

One Pennsylvania Plaza

New York, New York 10119-0165

212-594-5300

## Nature of Case:

Bench trial followed by appeal –  
Securities Law

This was the last major reported case under §16(b) of the Securities and Exchange Act of 1934 prior to its being amended, and there are those who think that our victory on behalf of defendants Chesapeake Insurance Company and related companies was instrumental in bringing about that amendment. A shareholder brought an action to recover short swing profits on behalf of issuer, alleging that certain affiliates of the issuer had beneficial ownership of the stock and also that the corporation's CEO was an insider and was liable for those profits. I tried the case and argued the appeal.

5. December 1986 Becor Western Corporation v. Greenville Steel Car Company  
United States District Court for the Western District of Pennsylvania 85 Civ. 1740

Judge: Gerald Weber (Deceased)

Opponent: Edward Schmidt, Jr.  
Rose, Schmidt, Hasley & DiSalle  
900 Oliver Building  
Pittsburgh, PA. 15222  
412-434-8600  
(Note: This attorney is no longer with the firm. There is an Edward Schmidt (sole practitioner) listed in Martindale's at 159 Washington Street, Pittsburgh, with no phone number, he looks to be about the right age.)

Nature of Case: Jury Trial  
Breach of Contract

In this case, my client, defendant Greenville, allegedly breached a contract to purchase railroad hopper cars. This was one of a number of similar cases brought after the highly speculative market for rail cars collapsed; this particular case was tried after an economic necessity defense by other customers had been rejected by a Federal appeals court. The plaintiff prevailed after a jury trial, but the verdict was only 40% of the amount sought.

6. July 1986 South Street Seaport Ltd. Partnership v. Bahr's Restaurant Corp. and 93 South Street Seaport Corporation  
Supreme Court, New York County Index No. 12166/86

Judge: Hyman Korn (Deceased)

Opponents: Joseph Chase, Esq. (Deceased or Retired)  
Hall, Dickler, Lawler, Kent & Friedman  
460 Park Avenue  
New York, New York 10022  
  
Noel Dennis, Esq.  
233 Broadway, 27<sup>th</sup> Floor  
New York, New York 10279  
212-385-1185



Nature of Case: Bench Trial (Settled after 5 days of testimony)  
Private Nuisance (Commercial Landlord - Tenant)

This was the first public nuisance case brought in New York City in many years. It involved the condition created by the "party" atmosphere in the streets at the South Street Seaport, where thousands of young professionals gathered to drink on Thursday and Friday nights. I represented the Rouse Company and its wholly-owned affiliates, landlord South Street Seaport Ltd. Partnership. After a most extraordinary trial, involving a dozen or so colorful witnesses, the defendants (bars that served alcohol in or adjacent to the demapped streets) agreed to new lease terms that substantially curtailed their on-street activities. The nuisance then abated. I tried the case with assistance of a younger lawyer.

7. July 1985

Sheehan v. Purolator Courier Corp.

United States District Court for the Eastern District of New York (82 Civ. 0438)  
United States Court of Appeal for the Second Circuit (Appeal)

Judge: I. Leo Glasser (Trial)-- 102 F.R.D. 641 (EDNY 1984)  
Timbers, Meskill and Kears, CJJ (Appeal) -- 839 F 2d  
99 (2d Cir. 1988)

Opponent: Judith P. Vladeck  
Vladeck, Waldman, Elias & Engelhardt  
1501 Broadway  
New York, New York  
212-354-8330

Nature of Case: Bench trial followed by appeal  
Employment Discrimination

This Title VII case involved allegations of sex discrimination at a major trucking company. It was brought by three women, representing line personnel, the Legal Department and Administration. I represented the corporate defendant. The opinion denying class certification (an issue I briefed and argued) has often been cited in subsequent opinions and law journals. After settling with the line representative, I tried the case to a favorable verdict against the other two plaintiffs and argued the appeal in the Second Circuit, where the verdict was affirmed.

8. November 1982 Emery Roth & Sons v. National Kinney Corp.  
 Supreme Court, New York County (Obtaining index number)

Judge: Arnold G. Fraiman (Deceased)

Co-Counsel: Constance Royster —  
 Cooper, Liebowitz, Royster & Wright  
 Tarrytown - Elmsford Center  
 Three West Main Street  
 Elmsford, New York 10523  
 914-347-5555 (H)  
 203-431-6652 (O)

Richard Godosky  
 Damashak, Godosky & Gentile  
 35 Worth Street  
 New York, New York 10013  
 212-431-0060

Opponent: Michael A. Lacher  
 Lacher & Lovell-Taylor  
 70 Lexington Avenue  
 New York, New York 10021  
 212-319-0060

Jill C. Lesser  
 Boies and Lazarus, LLP  
 41 East 57<sup>th</sup> Street  
 New York, New York 10022  
 212-223-1177

Nature of Case: Jury Trial (Settled before appeal)  
 Commercial Landlord - Tenant  
 This was a classic breach of lease case involving a well-known tenant in a major New York City office building. The tenant alleged that it had been constructively evicted from its premises due to landlord's conduct; my client, the landlord, counterclaimed for rent. I tried the case with a younger lawyer Ms. Royster. The jury not only threw out the complaint but awarded my client \$850,000 in damages on counterclaims. There were years of motion practice and interlocutory appeals prior to the trial.

9. 1991

Morse v. Weingarten

United States District Court of the Southern District of New York (91 Civ. 3893)

Judge: Morris Lasker (U.S. Dist. Court, Boston, MA)

Opponent: Stuart D. Wechsler  
 Wechslnr Skirnck Harwood Halebian & Fetter  
 555 Madison Avenue  
 New York, New York 10022  
 212-934-7400

Nature of Case: I briefed, argued and won dismissal of a civil class action (securities fraud) complaint against Michael Milken --- the first case against Milken (and one of the few) to be so dismissed. It involves allegations that the stock price in certain corporate takeovers was affected by Milken's allegedly fraudulent practices.

10. 1992

In Re: Jerrold & Bernice Lieberman

United States Bankruptcy Court of the Eastern District of New York (890-81045-20)

Judge: Robert J. Hall (EDNY) (Retired)

Opponents: George Weisz (Trustee in Bankruptcy)  
 Thomas Maloney (Counsel to the Trustee)  
 Cleary, Gottlieb, Stein & Hamilton  
 One Liberty Plaza  
 New York, New York 10006  
 212-225-2000

Stephen Mendelsohn  
 Meltzer, Lippe, Goldstein, Wolfe,  
 Schilissel & Sazer, P.C.  
 190 Willis Avenue  
 Mineola, New York 11501  
 516-747-0300

Nature of Case: I briefed, argued and won a motion for summary judgement dismissing fraud and contract claims brought by private creditors against the wife of a bankruptcy Long Island developer, on the ground that she could not be held liable for her husband's business debts. I then settled the case with the trustee in bankruptcy.

Because many of these matters are more than five years old, I am attaching the names and addresses of members of the Bar who observed me during the last few years of my practice or on the bench.

George J. Wade, Esq. Shearman & Sterling 599 Lexington Avenue New York, New York 10021	212-848-4190
Robert Barron, Esq. Cravatt, Swaine & Moore Worldwide Plaza 825 Eight Avenue New York, New York 10019-7415	212-474-1000
Bettina A. Plevan Proskauer, Rose 1585 Broadway New York, New York 10036	212-969-3065
Paul A. Victor, Esq. Flora Edwards, Esq. Dublirer, Haydon, Straci & Victor 17 Battery Place Suite 610 New York, New York 10004	212-310-8000 212-943-0880
Howard R. Meyer, Esq. 20 Vesey Street New York, New York 10013	212-406-9700
Richard Plansky, Esq. New York County District Attorney's Office 1 Hogan Place New York, New York 10013	212-335-4007
Robert Jaffee, Esq. 150 Nassau Street Suite 1805 New York, New York 10038	212-227-1357
Franklyn Gould, Esq. 233 Broadway New York, New York	212-267-2600

Steven J. Hornstein, Esq. Hornstein, Palumbo & Keith 350 Broadway Suite 1201 New York, New York	212-941-7100
Oswaldo Gonzalez 401 Broadway New York, New York 10013	212-334-9600
Ruby Ann Mages New York County District Attorney's Office One Hogan Place New York, New York 10013	212-335-9391
Linda Fairstein New York County District Attorney's Office One Hogan Place New York, New York 10013	212-335-9076

*19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).*

(A) In 1993, I was asked by Judith Kaye, Chief Judge of New York, to chair The Jury Project, a project intended to reform jury service in New York State. I organized the work of the task force, selected areas for inquiry, set public hearings and authored 90% or more of the final report, which garnered substantial praise from the press, the Bar, the Governor and the Legislature. Most of our recommendations were adopted, as New York implemented its most far-reaching jury reform program in almost a century. As a result of this work, I was recently asked to serve on a committee of the American Judicature society that will develop a guidebook for states wishing to embark on a jury reform program.

(B) For three years, I served as Vice Chancellor of the Episcopal Diocese of New York. By canon, the chancellors of the Diocese serve as personal counsel to the Bishop of New York. I was selected for this position because of my familiarity with employment law generally and with the issue of sexual misconduct by professional specifically. I had previously served on the Diocesan Committee that examined this issue and devised our Diocesan policy statement; I was the principal author of the Committee's widely circulated report. While Vice Chancellor, I advised the Bishop of New York on a number of sensitive matters involving allegations of sexual misconduct by Episcopal clergy against women and children. The details of these representations are, of course, protected by privilege. I also substantially rewrote portions of the Canons of the Diocese of New York and helped start a group of attorneys who are trying to rewrite Article 3 of the New York State Religious Corporations Law (relating to the Episcopal Church) to bring it into conformity with modern church law and practice. I have lectured widely on the subjects of sexual misconduct, canon law and civil law as it relates to religious institutions, throughout the Diocese of New York and at the Episcopal Divinity School in Cambridge, MA and General Theological Seminary in New York City.



(C) I served as a member of, and then chaired, the Committee on Women in the Profession of the Association of the Bar of the City of New York. As a member of the Committee, I authored a study proposal for a report on the glass ceiling in the legal profession in New York city, focusing specifically on large law firms. The Committee raised the money to fund the study and hired Dr. Cynthia Fuchs Epstein, Distinguished Professor of Sociology at City College of New York and author of the seminal work Women in Law, to carry out the study. Her report, which analyzed barriers to the advancement of women at large law firms, was published in the Fordham Law Review in 1995. I wrote the Foreword to the Report. (A copy of this Foreword is included in Exhibit A). While Chair of this Committee, I also convened a breakfast "network" group of women lawyers who were partners at law firms or General counsel or high-ranking Associate General counsel at major corporations in the metropolitan area. This was the first such effort among highly successful women lawyers in New York City.

(D) On behalf of the American Law Institute/American Bar Association's Continuing Education Program, I made a videotape (with Federal Magistrate Michael Dollinger and Richard Rosen, Esq.) concerning changes in the Federal Rules of Civil Procedure relating to pre-trial discovery. A copy of the video is enclosed; others can be obtained by contacting ALI/ABA at 4025 Chestnut Street, Philadelphia, PA 19104-3099. I also lectured on this subject at several ALI/ABA continuing Legal Education courses; my notes are included in Exhibit A among my other published writings.

(E) A complete list of my various Bar Association committee affiliations appears in response to Question 9 above. Many years ago, as Chair of the Committee on State Courts of Superior Jurisdiction, I released and publicly defended a report of the Committee (prepared during the tenure of my predecessor) that proposed an Individual Assignment Structure for case management for our State courts (published in the Record of the Association at Vol. 40, No. 2, March 1985). I also chaired the subcommittee that drafted a report opposing (on financial grounds) the creation of a new appellate court in New York State (this report was not published). I have continued to study issues relating to case management and recently served (at the request of Chief Judge Kaye) on the Committee to Study Civil Litigation Cost and Delay Reductions for New York's First Judicial Department (Manhattan and the Bronx). A copy of the Task Force Report, which I did not write, is included with my other written materials. I am currently a member of a Special Committee of the Association of the Bar of the State of New York that is studying ways to improve the judicial disciplinary system in both the State and Federal courts.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST

1. *List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other futures benefits which you expect to derive from previous business relationship, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.*

Under the Paul Weiss partnership agreement, a departing partner is paid "assured severance" in lieu of retaining any interest in the Firm's work-in-progress. The amount of my assured severance was calculated at 125% of the average of my 1992, 1993 and 1994 income from the Firm. The amount was liquidated upon my departure from the Firm and is paid to me at the rate of \$31,640 per quarter for five years. The payout will be complete on June 23, 2000.

2. *Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining those areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.*

I will recuse myself from any matter that involves an actual conflict of interest or an appearance of a conflict. I will not sit on any matter involving my former Firm for an appropriate period of time. I will not sit on matters involving certain former clients until at least the year 2000, which is five years after I left the firm. With respect to certain former clients, I will recuse myself permanently. I will not sit on matters involving George Soros or Soros Funds Management (of which my husband is an Managing Director) or any affiliated enterprise. In addition, will be unable to sit on matters involving Morgan Stanley Dean Witter & Co., my husband's former employer, until his deferred compensation has been fully paid out, which will not occur until the year 2003. I will keep myself sufficiently apprised of the financial affairs of myself and my husband and children so I am aware of any enterprises in which we have financial interests, and I will disqualify myself from sitting on such matters in accordance with the Guidelines of the Code of Judicial Conduct.

3. *Do you have any plans, commitments or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.*

No. However, I recently signed a contract with Morehouse Publishing to produce a book of scriptural meditations for persons who are serving on their church's Vestry (Board of Trustees). Under the contract, I will receive 9% of the net amount received by Morehouse from the sale of the book, with a \$500.00 advance against royalties. I expect the earnings on this to be de minimis.

4. *List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria and other items exceeding \$500 or more.*

See copy of Federal Financial Disclosure Form, attached as Exhibit C.

5. *Please complete the attached financial net worth statement in detail (add schedules as called for).*

Net Worth Statements for myself, my husband, our children and three family Trusts, attached as Exhibit D.

6. *Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.*

In 1994, I served as Co-Chair of the Lawyers for Pataki Committee during the election campaign of George Pataki for Governor of New York.

AO-10 (a)  
Rev. 1/98**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**Report Required by the Ethics  
Reform Act of 1985, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial) McMahon, Colleen .		2. Court or Organization U.S. Dist. Court - So. Dist. of NY	3. Date of Report 05/15/1998
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) US District Judge (Nominee)		5. Report Type (check type) X Nomination, Date / / Initial Annual Final	6. Reporting Period / / to / /
7. Chambers or Office Address 111 Centre Street Rm 1146 New York, New York 10013		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.			

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)☐ **POSITION**  
**NONE** (No reportable positions.)**NAME OF ORGANIZATION / ENTITY**

1 Trustee 1985 Sica Children's Trust

2 Trustee 1992 Frank V. Sica Insurance Trust

3

**II. AGREEMENTS** (Reporting individual only; see pp. 14-16 of Instructions.)☐ **DATE**  
**NONE** (No reportable agreements.)**PARTIES AND TERMS**

1 1995 Paul, Weiss, Rifkind, Wharton &amp; Garrison Assured Severance Plan

2

3

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)☐ **DATE**  
**NONE** (No reportable non-investment income.)**SOURCE AND TYPE****GROSS INCOME**  
(Yen, not spouse's)

1 1996 State of New York

\$ 113,000.00

2 1997 State Of New York

\$ 113,000.00

3 043098 State of New York

\$ 37,667.00

4 1996 Paul, Weiss, Rifkind, Wharton &amp; Garrison Assured Severance Plan

\$ 126,821.00

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting

McMahon, Colleen .

Date of Report

05/15/1990

**SECTION HEADING.** (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

**PART 3. NON-INVESTMENT INCOME** (cont'd.)

Line	Date	Source and Type	Gross Income
5	1987	Paul, Weiss, Rifkind, Wharton & Garrison Assured Severance Plan	5 126,608.00
6	04/30/88	Paul, Weiss, Rifkind, Wharton & Garrison Assured Severance Plan	3 31,640.00
7	1986	Morgan Stanley & Co. Inc. (S)	8 0.00
8	1987	Morgan Stanley, Dean Witter, Discover & Co. (S)	9 0.00
9	03/31/90	Morgan Stanley, Dean Witter, Discover & Co. (S)	5 0.00



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
McMahon, Colleen .Date of Report  
03/15/1990

## IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

## V. GIFTS

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1	Exempt		
2			
3			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	First Jewel	Contingent Capital Contribution	X
2	Morgan Stanley Venture Investors III (IRA)	Capital Contribution	H
3	IRS/State Of NY (J)	Provision for Income Taxes on First Quarter 1990 Paul Weiss Income	J
4	IRS/State Of New York (J)	Provision for Income Taxes on Morgan Stanley Stock, Options, EICF Units & Capital	F <sub>2</sub>
5	Morgan Stanley Venture Investors III LP (S)	Capital Contribution	H
6			

\* VAL CODES: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001 to \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more



<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting McMahon, Colleen .	Date of Report 05/15/1998
------------------------------------	--	------------------------------

**VII. Page 2 INVESTMENTS and TRUSTS— income, value, transactions** (Includes those of spouse and dependent children. See pp. 16-14 of instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse. "(S)" for separate ownership by spouse. "(DC)" for ownership by dependent child.</i>  <i>Place "(Q)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
	(1) Amount Code (A-I)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure				
						(2) Date: Month/Day	(3) Value Code (J-P)	(4) Gain Code (A-F)	(5) Identity of buyer/seller (if private transaction)	
NONE (No reportable income, assets, or transactions.)										
18 CSG Systems Int'l Inc. Com (S)		None		O	T	Exempt				
19 Cambridge Heart Inc. Com(S)		None		K	T	Exempt				
20 Computer Associates Int'l Inc. Com(S)	A	Dividend		L	T	Exempt				
21 Daou Systems Inc. Com.(S)		None		K	T	Exempt				
22 Telecom Semiconductor Inc. Com. (S)		None		L	T	Exempt				
23 MSIF Money Market Ac. (S)	B	Dividend		L	T	Exempt				
24 Summit Associates/Boston Safe Deposit Money Market A/C (S)	A	Interest		K	T	Exempt				
25 Summit Assoc./Boston Safe Deposit, Checking (S)		None		E	T	Exempt				
26 Intel Corp Com (DC) (Trust)	A	Dividend		K	T	Exempt				
27 Intl Business Machs Corp Com (DC) (Trust)	A	Dividend		K	T	Exempt				
28 Kohl's Corp Com (DC) (Trust)		None		H	T	Exempt				
29 KFB Investments Inc. (Com) (S)		None			V	Exempt				
30 Morgan Stanley Venture Investors III LP (S)	B	Interest		H	T	Exempt				
31 Intel Corp Com(DC)	A	Dividend		K	T	Exempt				
32 Intel Corp Com(DC)	A	Dividend		K	T	Exempt				
33 Microsoft Corp Com (DC)		None		K	T	Exempt				
34 Psychomedics Corp. Com (DC)	A	Dividend		J	T	Exempt				
1 Incl/Own Codes: A=\$1,000 or less		B=\$1,001-\$2,500		C=\$2,501-\$5,000		D=\$5,001-\$15,000		E=\$15,001-\$50,000		
(Col. B1, D4) F=\$50,001-\$100,000		G=\$100,001-\$1,000,000		H1=\$1,000,001-\$5,000,000		H2=\$5,000,001 or more				
2 Val Codes: J=\$15,000 or less		K=\$15,001-\$50,000		L=\$50,001-\$100,000		M=\$100,001-\$250,000		N=\$250,001-\$500,000		
(Col. C1, D3) O=\$500,001-\$1,000,000		P1=\$1,000,001-\$5,000,000		P2=\$5,000,001-\$25,000,000		P3=\$25,000,001-\$50,000,000		P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal		R=Cost (real estate only)		S=Assessment		T=Cash/Market				
(Col. C2) U=Book Value		V=Other		W=Estimated						

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
McMahon, Colleen

Date of Report  
05/15/1998

## VIL Page 3 INVESTMENTS and TRUSTS- Income, value, transactions

(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-I)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial m/c, merger, redemption)	If not exempt from disclosure			
						(2) Date Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-I)	(5) Identity of buyer/seller (if private transaction)
<b>NONE</b> (No reportable income, assets, or transactions.)									
35 Thornberg Ltd Term Muni Fd Nat'l	B	Dividend	K	T	Exempt				
36 Thornberg Ltd Term Muni Fund Nat'l (DC) (Trust)	C	Dividend	L	W	Exempt				
37 Thornberg Ltd Term Muni Fund Nat'l (S)	F	Dividend	P1	T	Exempt				
38 EES 1985 LP	C	Distribut ion	J	U	Exempt				
39 EES 1986 LP		None	J	U	Exempt				
40 Citibank(Checking)	A	Interest	K	T	Exempt				
41 Citibank(Savings)(DC)	A	Interest	J	T	Exempt				
42 Key Bank(CD) (DC)	A	Interest	J	T	Exempt				
43 Citibank(Savings)(DC)	A	Interest	J	T	Exempt				
44 Citibank(Savings)(DC)	A	Interest	J	T	Exempt				
45 Citibank(Savings)(Trust)	A	Interest	J	T	Exempt				
46 MSIF Money Market (DC) (Trust)	A	Dividend	J	T	Exempt				
47 Skyline Venture Partners, L.P. (S)	A	Interest	K	U	Exempt				
48 Information Associates-II, L.P. (S)	A	Interest	K	U	Exempt				
49 Information Associates, L.P. (S)		None	M	U	Exempt				
50 WSCP III L.P. (S)	E	Distribut ion	N	U	Exempt				
51 Morgan Stanley Venture Investors Annex L.P. (S)	A	Interest	L	U	Exempt				
1 Inco/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$5,001-\$100,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000 or more	E=\$15,001-\$50,000					
2 Val/Coder ..... In \$15,000 or less (Col. C1, D3) O=\$300,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$500,001 or more					
3 Val Mth Codes: G=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market						

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
McMahon, ColleenDate of Report  
05/15/1998

## VIL Page 4 INVESTMENTS AND TRUSTS— income, value, transactions (Includes income of spouse and dependent children. See pp. 36-54 of Instructions.)

A Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(U)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(Q)" after each asset except from prior disclosures.</i>	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1) Account Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-F)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-F)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
52 McKinley Capital Realty Partners, LLC (S)		None	L	U	Exempt				
53 Morgan Stanley Venture Investors, L.P. (S)	E	Distribut ion	M	U	Exempt				
54 Lot 33 Prospect Hill Rd, Chilmack, MA (S)		None	M	W	Exempt				
55 Lot in Abel's Hill Asen, Chilmack, MA (S)		None	M	W	Exempt				
56 Summit Assoc.-Marinez Pt 111 S.Shore Dr. East Haven CT (S)		None	O	U	Exempt				
57 Chrysler Corp.(IRA)	A	Dividend			Exempt				
58 Morgan Stanley Dean Witter, Co. Common (S)	F	Dividend	N	T	Exempt				
59 Boston Safe Money Market (S)	E	Interest	P2	T	Exempt				
60 Dreyfus Basic NY Municipal MM Fd(S)	E	Dividend	M	T	Exempt				
61 Bond Finance International Conv. Due 7/97 (IRA) (S)		None	J	T	Exempt				
62 MS Investments, Inc. (Com) (S)		None		V	Exempt				
63 Summit Assoc.-Mortgage Rec-3180 Main St. Bridgeport Int. Med(S)	F	Interest	N	T	Exempt				
64 Summit Associates-Notes Receivable-Primrose Pctr(S)		None	K	U	Exempt				
65 Morgan Stanley, Dean Witter Co. Stock Options (Com) (S)		None	P2	T	Exempt				
66 Morgan Stanley Dean Witter Co. EICP Units(Col) (S)		None	P3	T	Exempt				
67 Morgan Stanley Dean Witter Co. (Com)MS Capital Acc. Plan (S)		None	P1	T	Exempt				
68 Morgan Stanley Dean Witter Co. Deferred Profit Sharing(S)		None	P1	T	Exempt				
1 Int/Outs Codes: A=\$1,000 or less (Col. B1, D4) P=\$30,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$3,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$5,000,001 or more	E=\$15,001-\$50,000					
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$300,001-\$1,000,000	E=\$15,001-\$30,000 F1=\$1,000,001-\$3,000,000	L=\$30,001-\$100,000 F2=\$3,000,001-\$25,000,000	M=\$100,001-\$250,000 F3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 F4=\$50,000,001 or more					
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market						



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
McMahon, Colleen .Date of Report  
05/15/1998VII. Page 5 INVESTMENTS and TRUSTS— Income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(O)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(O)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
69 Summit Assoc. /Lafayette American Bank M(H)	B	Interest	K	T	Exempt				
70 Summit Assoc. Mortgage Rec. 3180 Main St. Mc. Carato (S)	D	Interest	K	T	Exempt				
71 Summit Assoc. Mortgage Rec. 3180 Main St. Orthosport (S)	E	Interest	M	T	Exempt				
72 Summit Assoc. Mortgage Rec. 3180 Main St. Dr. Shah (S)	D	Interest	L	T	Exempt				
73 Thornberg Value Fund (S)			P2	T	Exempt				
74 KFB Inv./Boston Safe M/H (S)	A	Interest	J	T	Exempt				
75 HB Investments, Inc./Boston Safe M/H (S)	A	Interest	J	T	Exempt				
76 Lancaster Partners IV, Ltd. (S)	E	Distribut ion			Exempt				
77 Lancaster Partners V, Ltd. (S)		None			Exempt				
78 Summit Assoc. /Sale of Real Estate-Stella Street, Ct. (S)	E	Distribut ion			Exempt				
79 Summit Assoc. Sale of Real Estate-Penny Ave. Trumbull Ct (S)	C	Distribut ion			Exempt				
80 Sale of Lot 137, 138 Mountain Village, Telluride, CO (S)	G	Distribut ion			Exempt				
81 McKinley Capital Special Situation FD L.P. (S)	D	Distribut ion			Exempt				
82 Northwestern Mutual Life (S)	A	Interest	J	T	Exempt				
83 Citibank (Trust)		None	J	T	Exempt				
84 EVILCO Life Insurance (Trust)	A	Interest	J	T	Exempt				
85 Citibank (Trust) (S)		None	J	T	Exempt				
1 Int'l Code: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000 or more	E=\$15,001-\$50,000					
2 Val Code: J=\$15,000 or less (Col. C1, D5)	K=\$15,001-\$50,000 P1=\$1,000,001-\$3,000,000	L=\$50,001-\$100,000 P2=\$3,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more					
3 Val Mth Code: Q=Appraised (Col. C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market						

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
Mortenson, Colleen .Date of Report  
05/15/1998VII. Page 6 INVESTMENTS and TRUSTS— income, value, transactions *(Includes those of spouses and dependent children. See pp. 16-54 of Instructions.)*

A. Description of Asset  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(Q)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Account Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (I-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, margin, redemption)	If not exempt from disclosure			
						(2) Date: Month Day	(3) Value Code (I-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
86 Northwestern Mutual Life (Trust) (S)			L	T	Exempt				
87 Northwestern Mutual Life Insurance (Trust) (S)		None	K	T	Exempt				
88 PHL Insurance (Trust) (S)			K	T	Exempt				
89									
90									
91									
92									
93									
94									
95									
96									
97									
98									
99									
100									
101									
102									
1 Into/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500	C=\$2,501-\$5,000	D=\$5,001-\$15,000	E=\$15,001-\$50,000					
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000					
3 Val Meth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment	W=Estimated	T=Cash/Market					

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting McMahon, Colleen .	Date of Report 05/15/1998
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.***(Indicate part of report.)*

Explanations Re: Section VII Item #'s 24,25,56,63,64,69,70,71,72,75,79

Summit Associates L.P., is a General Partnership, of which both shareholders are closely held "C", Corporations, 100% owned by Frank Sica. Summit Associates owns 4 Mortgages, real estate in Orange and Fairfield Ct., and holds a note receivable. The assets and income of Summit Associates are listed in detail on the Investment Summary. In addition, Summit Associates sold two properties in 1997, which are reflected in the Investment Summary on a net realized value basis. The assets of KPS and MS Investments are listed as cash in bank.

Explanation Re: Section VII Item #'s 29,74

KPS Investments Inc., is a general partner of Summit Associates, owned 100% by Frank Sica. The assets of the corporation are explained above.

Explanation Re: Section VII Item #'s 62,75

MS Investments Inc., is a general partner of Summit Associates, owned 100% by Frank Sica. The assets of the corporation are explained above.

Explanation Re: Section IX Item # 1 :

Under the Paul, Weiss partnership agreement, a departing partner is paid "Assured Severance" in lieu of retaining any interest in work-in-progress. The amount of my assured severance is \$ 625,000 and is calculated at 125% of the average of my 1992,1993, and 1994 income from the firm. The amount was liquidated upon my departure from the firm. It is paid to me quarterly over a five year period. I will receive \$ 31,640 quarterly beginning with the third quarter of 1995 and ending with the second quarter of 2000.

**FINANCIAL DISCLOSURE REPORT**Name of Person Reporting  
McMahon, Collisan .Date of Report  
05/15/1998**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature

*Collie Mc Mah*

Date

*21 May 98*

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

NET WORTH STATEMENT OF COLLEEN McMAHON  
(As of April 30, 1998)

## ASSETS

Cash on Hand: Citibank, NA	26,197.24
Real Estate Interests	
Residence, NY <sup>1</sup>	1,250,000.00
Lot 13, St. James' Club, Antigua <sup>2</sup>	25,000.00
<b>TOTAL REAL ESTATE</b>	<b>1,275,000.00</b>
Securities (Marketable)	
Thornburgh Ltd. Term Muni Fund	138,195.27
Morgan Stanley Institutional Funds <sup>3</sup>	239,707.88
Thornburgh Value Fund C-LA*	286,213.25
Chase Manhattan Corp. (com)*	15,796.12
Computer Assoc. Intl. (com)*	87,937.50
General Motors Corp. (com)*	13,475.00
Intel Corp. (com)*	161,625.00
Kohl's Corp. (com)*	162,252.00
Raytheon Corp. (com)*	662.25
Union Pacific Corp. (com)*	54,750.00
<b>TOTAL SECURITIES</b>	<b>1,025,419.00</b>
Limited Partnership Interests <sup>4</sup>	
First Jewel Associates LP	(150,151.00)
EE&S 1985 LP	( 24,423.00)
EE&S 1986 LP	( 9,598.00)
Morgan Stanley Ventures Investors III	250,000.00
<b>TOTAL LIMITED PARTNERSHIPS</b>	<b>65,828.00</b>

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<sup>1</sup>Est. current market value of 50% interest; property owned as joint tenants with right of survivorship with Frank V. Sica.

<sup>2</sup>Est. current market value of 50% interest; property owned as joint tenants with right of survivorship with Frank V. Sica.

<sup>3</sup>All items marked with an asterisk are owned by the Colleen McMahon IRA.

<sup>4</sup>Shown at most recent available value of capital account.



Severance Payment Due from Law Firm	316,360.00
Personal Property (Unscheduled)	300,000.00
Note Receivable (from Michael K. McMahon)	7,000.00
<b>TOTAL ASSETS</b>	<b>3,015,804.20</b>

## LIABILITIES

Capital Commitment to First Jewel Associates	26,000.00
Capital Commitment to Morgan Stanley Ventures Investors III	149,500.00
Provision for Income Taxes (law firm severance)	130,000.00
<b>TOTAL LIABILITIES</b>	<b>305,500.00</b>

<b>NET WORTH</b>	<b>2,710,304.20</b>
<b>TOTAL LIABILITIES and NET WORTH<sup>5</sup></b>	<b>3,015,804.20</b>

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<sup>5</sup> Judge McMahon has no other liabilities, contingent or otherwise, as endorser, co-maker or guarantor, or leases or contracts, or in respect of legal claims. None of her assets are pledged. She is not a defendant in any suit or legal action. She has never taken bankruptcy.

NET WORTH STATEMENT OF COLLEEN McMAHON  
(As Trustee of the 1992 Frank V. Sica Trust)

## ASSETS

Cash on Hand: Citibank NA	1,737.74
Northwestern Mutual Life Policy 12198399*	61,499.64
Northwestern Mutual Life Policy 13382789*	17,521.02
PHL Policy 2496602*	43,377.01

## TOTAL ASSETS

LIABILITIES	0.00
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NET WORTH	124,135.41
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TOTAL LIABILITIES and NET WORTH <sup>1</sup>	124,135.41
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\* Life insurance policy values shown are current cash surrender values.

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<sup>1</sup> The Trust has no additional liabilities, contingent or otherwise, whether as endorser, co-maker or guarantor, on leases or contracts, or in respect of legal claims or taxes. No trust Assets are pledged. The Trust is not a defendant in any suits or legal claims. The Trust has never taken bankruptcy.

NET WORTH STATEMENT: FRANK V. SICA  
(As of April 30, 1998)

## ASSETS

Cash on Hand	6,255,726.44
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## Real Estate

Residence, Bronxville, NY <sup>1</sup>	1,250,000.00
Lot 13, St. James' Club, Antigua <sup>2</sup>	25,000.00
Vacation Home, Chilmark, MA	2,500,000.00
Lot, Chilmark, MA	500,000.00
Lot, Chilmark, MA	225,000.00
Mariner's Point, East Haven, CT <sup>3</sup>	738,000.00

TOTAL REAL ESTATE	5,113,000.00
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## Securities (Marketable)

Thornburgh Value Fund	6,938,271.60
Morgan Stanley Dean Witter (com)	459,363.00
Alcoa (com)	775,000.00
CSG Systems Inc. (com)	571,389.00
Cambridge Heart Inc. (com)	18,724.50
Computer Associates (com)	87,937.50
Compaq Computer (com)*	2,918.50
Daou Systems Inc. (com)	23,634.00
Telecom Semiconductor (com)	60,790.50
Thornburgh Ltd. Term Muni Fund	1,117,880.36
Bond Finance Int'l 5.75 conv. Deb. <sup>4</sup>	0.00

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<sup>1</sup>Est. current market value of 50% interest: property owned as joint tenants with right of survivorship with Colleen McMahon.

<sup>2</sup>Est. current market value of 50% interest: property owned as joint tenants with right of survivorship with Colleen McMahon.

<sup>3</sup>Owned by Summit Associates, a general partnership between Mr. Sica and two closely-held corporations owned by him, KPB Investments and MS Investments. See note 5.

<sup>4</sup>In bankruptcy.

Securities (not marketable)<sup>5</sup>

KPB Investments, Inc.	No independent value: assets listed elsewhere
MS Investments, Inc.	No independent value: assets listed elsewhere

TOTAL SECURITIES	10,055,908.06
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Deferred Compensation from Morgan Stanley & Co.<sup>6</sup>

Stock Options	15,697,645.00
EICP Units	36,225,768.87
MS Capital Accumulation Plan Units	1,402,000.00

TOTAL DEFERRED COMP	51,916,413.87
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Morgan Stanley Deferred Profit Sharing Plan	1,016,885.00
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Northwestern Mutual Life Life Insurance Policy (cash surrender value)	10,652.78
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<sup>5</sup>These two closely-held corporations are the general partners in Summit Associates, a partnership that invests in real estate in Orange and Fairfield Co., CT. Mr. Sica is the sole shareholder of KPB and MS. Assets held by Summit are listed under Real Estate and Receivables; cash in these corporations is listed under Cash on Hand.

<sup>6</sup>Deferred compensation from Morgan Stanley consists of stock options at fixed prices, EICP Units (convertible to an equivalent number of shares of stock in Morgan Stanley Dean Witter & Co.) and units in the Morgan Stanley Capital Accumulation Plan (valued at \$1,000 per unit). All deferred compensation is shown at current market (less strike price in the case of options). However, these options and units are not exercisable or convertible until various dates in the future. There can be no guarantee that the value of these options and units will remain the same until the exercise or conversion dates. Therefore, these should be considered contingent values. Provision for taxes on this income appears under Liabilities.

Limited Partnership Interests<sup>7</sup>

Information Associates LP	157,648.00
Information Associates II LP	15,817.00
Skyline Ventures LP	47,281.00
Morgan Stanley Ventures Investors III	250,000.00
Morgan Stanley Capital Partners III <sup>1</sup>	346,352.00
Morgan Stanley Ventures Investors	118,335.00
Morgan Stanley Venture Investors Annex	86,539.00
McKinley Capital Realty Partners LLC	99,394.00
McKinley Capital Special Situations Fund	0.00
<b>TOTAL LIMITED PARTNERSHIPS</b>	<b>1,121,366.00</b>

## Receivables (Summit Associates)

Mortgages on Condominium Units at 3180 Main Street, Bridgeport, CT	807,415.00
Note from Primrose Partners	25,000.00
<b>TOTAL RECEIVABLES</b>	<b>832,415.00</b>

Personal Property (Unscheduled)	750,000.00
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<b>TOTAL ASSETS</b>	<b>77,055,451.93</b>
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<sup>7</sup> Limited partnership interests are shown at the most recently available value of Mr. Sica's capital account.

<sup>1</sup>MSCAP III is the fund through which Morgan Stanley Dean Witter & Co. and certain outside investors make direct investments in publicly and privately held companies. Mr. Sica was co-head of MSCAP III until his recent resignation. The value of Mr. Sica's continuing participation in MSCAP III is uncertain at this time, as it will vary depending on the performance of certain underlying investments. The value listed is a pro forma capital account.



## LIABILITIES

Provision for Income Taxes on Deferred Comp <sup>9</sup>	20,800,000.00
Capital Contribution for Morgan Stanley Ventures Investors III	149,500.00

TOTAL LIABILITIES	20,949,500.00
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NET WORTH	56,105,951.93
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TOTAL LIABILITIES and NET WORTH <sup>10</sup>	77,055,451.93
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<sup>9</sup>Estimated, based on current value of deferred compensation and current tax laws.

<sup>10</sup> Mr. Sica has no additional liabilities, contingent or otherwise, whether as endorser, co-maker or guarantor, on leases or contracts, or in respect of legal claims. None of his assets is pledged. He is not a defendant in any suit or legal action. He has never taken bankruptcy.

NET WORTH STATEMENT OF FRANK V. SICA  
(As Trustee of the 1990 Colleen McMahon Trust)

ASSETS

Cash on Hand: Citibank NA	148.37
EVLICO Life Ins. Policy (cash surrender at 3/31/98)	636.99
<b>TOTAL ASSETS</b>	<b>785.36</b>

<b>LIABILITIES</b>	<b>0.00</b>
<b>NET WORTH</b>	<b>785.36</b>
<b>TOTAL LIABILITIES and NET WORTH<sup>1</sup></b>	<b>785.36</b>

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<sup>1</sup> Mr. Sica has no additional liabilities, contingent or otherwise, whether as endorser, co-maker or guarantor, on leases or contracts, or in respect of legal claims. None of his assets is pledged. He is not a defendant in any suit or legal action. He has never taken bankruptcy.

**CHILDREN OF FRANK V. SICA AND COLLEEN McMAHON <sup>1</sup>**  
**NET WORTH STATEMENT**  
**(A/O April 30, 1998)**

**ASSETS****Cash**

Citibank NA Account Moira Catherine Sica	1,821.99
Key Bank CD Account Moira Catherine Sica	3,452.65
Citibank NA Account Patrick Vincent Sica	2,541.94
Citibank NA Account Brian Vincent Sica	2,399.15
Citibank NA Account 1985 Sica Children's Trust*	1,078.98

Total Cash	17,300.17
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**Securities**

Morgan Stanley Institutional Funds <sup>2</sup> *	6,005.46
Microsoft Corporation Common	36,050.00
Intel Corporation Common	32,325.00
Psychemedics Corp. Common	512.00
Intel Corporation Common *	32,325.00
Kohl's Corporation Common *	165,252.00
International Business Machines Common*	23,175.00
Thornburgh Funds Ltd. Term Mum *	50,777.77

Total Securities	340,417.27
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Total Assets	357,717.44
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**LIABILITIES**

Total Liabilities	0.00
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NET WORTH	357,717.44
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TOTAL LIABILITIES and NET WORTH <sup>3</sup>	357,717.44
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<sup>1</sup> Assets that are asterisked are owned through the 1985 Sic Children's Trust, Colleen McMahon, Trustee. The remainder of the securities are owned by the children through their father, Frank V. Sic, as custodian under the Uniform Gift to Minors Act.

<sup>2</sup> Value as of last statement received, which was February 1998.

<sup>3</sup> Neither the Sica children nor their Trust have any other liabilities, contingent or otherwise, whether as endorser, co-maker or guarantor, on leases or contracts, or in respect of legal claims or taxes. None of their assets are pledged. None of them are defendants in any suit or legal action. None has ever taken bankruptcy.

### III. GENERAL

1. *An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.*

For the first ten years of my practice, I was actively involved as an attorney with the arts community, principally dancers and dance companies. I served as pro bono counsel for a number of dance organizations, including at least five dance companies and an umbrella presenting organization for dancers. I also served on the Board of Directors of Volunteer Lawyers for the Arts (1978-1984), the public interest organization that coordinated representation for indigent artists, and Dance Theatre Workshop (1978-1984), the seminal and still leading umbrella organization for funding and presentation of small dance companies in New York City. I wrote an amicus brief on behalf of Volunteer Lawyers for the Arts on an successful appeal from a lower court holding that a painting was libelous. I taught seminars and workshops for dancers on how to file their tax returns and how to incorporate. I also brought a successful copyright infringement action on behalf of a playwright/client of Volunteer Lawyers for the Arts.

As my involvement with the arts tapered off, my involvement with the Episcopal Church and with the homeless increased. I served for three years as Vice Chancellor of the Diocese of New York, a pro bono position that involved me in almost every legal matter of significance in the Diocese, including especially allegations of sexual misconduct by clergy. As a member of a Diocesan Task Force examining this issue, I drafted the Diocesan procedures for dealing with such allegations and taught at numerous workshops and seminars addressing this topic. As counsel to the Bishop, I was deeply involved in several such matters, including one that ended up in a litigation. Other matters I handled for the Diocese included redrafting of canons (denominational laws) and examination of New York State statutes to bring them into conformity with modern church practice. I also became a Director of the Episcopal Housing Corporation, a Diocesan-sponsored support group that provides advice and seed money toward the construction of low-income housing. I am an Advisory Board member of The Bridge Fund, an innovative homeless-prevention program that began under the auspices of an Episcopal congregation in White Plains, New York, and later expanded to New York City.

I occasionally supervised briefing on criminal appeals for indigent criminal defendants that were handled by associates of our Firm under an arrangement with the Supreme Court, Appellate Division, First Department.

I did not retain my time records when I left Paul Weiss, but I spent 10% or more of my time each year working on pro bono matters.

In addition to the above activities, I served as Deputy Village Counsel and Counsel to the Zoning Board of Appeals for the Village of Bronxville, New York, between 1988 and 1993. I have been extremely active in my church, where I sing in the choir, accompany the children's choir, preach (as a licensed lay preacher of the Episcopal Church) and teach the Confirmation class. I have previously served on the Vestry, chaired the Stewardship Campaign and been President of the Community Service Fellowship. I am also extremely active in the non-legal affairs of the Episcopal Diocese of New York, where I am a delegate to the Diocesan Convention and a member of several committees; I have served on two episcopal (bishop) search committees in the past four years.

2. *The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?*

I do not belong and have not belonged to any such organization.

3. *Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).*

Senator D'Amato, who suggested my name to President Clinton, has a Judicial Screening Committee. I submitted an extensive background questionnaire to that Committee and met with members of the Committee in the spring of 1997. The Committee recommended me to the Senator, who submitted my name to Senator Moynihan and to the President in March 1998. Since that time, I have met with staff of the Department of Justice Office of Policy Development in Washington, D.C. and been interviewed by an FBI field agent and a representative of the American Bar Association, all as part of background reviews conducted by those organizations.

4. *Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.*

No such question has been asked of me by anyone.



5. *Please discuss your view on the following criticism involving "judicial activism."*

*The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both academic and criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:*

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution*
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals*
- c. A tendency by the judiciary to impose broad affirmative duties upon governments and society*
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness*
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.*

A trial judge must respect the separation of powers enshrined in our Constitution. Federal District Courts are courts of limited jurisdiction. The role of a trial judge is to resolve the specific dispute between the parties who have come before the court, applying the law as drafted by the Legislature and following binding judicial precedent. In interpreting the law, a judge must never set herself up as a super-Legislature, but must defer to the expressed intent of the people's elected representatives and respect the results of the political process.

It has long been a principle of federal jurisprudence that courts are not to give advisory opinions, but to resolve actual controversies. It is therefore imperative that trial judges pay careful attention to issues such as standing and ripeness, which have traditionally served to ensure adherence to the Constitution's case in controversy requirements.

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

Alvin K. Hellerstein (no other or former names)

2. **Address: List current place of residence and office address(es)**

Residence: New York, New York

Office: Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, NY 10038-4982

3. **Date and place of birth.**

December 28, 1933; New York, NY.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es)**

Married to Mildred (Markow) Hellerstein. My wife is not employed outside our home

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Columbia College, 116<sup>th</sup> Street and Amsterdam Avenue, New York, NY 10027.

Attended September, 1950 to June, 1954. Graduated, Bachelor of Arts, 1954.

Columbia University School of Law, 116<sup>th</sup> Street and Amsterdam Avenue, New York, NY 10027

Attended September 1953-June 1956. Graduated LL.B. 1956. (Under Columbia's professional option program, my first year of law school coincided with my fourth year of college).

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Summer 1955: Law Clerk, RCA Legal Offices, Executive Office, 30 Rockefeller Plaza, New York, NY 10112.

1956-57: Law Clerk, United States District Judge Edmund L. Palmieri, Southern District of New York, 40 Centre Street, New York, NY 10007.

1957-1960: U.S. Army, the Judge Advocate General's Corps, First Lieutenant.

1960-present: Stroock & Stroock & Lavan, 61 Broadway, New York, NY 10006 (1960 to approximately 1981), 7 Hanover Square, New York, NY 10004 (1981 to January, 1997), 180 Maiden Lane, New York, NY 10038 (January 1997-present). Tel. (212) 806-5400 (DID-5824).

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes. I served as a First Lieutenant, U.S. Army, in The Judge Advocate General's Corp. between May 19, 1957 and May 10, 1960. Thereafter, I served in the Inactive Reserves until June 12, 1964. My serial number was 02288516. I received an Honorable Discharge on June 12, 1964.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

At Columbia University School of Law, I was an editor of the Law Review, and I was awarded the Jerome Michael Cup in my third year as best speaker in a trial advocacy competition, and the Charles Bathgate Beck Price in my first year for having submitted one of the two best final examination papers in possessory estates. I was a Harlan Fiske Stone scholar in each of my three years, and a James Kent scholar in my second year. I received a New York State Regent's Scholarship for each of my four years of College, and a scholarship from the Law School to supplement that scholarship in my first year, and for each of my second and third years.

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups

Federal Bar Foundation, President 1995-1997, Chairman, 1997-present;  
Federal Bar Council, Vice President and other offices, approximately 1987-1995;  
American Bar Foundation, member, 1994-1998 (Life Member beginning 1998);  
Association of Bar of City of New York, 1961-present; Chair, Judiciary Committee 1992-1995;  
member Executive Committee, 1987-1991; Chair, Committee on Federal Courts, 1972-1975;  
miscellaneous other committees;  
American Bar Association, 1961-present (member, Business Law Section, Litigation Section, various committees);  
New York State Bar Association, 1961-present;  
New York Lawyers for the Public Interest, Director, 1995-present;  
International Association of Jewish lawyers and Jurists, American Section, Vice President and member of the Executive Committee, 1995-present.

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any lobbying organization. However, I have made contributions to America Israel Political Action Committee (AIPAC): generally \$100 per year, or less). Except for my synagogue and

the professional and community organizations listed in response to the questions of this questionnaire, I do not belong to any other organization.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

I was admitted to the following courts, on the following dates:

New York State courts -- December 3, 1956

United States District Courts:

S.D.N.Y. -- December 12, 1956

E.D.N.Y. -- March 21, 1963

D.D.C. -- May 20, 1997

W.D.N.Y. -- May 17, 1991

United States Supreme Court -- May 25, 1964

United States Courts of Appeals:

2d Circuit -- June 13, 1960

D.C. Circuit -- May 20, 1977

9<sup>th</sup> Circuit -- August 11, 1980

3d Circuit -- October 8, 1980

10<sup>th</sup> Circuit -- November 16, 1981

1<sup>st</sup> Circuit -- November 14, 1985

8<sup>th</sup> Circuit -- September 29, 1995

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving

constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Publications:

A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine. (Monograph published bi-annually by PLI and ALI/ABA in conjunction with programs on Federal Civil Practice and Civil Evidence; published also by NYSBA in connection with similar programs, and by Business Law Section, ABA, in connection with 1994 seminar for Committee on Corporate Law Departments) (See Speeches, below).

The Likely Insurance Treatment of Treble Damage RICO Judgments (with E. A. Mullins), 42 The Business Lawyer 121 (1986).

SEC Secret Subpoenas (with C. L. Briant), 18 Securities & Commodities Regulation 113 (1985).

Safeguards in SEC Disciplinary Proceedings, 16 The Review of Securities Regulation 915 (1983).

When Your Clients are in Conflict (with D. Bleich), 7 The National Law Journal 15 (1985).

Derivative Liability Under RICO (with A.M. Klinger), ALI/ABA Video L. Rev. Study Materials (1985).

Private Civil Actions and Concurrent or Subsequent Regulatory or Criminal Proceedings (May 1986) (ALI-ABA Resource Materials).

Government Assistance and Private Economic organization for Defense (with R.E. Speidel), 9 Military L. Rev. 99 (1960).

Book Review, Hon. Henry J. Friendly, Federal Jurisdiction: A General View, 28 The RECORD 842 (December, 1973).

States React to Hostile Tender Offers (with Nelson A. Boxer), New York Law Journal June 13, 1988.

Can a Client Forbid an Accountant From Talking to the Prosecution? (with Joel Cohen), New York Law Journal August 15, 1989.

Use of Depositions in Court Proceedings (with Curtis C. Mechling), 7 Moore's Federal Practice C. 32 (3<sup>rd</sup> Ed. 1997).



**Standards and Guidelines for Practice Under Rule 11 Of The Federal Rules Of Civil Procedure** (Committee Report, Committee on Rule 11, Litigation Section, American Bar Association 121 F.R.D. 101 (1988).

Report for the Committee on Federal Courts and the Honorable Judges of the United States District Court for the Southern District of New York, Report on the Experimental Individual Calendar Control Program in the United States District Court for the Southern District of New York, 10 REPORTS OF COMMITTEES 15 (Oct. 1971).

Controlling Litigation, Improving Financial Reporting: The 1995 private Securities Litigation Reform Act (with Laurence Greenwald, Melvin A. Brosterman and Susheel Kirpalani), Grant Thornton private publication (Trends in Corporate Governance) 1996.

Speeches (with materials in connection therewith to extent available):

The Attorney-Client and the Work Product Privileges (my monograph on this subject, listed above, is the current published version. Earlier versions were published in connection with the speeches listed below. I have not retained copies of the earlier versions; they were subsumed in the current version):

November 18, 1976, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

March 16-18, 1978, as part of an ALI/ABA program entitled the Federal Rules of Evidence: A Clinical Study of Recent Developments, given at Emory University School of Law, Atlanta, GA, Sol Schreiber Chair.

June 11-16, 1978, same, given at Villanova University School of Law, Villanova, PA.

October 19-21, 1978, same, given in St. Thomas, Virgin Islands.

January 11, 1979, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

June 24-29, 1979, as part of an ALI/ABA program, Trial Evidence in Federal and State Courts, Madison, Wisconsin, Sol Schreiber Chair.

November 12-14, 1981, as part of an ALI/ABA program, Civil Practice and Litigation in Federal Courts, San Juan, PR, Sol Schreiber Chair.

January 14-16, 1982, as part of an ALI/ABA program, Civil Practice and Litigation in Federal Courts, San Diego, CA.

March 1983, as part of an ALI/ABA program, Civil Practice and Litigation in Federal Courts, New Orleans, LA.

April 19, 1985, as part of a NYSBA program on Federal Court Practice, New York City.

December 9, 1988, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

November 8-10, 1990, as part of an ALI/ABA program, Advanced Course of Study, Civil Practice and Litigation Techniques in Federal and State Courts, Washington, D.C., Sol Schreiber Chair.

February 19, 1992, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

May 20-22, 1993, New York City, and  
October 14, 1993, as part of an ALI/ABA program, Advanced Course of Study, Civil Practice and Litigation Techniques in the Federal Courts, Complex Procedural Issues: Sol Schreiber Chair.

March 21, 1994, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

April 8, 1994, What Every Business Lawyer Ought to Know About the Lawyer/Client Privilege, ABA Section of Business Law, Washington, D.C.

September 30, 1994, for ALI/ABA CLE TV: The Lawyers' Video Magazine, Philadelphia PA (Eileen Kenney, Producer).

October 13-15, 1994, as part of an Advanced ALI/ABA Course of Study, Civil Practice and Litigation Techniques in the Federal Courts, Boston MA (Sol Schreiber, Chair).

December 5, 1994, as part of a program of the N.Y.S. Bar Association Continuing Legal Education Department on "Practical Evidence", New York City, Gregory P. Joseph, Chair.

February 14, 1996, as part of a PLI program on Federal Civil Practice, New York City, Barry Garfinkel Chair.

May 29, 1996, to the lawyers of Time Warner's Corporate Law and Music Group Departments.

December 13, 1996, Melville, LI, as part of a program of the NYSBA, Practical Evidence (Hon. James A. Gowan, J.S.C., N.Y., Chair).

Civil Discovery in Federal & State cases: How Do I Get Started? (with Michele L. Jacobson), Course Materials, CitiBar Center for Continuing legal Education, The Association of the Bar of the City of New York (1997).

The ABCs of Civil Litigation in N.Y.C. And N.Y.S. Courts: Initiating Litigation, Discovery and Other Pre-Trial Issues (with M.L. Jacobson), Association of the Bar of the City of New York, April 18, 1996 (Karen G. Milton, Director, Education and Training Programs).

Nuts & Bolts of Document Production for In-House and Outside Counsel: The Right Way is the Only Way (with J.A. Siegel and L.R. Shaw) (Moderator of Panel Discussion), ABA Section of Business Law, Nashville, TN, March 28, 1996 (James L. Holzman, Programs Chair, Litigation Committee).

The Fundamentals of Pre-Trial Discovery: A practitioner's Perspective (with Adam M. Greenfield), Course Material, The ABCs of Civil Litigation in N.Y.C., Discovery and Other Pre-Trial Issues, The Association of the Bar of the City of New York, April 17 and 18, 1996.

New York Civil Evidence (Recent Development in Evidence Law, with R.M. Cogan and M. Sasson)

July 21, 1995, as part of a CLE program of the Office of Court Administration to New York State judges, Westchester Marriott Hotel, Tarrytown, New York.

November 18, 1994, same, Syracuse, New York.

Moderator, "The Image of Lawyers", Winter meeting of Federal Bar Council, Acapulco, Mexico, February 1994.

"Alternative Disputes Resolution: The Experiences of the Southern and Eastern Districts of New York", Winter Meeting of Federal Bar Council, Hawaii, February 1993 (copy not available).

TROs and Preliminary Injunctions, November 8-10, 1990, as part of an ALI/ABA program, Advanced Course of Study, Civil Practice and Litigation Techniques in Federal and State Courts, Washington, D.C., Sol Schreiber, Chair (copy not available).

Plaintiffs and Defendants Objectives in Preparing for Trial, June 25-29, 1990, as part of an ALI/ABA program, Trial of a Securities Case, Charlottesville VA (Marvin Pickholz Chair) (copy not available).

Trial Evidence (with Stuart A. Summit), March 9, 1990, as part of a NYSBA program, Federal Civil Practice Forum, New York City (Hon. Shira S. Scheindlin, Chair) (copy not available).

"Derivative Liability Under RICO" (see Publications above):

As part of a videoconference sponsored by ALI/ABA, Philadelphia, Pa., 1985.

To a conference of the circuit and district judges of the Second and Third Circuits, Saratoga, N.Y., Spring, 1986 (approximate date).

To a conference of the circuit and district judges of the Ninth Circuit, Monterey CA, Fall, 1986 (approximate date).

Litigation Update, October 7-8, 1982, New York City, part of a PLI program, Broker-Dealer Exposure in a Changing Regulatory Climate (John F.X. Peloso, Chair) (copy not available).

Program of the National Conference on Professional Responsibility, May 17-20 1989, Chicago: Rule 11 and Discipline: Defining the boundaries (copy not available).

Seminar, Advanced ALI/ABA Course of Study: Civil RICO, Issues Confronting Plaintiffs and Defendants, New York City, May 14, 1988 (see Civil Rico: Plaintiffs Tactics and Strategy (with Alan M. Klinger and Michele L. Jacobson), Chapter IX, 5<sup>th</sup> Annual Rico Litigation Seminar (Law Journal Seminars Press 1998).

January 24, 1980, "Private Civil Actions and Concurrent or Subsequent Regulatory or Criminal Proceedings", as part of an ALI/ABA CLE Review (see Publications, above).

Civil Rico: The State of The Law (with Alan M. Klinger and Michele L. Jacobson) chapter VII, Broker-Dealer Institute (Prac. L. Inst. 1989).

State Securities Litigation: New Developments (with Carole W. Nimaroff), Chapter XII, Broker-Dealer Institute (Prac. L. Inst. 1987).

Filed Statement and Summaries of Testimony of Alvin Hellerstein, Chair, and Federico E. Virella, Jr., Member, Committee on the Judiciary, Association of the Bar of the City of New York, given January 27, 1994 to, and included with, Summary Report of The Judicial Friends and the Association of Hispanic Judges, Public Hearing on Judicial Selection (1994).

Address to the Annual Meeting of the Board of Jewish Education  
June 10, 1981, On the Occasion of Completing Three Years as President (copy not available).

Project Finance, Trade and Int'l Arbitration, a talk by Alvin K. Hellerstein at a seminar, Legal Issues of Doing Business in Israel, presented by Int'l Ass'n of Jewish Lawyers & Jurists, N.Y.C., June 15, 1994.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical examination was January 20, 1998.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk to the Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York (1956-57).

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Stroock & Stroock & Lavan, 1960 -present: Address: 61 Broadway, New York, NY 10006 (1960 to approximately 1981), 7 Hanover Square, New York, NY 10004 (1981 to January, 1997), 180 Maiden Lane, New York, NY 10038 (January 1997-present). Tel. (212) 806-5400 (DID-5824). Partner since 1969. I co-founded and I co-lead the firm's litigation department.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?



My specialty is litigation, including arbitration and other modes of disputes resolutions, in particular, complex cases involving large exposures. This has been the nature of my practice throughout my career.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical clients are those who present complex issues requiring litigation or counseling in anticipation of litigation. For Tosco Corp., for example, an independent oil refining company, I have supervised and conducted major litigations relating to tender offers, breaches of commercial relations, class actions and securities litigations, age discrimination, and environmental clean-up. For Grant Thornton, a national accounting company, I defended the company against claims of accounting malpractice and counseled with respect to issues in audits that anticipated possible litigation. I have represented institutional clients as both plaintiffs and defendants, and in regulatory proceedings. I have also defended clients against derivative liability for sexual abuse, represented a claimant with respect to ownership of an historic and valuable library, and coordinated parallel civil, criminal and regulatory litigations and proceedings.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court regularly.

2. What percentage of these appearances was in:
- (a) federal courts; --50%
  - (b) state courts of record; -- 25%
  - (c) other courts (i.e., arbitrations) -- 25%
3. What percentage of your litigation was:
- (a) civil; -- 95%
  - (b) criminal. -- 5%
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
- I tried eight to ten cases to verdict or judgment in courts of records over the course of my practice with Stroock & Stroock & Lavan. In addition, I tried approximately 25 general courts-martial to verdict and sentence as a Judge Advocate officer in Korea in 1959-60.
5. What percentage of these trials was:
- (a) jury -- 95%
  - (b) non-jury -- 5%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. National Association of Independent Automobile Insurers v. New York, 89 N.Y. 950 (1997) (Kaye, C.J., Bellacosa, Smith, Levine, Ciparick and Wesley, JJ.). Plaintiffs, automobile insurers, had successfully enjoined a New York tax imposed on payments of insurance reimbursements to automobile owners. The tax, anticipating sales taxes that repair shops were required to collect, was held unconstitutional by the trial court under the constitutions of New York and the United States as imposing an arbitrary double tax. (No. 23912, April 23, 1991, Spodek, J.S.C.). The Appellate Division reversed, 207 A.D.2d 191, 620 N.Y.S.2d 448 (2d Dep't 1995) (O'Brien, J., with Bracken, J.P. And Pizzuto, J. concurring, Ritter, J. dissenting), and the New York Court of Appeals affirmed (citation above). The Court of Appeals held that the policies of legislative discretion and presumptive constitutionality outweighed the apparent arbitrariness of the tax. However, the appeal brought about legislative changes to remedy the problem. I argued the motion for plaintiffs automobile insurers in the trial court, and argued the appeals in the Appellate Division, Second Department, and in the New York Court of Appeals. I was assisted by Edward P. Grosz, an associate (212-806-6285), and Martin J. Minkowitz, a partner (212-806-6256). August L. Fietkau, Assistant Attorney-General, 120 Broadway, New York, N.Y. 10006 (212-416-8664), represented New York State.

2. Lion Oil Co. v. Tosco Corp., 90 F.3d 268 (8th Cir.1996). Lion Oil, the owner of an oil refinery, had sued Tosco, the former owner of the refinery in the United States District Court for the Western District of Arkansas to recover environmental clean-up costs. After substantial discovery and cross-motions for summary judgment, the district court granted judgment of dismissal (Hon. Harry Barnes, U.S.D.J.), and the court of appeals affirmed. (Wollman, C.J., with Henley and Bowman, JJ.) I argued both the motion for judgment in the district court and the appeal. Susheel Kirpalani, an associate of my firm, assisted. (212-806-6478). Allan Gates, of Mitchell, Williams, Selig, Gates & Woodyard, 320 West Capitol Avenue, Little Rock, Ark. 72201 (501-370-4275) was co-counsel. Lion Oil was represented by Mark L. Austrian, of Collier, Shannon, Rill & Scott, 3050 K Street, N.W., Washington, D.C. 20007 (202-342-8400) and N. M. Norton of Wright, Lindsey & Jennings, 200 West Capitol Avenue, Little Rock, Ark. 72201 (501-371-0808)?

3. Elliman v. Elliman, AAA Case No. 13 180 00126 92. This case involved the interpretation of a partnership agreement and valuation of sophisticated and complex partnership businesses and income

streams. The arbitration, before three lawyer-arbitrators in 60 sessions, between June 1992 and July 1994, covered 10,889 pages of transcript and involved approximately 600 exhibits. The award, in favor of the terminated partner, Christopher J. Elliman, in the amount of \$4,851,108, was confirmed, and judgment was entered, in Supreme Court, New York County, No. 125028/94 October 19, 1994 (Bruce McM. Wright, J.S.C.). I acted as chief counsel for Christopher J. Elliman. I was assisted by associates Jonathan Siegel (212-806-6642), and Howard Horowitz (now at Lipper & Co., L.P., 101 Park Avenue, New York, NY 10178 (212-883-6351). The petitioners and counter-respondents were David D. Elliman and Arthur S. Penn, and the partnership, Elmrock Partners. They were represented by Proskauer, Rose, Goetz and Mendlesohn, 1585 Broadway, New York, NY 10019 (Dale Schreiber, chief counsel, Andrew R. Reich assisting) (212-969-3475). The arbitrators were Joseph P. Sullivan, Esq., McCarthy & Sullivan, 2095 Broadway, New York, NY 10023, Chair (212-787-3202), Martin S. Tackel, Esq., Sharff & Tackel, 10 Mitchell Place, White Plains, NY 10601 (914-997-0905) and Walter V. Farber, Esq., 595 Madison Avenue, New York, NY 10022 (212-308-4222). Related litigations between the parties and among the larger family continue. See, e.g., *Model v. Elliman*, No. 10287/93 (Sup. Ct. N.Y. County, Herman Cahn, J.S.C.) (involving issues of partnership dissolution and wind-up relating to a large tract of land adjoining Fort Bragg in North Carolina, and *Elliman v. Elliman*, No. 603377/96 (Sup. Ct. N.Y. County, Beatrice Shainswitt, J.S.C.) (involving issues of trusts and fiduciary obligations in the context of sales/leasebacks of nuclear power facilities). I am chief trial counsel for Christopher J. Elliman and other members of his family in these lawsuits, and, on October 25, 1996, I argued an appeal on their behalves in the Appellate Division, First Judicial Department, in *Model v. Elliman*, *supra*. The Appellate Division affirmed some aspects, and reversed other aspects, of the trial court's decisions, see 659 N.Y. Supp. 2d 755 (1<sup>st</sup> Dep't 1997) (Wallach, P.J., Nardelli, Tom, Mazzairelli, J.S.C.), and the case continues. In the appeal, Daniel R. Murdock of Winston & Strawn, 200 Park Avenue, New York, N.Y. 10166 (212-294-4669) and William A. Maher of Maher, Sullivan & McDaniel, 230 Park Avenue, New York, N.Y. 10022 (212-309-8733) represented respondents. In the continuing litigations, Martin London of Paul Weiss Rifkind Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019 (212-373-3197) was substituted for Daniel Murdock in the representation of the adverse clients.

4. *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992). New York City's Department of Environmental Protection, in order to discharge obligations imposed under a consent decree issued at the instance of the United States Department of Environmental Protection, had awarded contracts for the treatment and conversion of sludge to New York Organic Fertilizer Company, an indirect subsidiary of JWP Inc., and two other companies. Taxpayers, led by Hon. Carol Maloney, sued in the New York Supreme Court to enjoin performance because of alleged violations of public bidding requirements under the City Charter and State law. The defendants removed to the United States District Court, Eastern District of New York, pursuant to the All Writs Act and the jurisdiction of the district court under the Consent Decree. The United States intervened. A full record was developed by affidavits submitted under an accelerated schedule, and the matter was argued upon motion for judgment before United States Magistrate Judge Michael Orenstein (225 Cadman Plaza East, Brooklyn, NY 11201). Judge Orenstein granted judgment to defendants, and Hon. Jacob Mishler, U.S.D.J., following a *de novo* hearing, adopted Judge Orenstein's decision. (Uniondale Avenue and Hempstead Turnpike, Uniondale, NY 11553). Plaintiffs appealed, and the court of appeals for the Second Circuit affirmed. (Walker, C.J., with Lumbard and Van Graafiland, C.J.J.). I was chief counsel in the district court and argued the appeal for New York Organic, Inc., one of the three contracting parties. I was assisted by Joseph J. Giamboi, then an associate of the firm and now Vice-President and General Counsel, New York City

School Construction Authority, 30-30 Thomson Avenue, Long Island City, NY 11101 (718-472-8220). The Corporation Counsel (Barbara Yessel, Helen P. Brown and Lewis Finkelman, Assistants Corp. Counsel, 212-788- 1276, 1022 and 1267) represented the City. S. Mac Gutman of Gutman & Gutman, 19 Roslyn Road, Mineola, NY 11501 (516-248-0470) represented plaintiff-appellant. Paul A. Winick of Thelen, Marrin, Johnson & Brides, 330 Madison Avenue, New York, NY 10017 (212-297-3200) and K. Richard Marcus and Vincent Toma of McDonough, Marcus, Cohn & Treter, 600 Third Avenue, New York, NY 10016 (212-557-7990) represented the other contractors, Chambers Services, Inc. and Merco Joint Venture. The United States was represented by Deborah Zwany, Assistant U.S. Attorney, 225 Cadman Plaza East, Brooklyn, NY 11201 (718-33-2898). The New York Attorney General was represented by Ann L. Goldwasser, Department of Law, 120 Broadway, New York, NY 10271 (212-341-2459).

5. Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1988). This case involved issues arising from the termination of a master distribution contract and discriminatory pricing between master distributors. The district court, after a verdict by a jury in favor of the plaintiff, Best Brands, the master distributor in the Eastern States, granted judgment in the amount of \$45,174,000, after trebling. (U.S.D.C., S.D.N.Y., 85 Civil 3661, March 6, 1987, as amended April 28, 1987, Richard Owen, U.S.D.J.) The court of appeals reversed (Altamari, C.J., with Newman and Miner, C.JJ.), holding that actual competition between the favored and unfavored distributors, necessary for a claim under the Robinson-Patman Act, 15 U.S.C. § 13(a), had not been proven, and that the contract terms that were allegedly breached lacked sufficient specificity. I was chief trial counsel for the plaintiff in the district court, and I argued the appeal for plaintiff-respondent in the Second Circuit. I was assisted by Brian M. Cogan, then an associate and now a partner of Stroock & Stroock & Lavan (212-806-5654), and Paul E. Breene and Elizabeth A. Sherwin, then associates and now partners of Anderson, Kill, Olick & Oshinsky, One Gateway Center, Newark, NJ 07102 (201-642-5858). Professor William K. Jones, Charles Evans Hughes Professor of Law at the Columbia Law School (212-854-2640) also assisted on the brief. William M. Bitting of Hill, Farrer & Burrill, 445 S. Figueroa Street, Los Angeles, CA 90071 (213-620-0460) and Amy D. Kanengiser, then of Spengler, Carlson, Gubar, Brodsky & Frischling of New York City and now in the Office of the General Counsel, Nynex Corp., 1095 Avenue of the Americas, New York, NY 10036 (212-395-2121) represented Falstaff Brewing, defendant in the district court and appellant in the Second Circuit.

6. Financial Security Assurance Inc. v. State Government Insurance Commission of South Australia. This was an arbitration of a reinsurance dispute, pursuant to the federal arbitration act, 9 U.S.C. § 9, and governed by rules of the Center for Public Resources as modified by the parties. The case arose from claims of an Australian reinsurer, State Government Insurance Commission (SGIC), that it was entitled to rescind its agreement of reinsurance with Financial Security Assurance Inc. (FSA). FSA had ceded a portion of its insurance guarantee of mortgage-backed corporate notes. SGIC claimed that it was induced to reinsure by misstatements and omissions amounting to fraud. The arbitration trial took two weeks in June and July, 1994. I acted as chief counsel for petitioner, Financial Security Assurance Co., assisted by an associate, Michele L. Jacobson (212-806-6067). An award was entered in favor of petitioner in the amount of \$3,842,295, with a declaration of continuing obligations by the respondent. The award was confirmed, and judgment was entered, by the United States District Court, Southern District of New York. (94 Civil 7239, Nov. 14, 1994, Denise L. Cote, U.S.D.J.) Brown & Wood, 1 World Trade Center, New York, NY 10048 (Roger J. Hawke, chief counsel) (212-839-5544) tried the case for



respondent. The arbitrators were Richard M. Shusterman, Chair, of White & Williams, One Liberty Place, 1650 Market Street, Philadelphia PA 19103 (215-864-7000), Lawrence Brandes, Rosenman & Colin, 575 Madison Avenue, New York, NY 10022 (212-940-8800) and Aaron Stern, Stern, A.B., Inc., New King Street, P.O. Box 820-C, N. White Plains, NY 10603 (914-428-1717).

7. Agudas Chasidei Chabad of United States v. Gourary, CV 85 2909 (E.D.N.Y., CPS). This was a dispute over the ownership of a 50,000 volume library collected by the sixth dynastic rabbi, Joseph I. Schneerson, in the line of Lubavitcher chasidim, a sect of Orthodox Jews originating in Russia but, since 1940, centered at 770 Eastern Parkway, Brooklyn. The library was acquired in the 1930s, but included rare books, manuscripts and memorabilia dating back to the origins of the sect in the late 18th and early 19th centuries in Russia, and earlier. Rabbi Schneerson, with some of his immediate family including the plaintiffs, his daughter Hanna Gourary and her son Barry Gourary, managed to escape from Warsaw in 1940, with the help of friends and the intervention of the State Department, and was able to rescue the core of his library, some during the war and some after. Additional volumes were acquired in the 1950s. I was chief trial counsel for the defendants Hanna and Barry Gourary, defending, as heirs, against the claim of the corporate representative of Lubavitcher chasidim, led by the then current dynastic leader, the late Rabbi Menachem Mendel Schneerson, the seventh Lubavitcher rabbi, also a nephew of Rabbi Joseph I. Schneerson. After trial of the issue of ownership lasting approximately a month, the district court granted judgment in favor of plaintiff. (650 F. Supp. 1463 (E.D.N.Y. 1987) (Charles P. Sifton, U.S.D.J.). Defendants, through successor counsel (Richard A. Jaffe of Abady & Jaffe; firm apparently dissolved and Mr. Jaffe's current address unknown), appealed. The Second Circuit affirmed, 833 F.2d 431 (1987). Schlamm Stone & Dolan, 475 Park Ave. So., NYC 10016 (696-1600) (Richard H. Dolan), Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Wash. D.C. 20037 (202) 293-6400 (Nathan Lewin, Seth P. Waxman), and Jerome J. Shestack, Schnader, Harrison, Segal & Lewis, 1600 Market Street, Phila. Pa. 19103; 215-751-2446 represented plaintiff. Brian M. Cogan (212-806-5654) and Elizabeth A. Mullins (212-806-5832), then associates and now partners of Stroock & Stroock & Lavan, assisted me.

8. U.S. Financial Securities Lit'n, M.D.L. 161, U.S.D.C., S.D. Cal. (Howard B. Turrentine, U.S.D.J.). This litigation of securities fraud in the common stock and debentures of U.S. Financial Securities, Inc. was transferred from the United States District Court for the Southern District of New York to the Southern District of California, and consolidated with other related cases in other district courts. 375 F. Supp. 1403 (J.P.M.D.L. 1974); 385 F. Supp. 586 (J.P.M.D.L. 1974) (tag-along). Class actions were then certified, 64 F.R.D. 443 (S.D. Cal. 1974), and extensive pre-trial proceedings followed. E.g., 69 F.R.D. 24 (S.D. Cal. 1975); 74 F.R.D. 497 (S.D. Cal. 1975). I was in charge, on behalf of my firm, of the representation of Decatur Income Fund and other institutional investors which had purchased debentures of U.S. Financial. Fred C. Aldridge, Jr. of Stradly, Ronon, Stevens & Young, 2600 One Commerce Square, Philadelphia, PA 19103 (215-564-8120) was co-counsel. We were assisted by David C. Pollack, then an associate and now a partner of Stroock & Stroock & Lavan (305-789-9342). We reached a favorable settlement, in combination with two class actions and another individual action; the remaining cases settled after additional proceedings. The settlement group with which my clients and I were joined consisted of: Melvyn I. Weiss and William Lerach of Milberg, Weiss, Bershad, Spechtrie & Lerach, 1 Pennsylvania Plaza, New York, N.Y. (212-594-5300), representing the debenture class of plaintiffs, Irving Morris of Morris & Morris, 1105 N. Market Street, Wilmington, DE 19899 (302-426-0400) representing the common stock class of plaintiffs and J. Tomlinson Forte of Reed, Smith, Shaw



& McClay, 435 Sixth Avenue, Pittsburgh, PA 15219 (412-288-3131) representing Mellon Bank, N.A., another plaintiff debenture holder. The recovery for the plaintiffs for which I acted was approximately \$30 million, approximately 95% of their loss. Irwin F. Woodland of Gibson, Dunn & Crutcher, One Century Plaza, 2029 Century Park East, Los Angeles, CA 90067 (310-552-3400) represented defendant Touche, Ross & Co.; Everett B. Clary and James W. Colbert III of O'Melveny & Myers, 400 South Hope Street, Los Angeles, CA 90071 (213-669-6000) represented defendant Union Bank; William T. Norfolk and Robert Katz of Sullivan & Cromwell, 125 Broad Street, New York, N.Y. (212-558-4000) represented defendant Goldman Sachs & Co. and other broker-dealers (Mr. Katz is now general counsel of Goldman Sachs (212- 902-1000); and J. Asa Rountree of Debevoise & Plimpton, 875 Third Avenue, New York, N.Y. (212-909-6000) represented the outside directors of U.S. Financial who were defendants.

9. United States v. Arroyo, 494 F.2d 1316 (2d Cir. 1974) (Danaher, C.J., with Lumbard and Timbers(JJ.)). This was an appeal of convictions of five defendants under the narcotics law, following a trial before District Judge Arnold Bauman and a jury. I represented one of the defendants, Carlos Sanchez, following CJA assignment by the court. The trial involved a complicated, "French Connection" conspiracy to import and distribute heroin, processed in Marseilles, shipped to Buenos Aires, and hidden in a shipment of hides exported from Buenos Aires, via Rio de Janeiro, to New York. I was trial counsel before Judge Bauman, and I argued my client's appeal to the Second Circuit. Paul S. Levy, then an associate and presently a partner of Joseph, Littlejohn & Levy, 450 Lexington Avenue, New York, N.Y. 10017 ( 212-286-8600) assisted. Franklin B. Velie, presently of Christy & Viener, 620 Fifth Avenue, New York, N.Y. 10020 (212-632-5503) was Assistant United States Attorney. Counsel for other defendants were: Albert J. Krieger, 1899 South Bayshore Drive, Miami FL 10177 (305-854-0050), Jay Goldberg, 250 Park Avenue, New York, N.Y. 10177 (212-983-6000) and Stanley M. Meyer (practiced in Mineola, N.Y., address unknown).

10. In Re Atlantic Fin. Mgmt., 718 F.Supp. 1003, 718 F.Supp. 1012, 718 F.Supp. 1018 (D. Mass., MDL No. 584, 1988, 1989). This action, transferred by the Multidistrict panel to the District of Massachusetts, consolidated two class actions claiming fraud in connection with the sales of securities of AZL, Inc., an international oil and agriculture company. After a month of trial before Walter Jay Skinner, U.S.D.J. and a jury, the actions were settled. The district court ruled, before the trial, on issues of respondeat superior and controlling persons liability under the Securities laws and, towards the end of trial, on the fairness and propriety of bar orders with respect to partial settlements. The former issue was reviewed by the court of appeals for the First Circuit, 784 F.2d 29 (1986), cert. denied, 481 U.S. 1072 (1987) (three votes favored granting the writ). I was co-counsel for defendant AZL with Jerome Gotkin and Gordon P. Katz, then of Widett, Slater & Goldman and now partners of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, One Financial Center, Boston, MA (617-542-6000) and Sherburne, Powers & Needman, One Beacon Street, Boston, MA 02108 (617-532-2700), respectively. Alan M. Klinger (212-806-5818), then an associate and now a partner of Stroock & Stroock & Lavan, assisted me. Peter J. Schneider and Robert J. Cordy of Burns & Levinson, 125 Sumner Street, Boston, MA 02110 (617-345-3000) acted as liaison plaintiffs. James L. Ackerman and Sharon S. Tisher of Day, Berry & Howard, 260 Franklin Street, Boston, MA 02110 (617-345-4600) represented the individual AZL defendants. Henry F. Minnerop and Judith Welcom of Brown & Wood, One World Trade Center, New York, N.Y. 10048 (212-839-5300) represented defendant Becker Paribas, Inc.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I was Chair of the Judiciary Committee of the Association of the Bar of the City of New York between September 1992 through August 1995. The Judiciary Committee investigates and evaluates every elected and appointed candidate for City, State and Federal judicial positions within, or affecting, New York City. The committee membership was broad-based, diversified according to types of practice and racial and ethnic identifications. The Committee performed its investigations and evaluations of candidates according to strict and high standards, thus contributing to a high quality of justice in the courts within, and affecting, New York City. In the three years when I was Chair, the Committee investigated and evaluated 426 candidates for judicial office.

I organized a Program Committee for the Federal Bar Council and served as the Co-Chair with Donald Zoeller. Between September 1994 and November 1996, we developed a series of interesting, and well-attended educational programs for federal practitioners. The programs were presented by experienced lawyers, judges and law professors, who discussed ethical issues in pre-trial depositions, successive state and federal prosecutions, pre-trial and trial publicity in criminal cases, recent changes in federal practice and procedure, among other issues.

I was Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York between September 1972 and August 1975, and a member of the Committee for two years before then. The Committee published reports that led to the adoption by the Southern District judges of the Individual Assignment Plan for controlling cases to replace a master Calendar system. The Committee prepared other reports on subjects that included urging the adoption by the Second Circuit of CAMP (Civil Appeals Management Plan), using a Staff Counsel to help settle and limit issues in pending appeals, promoting procedures in the district courts to reduce sentencing disparities prior to the adoption of the Sentencing Guidelines, and creating efficiencies with regard to class actions.

My speeches, lectures and writings on the attorney-client privileges and on issues of practice and procedure in the federal courts are described in answer to Question 12 of this questionnaire.

I chaired a subcommittee on Rule 11 for the Section on Litigation, American Bar Association, 1988-1992. The subcommittee publicized a paper on Rule 11 standards, which the present Section Chair, Gregory P. Joseph, developed for the Committee as one of its members. See Standards and Guidelines for Practice Under Rule 11, 121 F.R.D. 101 (1988).

I was a member of several committees of the Second Circuit, on the Civil Appeals Management Plan under Professor Maurice Rosenberg, Chair, and on the Pre-Trial Phase of Civil Litigation, under

Professor Rosenberg and, after him, under Standish Medina, Chairs. I succeeded Mr. Medina as Chair. The Committees functioned between approximately 1978-1994.

May 22, 1998

  
ALVIN K. HELLERSTEIN

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
  1. (a) Upon my retirement from Stroock & Stroock & Lavan LLP, I will be entitled to receive, pursuant to the firm's Pension Agreement with all its partners, (i) a proportional portion of the firm's income for the year of my retirement, according to the portion of the year that I was an active partner and (ii), thereafter (and subject to ratification by the firm's partners of a proposed modification to the existing Pension Agreement), a yearly pension in a set amount, subject to adjustments for changes in the cost of living and to equalize for possible deteriorations in the pensions of other retired partners similarly situated.
  - (b) I will be entitled to distributions from investments I made in various common stock and bond funds with other of the firm's partners, though investment partnerships that are independent of the firm. The investments are likely to be substantially distributed to the owning partners within five years.
  - (c) I have a vested and separable interest in "401-K" and IRA accounts, reflecting funds I contributed (directly or beneficially), and increases thereon, through the Stroock & Stroock & Lavan Retirement Plan, into professionally managed common funds. It is anticipated that, following my retirement from the firm, my interest will be rolled over into a separate IRA account in my name.

I have no other arrangements.
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.
  2. Except for cases where my firm appears for a party, or where the clients for whom I had major litigation responsibility appear as parties (see Answer to I.17.b.2, above), in which instances I should recuse myself, I believe that there should not be potential conflicts of interest. I expect to follow the requirements provided for judges by the Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

3. No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

4. See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

5. See attached Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

6. My wife and I have been involved in contributing and raising funds for the Clinton-Gore 1996 campaign, their 1992 campaign and, before that, for Senator Gore's primary campaign for President in 1988. My wife and I contributed before then to Senator Gore's Senatorial and Congressional campaigns.

In 1960, I was active as a speaker in President Kennedy's campaign for President. In 1961, I helped to organize and run a successful primary campaign to establish the Ansonia Independent Democrats (West 72d Street, New York City), and in related City and Congressional campaigns in the early 1960's (inclusive of interest and costs).

I did not have a title or any given set of responsibilities in any campaign.

May 22, 1998

  
ALVIN K. HELLERSTEIN



## FINANCIAL STATEMENT

## NET WORTH

February 28, 1998

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) and all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	38,500	Notes payable to banks— secured	0
U.S. Government securities (held in "Vista" a common fund of Chase)	113,250	Notes payable to banks-- unsecured	0
Listed securities-1) 400 shares of Barrick Gold;	7,750	Notes payable to relatives	0
2) 602 shares Mellon Bank	37,500		
Stroock & Stroock & Lavan Investment Partnerships	324,383		
		Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due- Am. Express	2,500
		Visa	2,500
Stroock & Stroock & Lavan Retirement Plan (as of 1/31/95) ("401-K, IRA")	2,180,440	Unpaid income tax	0
Various Dreyfus funds (as of 12/31/97)	56,893	Other unpaid tax and interest	0
Mutual Qualified Fund (as of 12/31/97)	47,189	Real estate mortgages payable to Chase Mortgage Corp., Manhattan Condo	249,026
Real estate owned- West Palm Beach Condo	30,000	Chattel mortgages and other liens payable	0
Manhattan Condo	400,000		
Real estate mortgages receivable	0	Other debts—itemize:	0
Autos and other personal property	100,000	Owed to Stroock & Stroock & Lavan Retirement Plan	2,483
Cash value—life insurance	37,930		
Due from Stroock & Stroock & Lavan LLP ('97 draw balance)	30,829	Owed to life insurance co.	10,377

Stroock & Stroock & Lavan Capital Account	350,439		
Stroock & Stroock & Lavan Tax Deposit Account	54,561		
Pension from Stroock & Stroock & Lavan LLP (see note)	—	Total liabilities	266,886
		Net Worth	3,542,778
Total Assets	3,809,644	Total liabilities and net worth	3,809,664
<b>CONTINGENT LIABILITIES</b>		<b>GENERAL INFORMATION</b>	
As endorser, co-maker or guarantor—see notes	—	Are any assets pledged?	No, except see real estate mortgage above.
On leases or contracts—see notes	—	Are you defendant in any suits or legal actions?	No, but see notes.
Legal Claims	0	Have you ever taken bankruptcy?	No.
Provision for Federal Income Tax	28,000		
Other special debt	0		

#### NOTES TO FINANCIAL STATEMENT

1. Upon my retirement from Stroock & Stroock & Lavan LLP, I will be entitled to receive, pursuant to the firm's Pension Agreement with all its partners, (i) a proportional portion of the firm's income for the year of my retirement, according to the portion of the year that I was an active partner and (ii), thereafter (and subject to ratification by the firm's partners of a proposed modification to the existing Pension Agreement), a yearly pension in a set amount, subject to adjustments for changes in the cost of living and to equalize for possible deteriorations in the pensions of other retired partners similarly situated.

2. Pursuant to agreement among the firm, its partners, and its lending banks, I am liable, and will continue for one year after retirement to be liable, subject to certain limitations, as a guarantor to the firm's lending banks, and to the lessor of its offices at 180 Maiden Lane, New York, N. Y. 10038, in the amounts respectively, of \$300,000 its banks, \$175,000 to its major lessor, and \$25,000 to lessors of other of its offices.

3. The firm is a defendant to the following suits or legal actions; I am not named in any of them, and I was not involved in the facts and allegations giving rise to them.

*Baker Robbins & Co. v. Stroock & Stroock & Lavan*, 98 Civ. 143 (SHS) (U.S. Dist. Ct., S.D.N.Y.). This is an action by the firm's former computer consultants to recover \$440,000 plus interest based on invoices sent to the firm. The firm contends that the services were of poor and inadequate quality, and has counterclaimed for damages in an amount exceeding the damages demanded in the complaint. The action was settled, and a stipulation thereof is to be entered.

*Wolfson v. Rosenthal, et al.*, (N.Y. Sup. Ct., Civil 128318-93) (Ramos, J). This action, against a firm later acquired by Stroock & Stroock & Lavan and its then partners, by one of its former partners, was commenced November 1993. The complaining partner sues for an accounting, and alleges that he is entitled to the value of his 18.5% partnership share under the partnership agreement of the former firm. The court determined that, because of the mergers into Stroock & Stroock & Lavan, the former firm was terminated, that plaintiff was therefore entitled to his distributive share, and that his former partners were ordered to account to him. Accordingly, an accounting was furnished and, except for a continuing dispute as to the value, if any, of goodwill, plaintiff's claim has been satisfied. As to the issue of goodwill, an official referee is to hear and determine, and report to the court. Stroock & Stroock & Lavan LLP, although not named in the lawsuit, has assumed any liability to the plaintiff.

*Wiz Technology, Inc. v. Stroock & Stroock & Lavan*, Superior Court, CA (L.A. Cty., Case No. BC169395). In March 1997 plaintiff, Wiz Technology, Inc. ("Wiz"), filed an action against the firm alleging that the firm (and others not identified) were negligent in acting as Wiz's counsel in connection with a February 1994 public offering of Wiz common stock. The firm has denied the allegations of the complaint because, among other reasons, it did not act as Wiz's counsel. Rather, the firm acted as counsel to the underwriter. In January 1997, in a related state court action brought by the underwriter, Strasbourger Pearson Tulcin Wolff, Inc., against Wiz, in which the firm appeared as counsel for the underwriter, the state court granted Wiz's motion to disqualify the firm based on an alleged conflict of interest. The firm has appealed that order and the California Court of Appeal has stayed that action pending the disposition of the appeal. On January 29, 1998 Wiz filed for protection under chapter 11 of the bankruptcy laws.

*Overseas Commodities, Ltd. v. Stroock & Stroock & Lavan, et al.* (Sup. Ct. N.Y. Cty., Civil 103150/95) is a lawsuit by a former real estate client of the firm, against the firm and a former partner and an associate, claiming that they were negligent and breached contractual and fiduciary duties in connection with the purchase of cooperative apartments in 1989, resulting in damage claimed to exceed \$1 million. The defendants have denied wrongdoing or liability.

*Liddle & Robinson v. Greenfield, Stein & Senior; Greenfield, Stein & Senior v. Stroock & Stroock & Lavan* (Sup. Ct. N.Y. Cty., Civil 362432/96, 601130/97, 590848/97). In the course of representing Liddle & Robinson, a law firm in New York, in a lawsuit against its former partner Paul Shoemaker, we represented the plaintiff in a second lawsuit against defendant's new law firm, Greenfield, Stein & Senior, to recover fees due to Liddle, Robinson. The Greenfield firm counterclaimed against Stroock & Stroock & Lavan, and against its partner in charge of the matter, claiming violation of the New York Judiciary Law in bringing the suit. The cases are in discovery.

Guilden as Executor v. Stroock & Stroock & Lavan (Sup. Ct. N.Y. Cty., Civil No. 116507/97). The complaint alleges that the firm and one of its partners negligently failed to file a New York State Estate Tax Refund Claim for approximately \$645,000, and claims damages in excess of \$1 million. Defendants have denied the allegations and liability. Discovery is proceeding.

May 22, 1998



ALVIN K. HELLERSTEIN

AO-10 (w)  
Rev. 1/98**FINANCIAL DISCLOSURE REPORT**  
**Initial Report**Report Required by the Ethics  
Reform Act of 1989, Pub L No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial) Hellerstein, Alvin K.		<b>2. Court or Organization</b> U.S.D.C.-S.D.N.Y.	<b>3. Date of Report</b> 05/22/1998
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)  Nominee		<b>5. Report Type (check type)</b> Nomination, Date 05/15/1998  <input checked="" type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	<b>6. Reporting Period</b> 01/01/1997 to 04/30/1998
<b>7. Chambers or Office Address</b> 180 Maiden Lane New York, New York 10038		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.			

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)**POSITION****NAME OF ORGANIZATION / ENTITY**☒ **NONE** (No reportable positions.)

1 \_\_\_\_\_

2 \_\_\_\_\_

3 \_\_\_\_\_

**II. AGREEMENTS** (Reporting individual only; see pp. 14-16 of Instructions.)**DATE****PARTIES AND TERMS**☐ **NONE** (No reportable agreements.)

1 \_\_\_\_\_

Stroock &amp; Stroock &amp; Lavan LLP Retirement Plan with former law firm, no control.

2 \_\_\_\_\_

3 \_\_\_\_\_

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)**DATE****SOURCE AND TYPE****GROSS INCOME**  
(yours, not spouse's)☐ **NONE** (No reportable non-investment income.)

1 \_\_\_\_\_

Partner, Stroock &amp; Stroock &amp; Lavan LLP (1996 CY-\$567,505); (1997 CY- \$535,942)

2 \_\_\_\_\_

3 \_\_\_\_\_

4 \_\_\_\_\_



**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting  
Hellerstein, Alvin K.

Date of Report  
05/22/1998

**IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1		Exempt
2		
3		
4		
5		
6		
7		

**V. GIFTS**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1		Exempt	
2			
3			

**VI. LIABILITIES**

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	American Express, Visa	credit cards	J
2	Chase Mortgage Corp.	mortgage, Manhattan condo	M
3	Stroock & Stroock & Lavan LLP Retirement Plan	retirement plan	J
4			
5			
6			

\* VAL CODES: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001 to \$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure				
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)	
<input type="checkbox"/> NONE (No reportable income/assets, or transactions.)										
1 Manhattan Condo	E	Rent	N	W	exempt					
2 W. Palm Beach Condo	C	Rent	K	W	exempt					
3 Chase Manhattan Bank	A	Interest	K	U	exempt					
4 Dreyfus Growth Opportunity Fund (IRA)	C	Dividend	K	T	exempt					
5 Mutual Qualified Shares (IRA)	C	Dividend	K	T	exempt					
6 Dreyfus Money Market Fund (spouse)	A	Interest/ Div	K	T	exempt					
7 Dreyfus Money Market Fund (spouse)	A	Interest/ Div	K	T	exempt					
8 Stroock & Stroock & Lavan Retirement Plan, as follows:										
9 Bernstein Interm. Fund	D	Interest	N	T	exempt					
10 Bernstein Equity Fund	G	Dividend	O	T	exempt					
11 Dreyfus Liquid Assets	B	Interest/ Div	L	T	exempt					
12 Oppenheimer Capital	G	Dividend	O	T	exempt					
13 Euro-Pacific Fund	E	Dividend	M	T	exempt					
14 Barrick Gold Corp., 400 shares	A	Dividend	J	T	exempt					
15 Mellon Bank Corp., 735 shares	R	Dividend	K	T	exempt					
16 S&S&L Investment Partnerships, as follows:										
17 Warburg Pincus Funds	F	Dividend	M	W						
1 Incl/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$500,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000			
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more			
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market					

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(X)" after each asset exempt from prior disclosure.		(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)										
18	Loeb Partners Investments	E	Dividend	K	M					
19	Pine Street Funds	M	Dividend	L	T					
20	Wellsford		None	J	T					
21	BK Partners	C	Dividend	J	T					
22	Glenwood Gardens	A	Dividend	J	M					
23	United Park City Mines	A	Dividend	K	T					
24	Angiosonics		None	K	R					
25										
26										
27										
28										
29										
30										
31										
32										
33										
34										
1 Inr/Gam Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes (Col. C2) Q=Appraisal U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting

Hellerstein, Alvin K.

Date of Report

05/22/1998

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.***(Indicate part of report.)*

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Hellerstein, Alvin K.	Date of Report 05/22/1998
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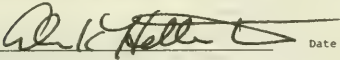
**IX. CERTIFICATION**

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date

May 22, 1998

**Note:**

Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544



### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
  1. (a) I wrote the brief leading to a grant by the United States Supreme Court of a writ of certiorari, and participated in writing the appellant's brief, in Henry v. Mississippi, 379 U.S. 443 (1965). (Aaron Henry was a civil rights leader who had been convicted by the Mississippi state courts.)
  - (b) I organized the pro bono activities of my law firm in the mid 1970's, and continue to provide sponsorship of the firm's pro bono activities. I serve as a director of New York Lawyers for the Public Interest, an organization that acts as a clearinghouse for conducting pro bono litigation and litigation cases.
  - (c) I volunteered for the CJA list when it was organized in the Southern District of New York, in approximately 1973, and was assigned the representation of Carlos Sanchez. The trial and appeal that resulted are described in item "9" under question "13". Thereafter, I represented two additional defendants in plea negotiations. I withdrew from the program in the late 1970's or early 1980's, when the CJA program became oriented toward criminal law specialists.
2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?
  2. I have held no such memberships.
3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).
  3. Yes, there is and it recommended my nomination to Senator Moynihan, along with four other finalists. The process involved my completing an elaborate questionnaire, generally similar to this one, being interviewed by a screening panel of diverse lay and legal representation, whose members had read and, through a subcommittee, had investigated my

responses and my reputation in the community and, finally, being interviewed by Senator Moynihan. Senator Moynihan then recommended me for nomination as United States District Judge for the Southern District of New York. I then completed questionnaires for the Department of Justice and for the Judiciary Committee of the American Bar Association, and was interviewed, and my background and reputation were researched, by committees of the Department and the Association. I also completed a questionnaire for, and was interviewed by, the Federal Bureau of Investigation. Finally, I completed this Committee's questionnaire.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

4. No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

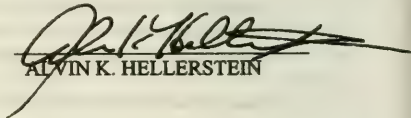
5. The Constitution defines the "judicial power" as extending to "cases" and "controversies" arising under the Constitution or laws of the United States. If judges reach too broadly in formulating the rule of decision necessary to decide the case before them, or if they take cases where parties, although not aggrieved, seek judicial review of particular legislation, they can be accused of legislating. If judges become too aggressive in regulating conduct, they can be accused of becoming super-administrators. In such instances, and in others where judges fail to respect the jurisdictional limitation of "cases" and "controversies", separation of powers can be compromised, between the federal

government and the states, and between the federal courts and the executive and the Congress, and liberty and respect for the Constitution can be diminished.

In my opinion, District Judges function with regard to "cases and controversies", and decide the issues presented by the pleadings. Federal courts are courts of limited jurisdiction, and the judgments of District Judges are subject to such limited jurisdiction. Constitutional and statutory standards and precedents defining who is a proper party should be observed, and the issues presented by the parties should be appropriate and necessary for adjudication. Accordingly, judges should limit their decisions to the parties before them, the issues they present, and the remedies appropriate to redress the issues presented for decision.

Judges should not have a political agenda. Rather, a judge should have a balanced judgment, focused on the cases and controversies presented to the court, and be patient, tactful and respectful of litigants and counsel to assure fair consideration of all relevant issues, in accordance with law and precedent.

May 26 1998



ALVIN K. HELLERSTEIN

**QUESTIONNAIRE FOR JUDICIAL NOMINEES****I. BIOGRAPHICAL INFORMATION (PUBLIC)****1. Full name (include any former names used).**

William H. Pauley III

**2. Address: List current place of residence and office address(es).**

Residence: Garden City, New York

Office: Snitow & Pauley  
345 Madison Avenue  
New York, New York 10017-3707

**3. Date and place of birth:**

August 14, 1952  
Glen Cove, New York

**4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married, November 3, 1984.

My wife's name is Kimberly Frank Pauley. She is a licensed real estate sales person with an office at Hubbell & Klapper, Inc., in Garden City, New York. She is also employed on a part-time basis to assist my law firm with its billing.

**5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.****Duke University**

September 1970 - May 1974  
Bachelor of Arts, May 12, 1974  
Magna Cum Laude

**Duke University School of Law**

August 1974 - May 1977  
Juris Doctor, May 8, 1977

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

May 1974 - August 1974	Shipping Clerk (summer position) Edmos Corporation Garvies Point Road Glen Cove, New York 11542
May 1975 - June 1975	Shipping Clerk (summer position) Edmos Corporation Garvies Point Road Glen Cove, New York 11542
June 1975 - August 1975	Law Clerk (summer position) Office of the Nassau County Attorney One West Street Mineola, New York 11501
September 1975 - May 1976	Crime Report Analyst (work-study) (part-time) Durham Police Department Durham, North Carolina
June 1976 - August 1976	Law Clerk (summer position) Office of the Nassau County Attorney One West Street Mineola, New York 11501
September 1976 - May 1977	Crime Report Analyst (work-study) (part-time) Durham Police Department Durham, North Carolina
September 1977 - April 1978	Law Clerk Office of the Nassau County Attorney One West Street Mineola, New York 11501
September 1977 - July 1978	Retail Sales Person (part-time) Bloomingdale's Department Store Garden City, New York



May 1978 - August 1978	Deputy County Attorney Office of the Nassau County Attorney One West Street Mineola, New York 11501
August 1978 - August 1982	Associate Attorney Orenstein, Snitow, Sutak & Pollack, P.C. 750 Third Avenue New York, New York 10017
August 1982 - August 1983	Associate Attorney Orenstein, Snitow & Sutak, P.C. 750 Third Avenue New York, New York 10017
August 1983 - January 1985	Shareholder and Member Orenstein, Snitow & Pauley, P.C. 750 Third Avenue New York, New York 10017
January 1984 - Present	Assistant Counsel (part-time) Assembly Minority Leader New York State Assembly Room 933 Legislative Office Building Albany, New York 12248
January 1985 - Present	Partner Snitow & Pauley 345 Madison Avenue New York, New York 10017
July 1987 - Present	Vice President Snapau Corp. 345 Madison Avenue New York, New York 10017

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

*Phi Beta Kappa*

Duke University, December 1974

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association

Association of the Bar of the City of New York

New York State Bar Association

Federal Bar Council

Theodore Roosevelt American Inn of Court

Nassau County Bar Association

The Florida Bar

The District of Columbia Bar

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Duke University Alumni Association --

President of the New York Metropolitan Area Chapter in 1985

ArtWatch International, Inc.

Community Church of Garden City

Sun & Surf Beach Club

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Appellate Division of the Supreme Court,

Second Judicial Department,

State of New York, January 1978

Supreme Court of the State of Florida, May 1978

District of Columbia Court of Appeals, March 1980

United States District Court for the Eastern District  
of New York, May 1978

United States District Court for the Southern District  
of New York, June 1978

United States Court of Appeals for the Second Circuit,  
July 1978

United States Court of Appeals for the District of  
Columbia Circuit, October 1978

United States Court of Appeals for the Federal Circuit,  
February 1985

United States Court of Appeals for the Third Circuit,  
July 1990

United States Supreme Court, October 1983

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Protecting Madmen from Madmen: The Scope of Municipal Liability Under Dwars v. City of New York", Touro College School of Law, Civil Rights Symposium titled "Conflicts of Interest in Civil Rights Actions Against Police Post-Rodney King" (March 1993).

"Americans With Disabilities Act of 1990: Cases of First Impression", Practicing Law Institute program titled "Litigation Management Supercourse" (March 1993).

"Enabling the Disabled: Has the Americans With Disabilities Act Created a New 'Suspect Class'?", Nassau Academy of Law (April 1994).

"Trials and Federal Rules of Evidence", New York State Bar Association Continuing Legal Education program titled "Federal Civil Court Practice" (April 1995).

"False Arrest and Police Brutality Litigation", New York State Bar Association Continuing Legal Education program titled "Major Litigation Issues Confronting Municipalities" (November 1996).

"Discovery of Experts Under New Rule 26", New York State Bar Association Continuing Legal Education program titled "Expert Testimony in Federal Court After Daubert and New Rule 26 -- From Discovery Through Trial" (June 1997).

13. **Health:** What is the present state of your health? List the date of your last physical examination.

Excellent. My last physical examination was conducted on July 8, 1997.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

May 1978 - August 1978 (Appointive Office)  
Deputy County Attorney  
Office of the Nassau County Attorney  
One West Street  
Mineola, New York 11501

January 1984 - Present (Appointive Office)  
Assistant Counsel to the Assembly Minority Leader (Part-Time)  
New York State Assembly, Room 933  
Legislative Office Building  
Albany, New York 12248

17. Legal Career:

## a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I have not served as clerk to a judge, nor have I practiced alone. The dates, names, and addresses of the law firms and government agencies with which I have been connected and the nature of my connection with each are as follows:

September 1977 - August 1978

Law Clerk; Deputy County Attorney  
Office of the Nassau County Attorney  
One West Street  
Mineola, New York 11501

During my tenure as a Law Clerk and subsequently as a Deputy County Attorney in a large municipal law office, I initially worked in the Municipal Services Bureau where I prepared contracts and calendar items for the Board of Supervisors, the former legislative branch of Nassau County. After several months, I transferred to the Appeals Bureau where I prepared appellate briefs and motions and argued appeals on behalf of Nassau County, its departments, agencies and officials.

August 1978 - August 1982

Associate Attorney  
Orenstein, Snitow, Sutak & Pollack, P.C.  
750 Third Avenue  
New York, New York 10017

During my tenure as an associate attorney with a mid-town Manhattan law firm, my practice focused on federal and state civil litigation. I worked principally under the direction of certain



members of the firm and other attorneys preparing motions and briefs and conducting discovery. Over time, my representation of municipalities in the defense of federal civil rights and employment discrimination claims assumed a greater significance in the overall mix of my practice.

August 1982 - August 1983

Associate Attorney  
Orenstein, Snitow & Sutak, P.C.  
750 Third Avenue  
New York, New York 10017

While the firm's name changed, my responsibilities did not differ materially from those described in the preceding paragraph.

August 1983 - January 1985

Shareholder and Member  
Orenstein, Snitow & Pauley, P.C.  
750 Third Avenue  
New York, New York 10017

As a partner of a mid-town Manhattan law firm, I had lead responsibility for litigation matters in which I was involved. Federal civil rights litigation became a mainstay of my practice. I also litigated a variety of corporate legal matters.

January 1985 - Present

Partner  
Snitow & Pauley  
345 Madison Avenue  
New York, New York 10017

In January 1985, Franklyn H. Snitow and I left the law firm of Orenstein, Snitow & Pauley, P.C. to start our own partnership. Since that time, we have practiced together as equal partners. My civil litigation practice has included commercial and municipal clients with a variety of matters ranging from diversity claims to federal civil rights. Federal civil rights litigation continues to be an important part of my practice. I also represent municipalities in a wide spectrum of litigation, including Title VII employment discrimination actions, land use and zoning matters, state and federal environmental claims and civil rights actions challenging the conduct of police officers and/or assistant district attorneys.

January 1984 - Present

Assistant Counsel (part-time)  
 Assembly Minority Leader  
 New York State Assembly, Room 933  
 Legislative Office Building  
 Albany, New York 12248

In my capacity as an Assistant Counsel to three Assembly Minority Leaders, I have advised them on personnel and human resources issues and appeared in litigation where they were named in their official capacity. I also advise the Assembly Minority Leader and his staff on State ethics rules.

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

September 1977 - August 1978

During my brief tenure as a Law Clerk and Deputy County Attorney, I had the opportunity to brief and argue some significant civil service law cases in the Appellate Division, Second Department and the New York State Court of Appeals. Within five months of my Bar admission, I argued before the New York State Court of Appeals in an Article 78 proceeding challenging a municipality's right to disqualify candidates from further consideration for appointment as police officers. The Court of Appeals reversed the Appellate Division, Second Department, and upheld Nassau County's authority to disqualify a police officer candidate based on a single high blood pressure reading.

August 1978 - August 1983

During my tenure as an Associate Attorney, my practice focused on federal and state civil litigation. I worked principally under the direction of certain members of the firm and other attorneys preparing motions and briefs and conducting discovery.

I participated in a number of complex trials in the Southern and Eastern Districts of New York and in New York State Supreme Court. I also had lead responsibility for trials in administrative matters before public bodies such as the Merit Systems Protection Board. Finally, I became familiar with corporate and real estate matters and provided legal advice to a number of the firm's corporate clients.

August 1983 - Present

As a member or partner of a mid-town Manhattan law firm, I have had lead responsibility for litigation matters in which I was involved. While the defense of employment discrimination actions continues to be a principal focus of my practice, I also represent government institutions in a variety of class action and pattern and practice litigation. As Special Counsel for Nassau County, I also had extensive involvement with precedent-setting litigation involving jail overcrowding and the modification of consent decrees in institutional reform litigation.

Apart from a steady stream of commercial litigation involving contract disputes, I currently defend municipalities against a panoply of claims ranging from First Amendment free speech and free association claims; land use regulation takings and due process claims; Fifth, Eighth and Fourteenth Amendment claims concerning the conditions of confinement for sentenced inmates and pre-trial detainees; and civil rights claims challenging the conduct of police officers, correction officers, and assistant district attorneys.

In my capacity as an Assistant Counsel to three Assembly Minority Leaders, I have advised them on personnel and human resources issues and appeared in litigation where they were named in their official capacity.

**2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

While my civil litigation practice includes commercial and municipal clients with a variety of matters ranging from diversity claims to federal civil rights, my typical clients are state and local government officials. I have litigated numerous employment discrimination matters and have developed a specialty in defending employers against race, sex, age, and disability claims in state and federal courts. Those matters range from the defense of class actions to individual claims of sexual harassment. I have extensive experience litigating Title VII employment discrimination claims.

In particular, I have defended significant cases involving: (1) the development and implementation of police officer selection and promotion examinations; (2) a comparable worth challenge to a

municipal compensation and job classification system; (3) inmate claims concerning the conditions of confinement at a municipal correctional facility; (4) civil rights claims against police officers and state prosecutors; (5) challenges to local land use and zoning policies; and (6) claims of age and disability employment discrimination.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Over the last 20 years, I have appeared in federal and state courts frequently. The frequency of my appearances in court has not varied.

2. **What percentage of these appearances was in:**

(a) federal courts: 75%

(b) state courts of  
record: 20%

(c) other courts: 5%

3. **What percentage of your litigation was:**

(a) civil: 95%

(b) criminal: 5%

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

As sole counsel, I tried seven federal cases and six state cases to verdict or judgment. As chief counsel, I tried seven federal cases to verdict or judgment. As an associate counsel, I tried eight federal cases and three state case to verdict or judgment.

5. **What percentage of these trials was:**

(a) jury: 30%

(b) non-jury: 70%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- (1) United States v. Nassau County  
Civil Action No. 77 Civ. 1881 (JM)

In 1977, the Department of Justice filed a Title VII pattern and practice action against Nassau County and the Nassau County Police Department in the United States District Court for the Eastern District of New York. The action challenged the hiring and promotion of police officers in the Nassau County Police Department and alleged unlawful adverse impact on African-Americans, Hispanics, and women. In 1979, the Nassau County Attorney retained me as Associate Special Counsel for the Nassau County defendants. Later, I was named Special Counsel for the Nassau County defendants and continue to serve in that capacity.

Over the last 20 years, this litigation has focused on the development of selection instruments for law enforcement personnel that are validated under the Uniform Guidelines for Employee Selection. The action has been supervised by three different federal district judges in the Eastern District of New York: Hon. George C. Pratt, Hon. Frank X. Altamari, and most recently, Hon. Jacob Mishler. In 1982, the United States and Nassau County entered into a consent decree that required the County to utilize a selection device for police officers that had been validated under the Uniform Guidelines.

Thereafter, Nassau County administered successive generations of new examinations for police officers that were aimed at better predicting job performance while also reducing adverse impact. In 1988, the Guardians Association of Nassau County, Inc., a fraternal organization of African American police officers, filed suit challenging the examinations in an



action titled Guardians Association v. Nassau County, 88 Civ. 3836 (JM) in the United States District Court for the Eastern District of New York.

In 1990, Nassau County negotiated a precedent-setting agreement with the United States to develop jointly a new police officer selection examination. At that time, Nassau County also resolved the claims of the Guardians Association. In 1994, the new examination was administered to more than 25,000 applicants. In 1995, Nassau County's proposed use of that examination was approved by District Judge Mishler. In 1998, the examination withstood a challenge alleging a claim of reverse discrimination. See Hayden v. Nassau County, 97 Civ. 1411 (JM).

The name, current address, and telephone number of the principal counsel for the United States are:

John M. Gadzichowski, Esq.  
Special Litigation Counsel  
Civil Rights Division  
U.S. Department of Justice  
Washington, D.C. 20035-5968  
(202) 514-3834

The name, current address, and telephone number of an attorney who served as co-counsel with me in the litigation until 1989 are:

Hon. James M. Catterson, Jr.  
District Attorney  
Suffolk County District Attorney's Office  
County Complex North  
Building Seventy-Seven  
Veterans Memorial Highway  
Hauppauge, New York 11788  
(516) 853-4169

The names, current addresses, and telephone numbers of the principal counsel for the intervenor defendants are:

Harry Greenberg, Esq.  
Solomon, Richman, Greenberg, P.C.  
3000 Marcus Avenue, Suite 1E3  
Lake Success, New York 11042  
(516) 437-6443

-and-

Raymond G. Lavallee, Esq.  
33 South Guy Lombardo Avenue  
Freeport, New York 11520  
(516) 546-2212

The names, current addresses, and telephone numbers of the principal counsel for the Guardians Association are:

Paul C. Saunders, Esq.  
Cravath Swaine & Moore  
825 Eighth Avenue  
New York, New York 10019  
(212) 474-1404

-and-

Richard T. Seymour, Esq.  
Lawyers' Committee for Civil Rights Under Law  
1450 "G" Street, N.W., Suite 400  
Washington, D.C. 20005  
(202) 662-8600

- (2) Sedima, S.P.R.L. v. Imrex Co., Inc.,  
574 F.Supp. 963 (E.D.N.Y. 1983)  
741 F.2d 481 (2d Cir. 1984)  
473 U.S. 479, 105 S.Ct. 3275 (1985)

In 1982, I represented Sedima, S.P.R.L., a Belgian corporation participating in NATO's program to upgrade HAWK missile systems in Europe, in a diversity action against Imrex Co., Inc., a New York corporation, in the United States District Court for the Eastern District of New York. The complaint alleged fraud, breach of fiduciary duty and breach of an agreement of joint venture against Imrex. Discovery revealed multiple acts of mail fraud and wire fraud by Imrex. Accordingly, Sedima moved to amend its complaint to allege additional claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).

In 1983, District Judge I. Leo Glasser denied Sedima's motion for leave to amend its complaint to plead a RICO claim. That decision is reported at Sedima v. Imrex, 574 F. Supp. 963 (E.D.N.Y. 1983). In 1984, the United States Court of Appeals for the Second Circuit affirmed. That opinion and judgment is reported at Sedima v. Imrex, 741 F.2d 481 (2d Cir. 1984).

Thereafter, the United States Supreme Court granted a writ of certiorari, reversed the Court of Appeals, and reinstated the RICO claims. I authored the brief that was filed in the Supreme Court and my partner argued the appeal. The Court's landmark opinion cleared the way for private litigants to pursue RICO claims in federal court.

The principal counsel for Imrex was Richard Eisenberg, Esq. of the law firm of Shaw, Licitra, et al. That law firm no longer exists. The name, current address, and telephone number of the principal counsel are:

Richard Eisenberg, Esq.  
307 East Shore Road  
Great Neck, New York 11023  
(516) 829-3810

- (3) Doyle v. Suffolk County  
786 F.2d 523 (2d Cir. 1986)

In 1985, Doyle and other candidates for positions as police officers in Suffolk County filed a federal civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York. The complaint challenged enforcement of New York's statutory prohibition against the hiring of police officers who are "more than 29 years of age". Application of the Age Discrimination in Employment Act (ADEA) by the Court of Appeals in Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985), had partially invalidated the statute by excluding from its reach those between the ages of 40 and 70.

The Doyle litigation, together with a related but unconsolidated action titled Hettinger v. Nassau County Civil Service Commission (E.D.N.Y.), raised equal protection challenges to the partially invalidated State statute. In Doyle, then District Judge Frank X. Altimari upheld the constitutionality of the statute, while in Hettinger, District Judge Jack B. Weinstein struck down the statute as applied to persons of all ages, not simply to those between 40 and 70. I prepared the motion papers in both actions and the brief that was filed in the United States Court of Appeals for the Second Circuit. The Court of Appeals sustained the 29-year-old age limit, even in the wake of its partial invalidation by the ADEA. The Court of Appeals' opinion is reported at Doyle v. Suffolk County, 786 F.2d 523 (2d Cir. 1986).

The name, current address, and telephone number of the counsel for plaintiffs are:

Douglas J. Kramer, Esq.  
 Baden, Kramer, Huffman & Brodsky, P.C.  
 20 Broad Street  
 New York, New York 10005  
 (212) 363-7020

The name, current address, and telephone number of co-counsel are:

Hon. James M. Catterson, Jr.  
 District Attorney  
 Suffolk County District Attorney's Office  
 County Complex North  
 Building Seventy-Seven  
 Veterans Memorial Highway  
 Hauppauge, New York 11788  
 (516) 853-4169

- (4) American Federation of State, County and Municipal Employees (AFSCME) v. Nassau County  
 609 F. Supp. 695 (E.D.N.Y. 1985)  
 664 F. Supp. 64 (E.D.N.Y. 1987)  
 799 F. Supp. 1370 (E.D.N.Y. 1992)  
 825 F. Supp. 468 (E.D.N.Y. 1993)  
 1995 WL 347031 (E.D.N.Y. May 31, 1995)  
 1995 WL 405001 (E.D.N.Y. June 26, 1995)  
 96 F.3d 644 (2d Cir. 1996), cert. denied \_\_ U.S. \_\_, 117 S.Ct. 1107 (1997)

In 1984, AFSCME filed a class action challenge to Nassau County's compensation and job classification system alleging that job titles largely populated by women were paid less than job titles largely populated by men. The action presented gender-based discrimination claims under Title VII and the Equal Pay Act and involved a class of approximately 15,000 present and former employees. I represented Nassau County and all of the other defendants from 1984 until the proceedings concluded in 1997.

Following five years of extensive discovery and motion practice, a bench trial was conducted by District Judge I. Leo Glasser in the United States District Court for the Eastern District of New York from November 1989 through February 1990. In 1992, District Judge Glasser issued a memorandum and order dismissing all of the claims, except for a single Equal Pay Act claim on behalf of approximately 15 employees. See AFSCME v. Nassau County, 799 F. Supp. 1370 (1992).

Thereafter, Nassau County moved as a prevailing party defendant for an award of attorneys' fees and expert witness fees under 42 U.S.C. § 1988, the attorney fee shifting statute. Judge Glasser found that AFSCME's pursuit of its claims was unreasonable and without foundation and awarded Nassau County more than \$980,000 in attorneys' fees (AFSCME v. Nassau County, 825 F. Supp. 468 (E.D.N.Y. 1993)) and \$550,000 in expert witness fees (AFSCME v. Nassau County, 1995 WL 347031 (E.D.N.Y. May 31, 1995)). The Court of Appeals reversed. See AFSCME v. Nassau County, 96 F.3d 644 (2d Cir. 1996). Nassau County filed a petition for a writ of certiorari arguing that the Second Circuit had improperly collapsed the Supreme Court's tripartite criteria for recovery of attorneys' fees into a single standard of frivolousness. The Supreme Court denied certiorari.

The principal counsel for AFSCME were Joel I. Klein, Esq. and Paul M. Smith, Esq. of the law firm of Onek, Klein & Farr. That law firm no longer exists. The names, addresses, and telephone numbers of the principal counsel for plaintiff are:

Hon. Joel I. Klein  
Assistant Attorney General  
Antitrust Division  
Department of Justice  
Washington, D.C. 20035

-and-

Paul M. Smith, Esq.  
Jenner & Block  
601 Thirteenth Street, N.W., Suite 1200  
Washington, D.C. 20005  
(202) 639-6000

- (5) Badgley v. Santacroce  
729 F.2d 894 (2d Cir. 1984)  
800 F.2d 33 (2d Cir. 1986)  
815 F.2d 888 (2d Cir. 1987)  
853 F.2d 50 (2d Cir. 1988)

In 1980, the Legal Aid Society of Nassau County, Inc., filed a class action complaint in the United States District Court for the Eastern District of New York. The complaint challenged the conditions of confinement for pre-trial detainees and sentenced inmates at the Nassau County Correctional Center (NCCC), a large municipal jail facility. In 1981, then District Judge George



C. Pratt issued orders requiring defendants to reduce the population at NCCC within 60 days by admitting no more than 14 inmates for every 15 released. At that time, together with co-counsel, I was retained by the Nassau County Attorney to represent the defendants in the action. Since 1981, I have continued to serve as counsel in the action.

Following my engagement as counsel, Nassau County moved before the Court of Appeals to stay the District Court's release orders. The Court of Appeals stayed the orders and remanded the case for further consideration. Thereafter, the parties negotiated a consent judgment that fixed the maximum population of NCCC and established durational limits on double celling. However, the explosive growth of the inmate population during the mid-1980s led to non-compliance with the consent judgment and spawned litigation. See Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984); Badgley v. Santacroce, 815 F.2d 888 (2d Cir. 1987); Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988).

A plethora of complex issues relating to modification and enforcement of the consent decrees focused the parties and the court on ways to reduce the inmate population at NCCC. For example, the District Court appointed a Special Master who conducted extensive hearings and found that deviations from the consent decrees were constitutional violations. The Court of Appeals reversed and remanded again. See Badgley v. Santacroce, 800 F.2d 33 (2d Cir. 1986), cert. denied, 479 U.S. 1067, 107 S.Ct. 955 (1987). Nassau County subsequently filed declaratory judgment actions to require the State of New York to remove sentenced inmates and parole violators from NCCC within a specified time after the imposition of sentence or final parole adjudication. See Nassau County v. Cuomo, 69 N.Y.2d 737, 512 N.Y.S.2d 362 (1987). Together with co-counsel, I was the architect of that litigation.

Overcrowding at NCCC also led to litigation against the New York State judiciary. Confronted with contempt under the federal consent decrees, the Sheriff refused to accept inmates at NCCC. As a result, a State court judge directed that arraigned detainees be held overnight in courthouse detention cells. The inmates filed a declaratory judgment action, and thereafter State judges were prohibited from detaining prisoners at courthouses after arraignment except in emergency circumstances. See Howell v. McGinty, 129 A.D.2d 60, 516 N.Y.S.2d 694 (2d Dep't 1987).

While this litigation continued, Nassau County embarked on a 7-year, \$150 million construction program and eventually built a women's facility, a satellite facility, and a new maximum security facility at NCCC, thereby

adding more than 1,400 beds. I continue to serve as counsel to Nassau County on all issues relating to the conditions of confinement at NCCC.

The names, addresses, and telephone numbers of counsel for the inmate plaintiff class are:

Matthew Muraskin, Esq.  
Attorney-in-Chief  
Legal Aid Society of Nassau County  
250 Fulton Avenue  
Hempstead, New York 11550  
(516) 560-6412

-and-

Kent V. Moston, Esq.  
Chief of Appeals  
Legal Aid Society of Nassau County  
250 Fulton Avenue  
Hempstead, New York 11550  
(516) 560-6402

The names, addresses, and telephone numbers of other counsel are

Robert K. Drinan, Esq.  
Assistant Attorney General  
Office of the Attorney General  
200 Old Country Road  
Mineola, New York 11501  
(516) 248-3312

-and-

Hon. James M. Catterson, Jr.  
District Attorney  
Suffolk County District Attorney's Office  
County Complex North  
Building Seventy-Seven  
Veterans Memorial Highway  
Hauppauge, New York 11788  
(516) 853-4169

- (6) Carrefour (U.S.A.) Properties, Inc. v. The Town of Brookhaven  
89 Civ. 0498 (ERK)

In 1989, Carrefour, a French retailer, filed a federal civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York and a parallel Article 78 proceeding in the New York State Supreme Court. Both challenged the Town of Brookhaven's rezoning of a 69-acre tract purchased by Carrefour. The Town rezoned that parcel from a commercial zone that would have permitted Carrefour to build a 729,000 square foot retail complex into a residential zone that would allow for commercial development only upon a showing that such development would not adversely affect existing infrastructure. When the litigation commenced, the Town retained me as Special Counsel to represent all defendants.

Extensive motion practice winnowed the claims. Thereafter, discovery was conducted over a two-year period that involved inquiry into State Environmental Quality Review Act (SEQRA) issues and the federal claims. Shortly before a scheduled trial, the parties entered into compromise negotiations which resulted in a resolution of the matter that allowed a limited commercial development of the property and preserved the validity of the Town Board's commercial rezonings of more than 1,200 acres.

The names, addresses, and telephone numbers of counsel for the plaintiff are:

George Weisz, Esq.  
Deborah Buell, Esq.  
Cleary Gottlieb Steen & Hamilton  
One Liberty Plaza  
New York, New York 10006  
(212) 225-2000

- (7) Matter of Kane  
143 A.D.2d 610, 517 N.Y.S.2d 771 (2d Dep't 1987)  
151 A.D.2d 672, 543 N.Y.S.2d 934 (2d Dep't 1989) (Mem)  
75 N.Y.2d 511, 554 N.Y.S.2d 457 (1990)

In 1984, an attorney was appointed by the New York State Supreme Court as a Receiver to manage the affairs of a New York corporation that had two equal shareholders who were locked in a dispute. Months later, when the disputing shareholders agreed that one of them would buy out the other, the Receiver demanded exorbitant commissions and professionals fees in exchange for his consent to the closing and termination of his receivership.

Since the business was failing under the Receiver's stewardship, the parties agreed to the Receiver's demand and paid him. Thereafter, I was retained by the remaining shareholder to ascertain what amount should have been paid pursuant to the N.Y. Business Corporation Law and to compel the former Receiver to repay the money he received in excess of the allowable commission.

I concluded that the payment to the former Receiver grossly exceeded the allowable commission. The former Receiver was a prominent attorney who litigated the matter vigorously. Apart from motion practice, I conducted an evidentiary hearing and argued several appeals. Ultimately, I argued the issue of a receiver's fiduciary duty as an officer of the court in the New York Court of Appeals. The Court of Appeals held that the Receiver, as a representative of the court, was bound by the strict fiduciary obligations imposed by the N.Y. Business Corporation Law and could not make a private agreement with the shareholders. Associate Judge Joseph W. Bellacosa's opinion is reported at Matter of Kane, 75 N.Y.2d 511, 554 N.Y.S.2d 457 (1990). Thereafter, I engaged in extended post-judgment proceedings in order to collect the sum that was due with accrued interest from the former Receiver.

The names, addresses, and telephone number of the former Receiver's counsel are:

A. Thomas Levin, Esq.  
Meyer, Suozzi, English & Klein, P.C.  
1505 Kellum Place  
Mineola, New York 11501  
(516) 741-6565

(8) Prophet v. Nassau County  
Civil Action No. 94 Civ. 2301 (ADS)

In 1992, Mr. Prophet filed a federal civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York. The complaint asserted that elected members of the Nassau County Board of Supervisors and other local government officials had discriminated against Mr. Prophet because he was an African-American and had exercised his First Amendment right to speak out on issues of public concern. I served as Special Counsel to Nassau County and all except one of the elected and appointed officials who were named as defendants in the action from its inception to the present.

Nassau County engaged in extensive motion practice and discovery that resulted in the dismissal of several claims. In 1997, I tried the remaining federal and state claims for more than five weeks before District Judge Arthur D. Spatt and a jury. While all the federal civil rights claims were dismissed, the jury did not reach a unanimous verdict on a single supplemental claim of libel. Consequently, I retried the libel claim in another two-and-a-half-week trial in May 1997 and obtained a verdict for the remaining defendant.

The name, current address, and telephone number of counsel for the plaintiff are:

Frederick K. Brewington, Esq.  
50 Clinton Street, Suite 501  
Hempstead, New York 11550  
(516) 489-6959

The name, current address, and telephone number of counsel for the other defendant are:

Ronald J. Rosenberg, Esq.  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530  
(516) 747-7400

- (9) Pinaud v. Suffolk County  
798 F. Supp. 913 (E.D.N.Y. 1992)  
52 F.3d 1139 (2d Cir. 1995)

In 1991, Mr. Pinaud filed a federal civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York. The complaint asserted that assistant district attorneys had conspired to imprison him unlawfully and to violate his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Mr. Pinaud served a 28-month sentence on a State conviction that was subsequently vacated and for which the charge was eventually dismissed. He was denied any credit for the 28 months that he served on the vacated State conviction in connection with his federal sentence for tax crimes. I served as Special Counsel to the current District Attorney and several assistant district attorneys from the inception of the litigation until its conclusion in 1995.

The District Attorney moved to dismiss Mr. Pinaud's claims on the grounds that absolute prosecutorial immunity shielded assistant district attorneys from suit and that Mr. Pinaud's other claims were time-barred. In 1992,



District Judge Leonard D. Wexler issued a memorandum and order dismissing various claims and entering a final judgment on the basis of a stipulation. Judge Wexler's decision is reported at Pinaud v. County of Suffolk, 798 F. Supp. 913 (E.D.N.Y. 1992).

The United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. I prepared the brief and argued the appeal before the Court of Appeals (Circuit Judges Oakes, Jacobs and Calabresi). The Court of Appeals' opinion is reported at Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995).

The name, current address, and telephone number of the counsel for the plaintiff are:

Jared J. Scharf, Esq.  
11 Martine Avenue  
White Plains, New York 10606  
(914) 682-9777

The names, current addresses, and telephone numbers of counsel for other defendants are:

Raymond G. Perini, Esq.  
Perini & Hoerger  
1770 Motor Parkway  
Hauppauge, New York 11788  
(516) 232-2224

-and-

Hon. Robert J. Cimino  
Suffolk County Attorney  
Suffolk County Department of Law  
158 North County Complex  
Veterans Memorial Highway  
Hauppauge, New York 11788  
(516) 853-4049

- (10) Santemma v. Chasco Co.  
 Nassau County Index No. 8158/96  
 \_\_\_ A.D.2d \_\_\_, 660 N.Y.S.2d 451 (2d Dep't 1997)

In 1996, Mr. Santemma, a prominent tax certiorari attorney, commenced a proceeding to fix and enforce a \$2.1 million charging lien on the proceeds of tax certiorari settlements obtained by Chasco Co. Chasco owns a large commercial office building complex. Mr. Santemma claimed that he was entitled to recover one-third of the total proceeds of the tax certiorari settlement, even though he did not have an agreement to that effect with the client. Chasco objected to Mr. Santemma's demand for a multi-million dollar payment and retained me to defend the proceeding.

After extensive motion practice, the Court ruled that no contingency fee agreement existed between the parties and set the matter down for an evidentiary hearing to determine the quantum meruit value of Mr. Santemma's services. Mr. Santemma appealed and the Appellate Division, Second Department, unanimously affirmed and reiterated that the required evidentiary hearing be limited to a quantum meruit determination. The proceeding was remanded for an evidentiary hearing.

Following a six-day bench trial, Justice Thomas A. Adams determined that Mr. Santemma was entitled to a legal fee of \$27,000 based on the criteria utilized by New York courts to determine a reasonable fee. On March 31, 1998, the Court directed Mr. Santemma to return to the client the more than \$2.1 million he was holding in escrow, less his fee. This case resolved the question of whether a contingency fee can be imposed in the absence of an agreement. The Court reaffirmed the fiduciary obligation of an attorney and the public policy in New York that all contingent fee arrangements be in writing.

The name, current address, and telephone number of the counsel for the plaintiff are:

Joseph Jaspan, Esq.  
 Stanley Harwood, Esq.  
 Laurel R. Kretzing, Esq.  
 Jaspan Schlesinger Silverman & Hoffman, LLP  
 300 Garden City Plaza  
 Garden City, New York 11530-3324  
 (516) 746-8000

-and-

William F. Levine, Esq.  
 Levine & Grossman  
 114 Old Country Road  
 Mineola, New York 11501  
 (516) 248-7575

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Throughout my professional life, I have litigated complex civil actions ranging from RICO and fraud claims to federal civil rights matters. For the most part, that litigation has involved extensive discovery and motion practice. As a result, I have developed a comprehensive knowledge and understanding of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The demands of this sophisticated litigation have honed my organizational skills. I have also learned how to marshal the limited resources of a small law firm to represent my institutional clients effectively.

For nearly 20 years, I have been involved with police testing litigation and efforts by large municipalities to develop selection devices that better predict on-the-job performance while reducing adverse impact on minorities and women. That work has allowed me to analyze volumes of statistical data with the assistance of distinguished industrial psychologists and statisticians so that it could be presented in court.

My work as Special Counsel to Nassau County has afforded me the opportunity to advise government officials on a variety of human resources issues that have concrete practical applications. For example, I revised the physical and medical screening guidelines for police officers in order to conform to the Americans With Disabilities Act. I also participated in the design and implementation of recruitment programs to attract candidates for police officer positions. In addition, I coordinated the simultaneous administration of a police officer examination with video components to more than 25,000 candidates at Madison Square Garden and the Nassau County Veterans Memorial Coliseum. That effort involved more than 500 civil service and law enforcement personnel.

I also have extensive experience litigating issues relating to the conditions of confinement for pre-trial detainees and sentenced inmates. For example, I have worked with government officials in formulating a variety

of practical measures to address the jail overcrowding crisis. Some were stop-gap, such as the construction of temporary facilities and the transfer of inmates from Nassau County to other municipalities with less crowded facilities in upstate New York. Other measures were long-term, such as the construction of a 240-bed women's facility and an 832-bed maximum security facility. These projects solved a chronic overcrowding problem.

My legal activities have also focused on defending law enforcement personnel, including police officers, correction officers and assistant district attorneys in actions alleging sophisticated civil rights claims. More recently, I have represented municipalities in constitutional challenges to zoning laws and federal environmental claims. I also continue to litigate RICO claims as they arise in a variety of commercial and civil rights contexts.

Finally, in my capacity as Assistant Counsel to the Minority Leader, I have advised government officials within the New York State Assembly on a wide spectrum of personnel and management issues. My work there has extended to addressing various groups of Assembly employees on workplace and ethics matters.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I am a 50% partner in the law firm of Snitow & Pauley. My law partner and I have agreed that my equity interest in Snitow & Pauley will be valued on the date of my withdrawal. That valuation will be calculated on a net equity basis by billing all work in progress as of that date, applying all monies received thereafter on accounts receivable to any current or accrued liabilities, and thereafter distributing to me 50% of the remaining sums. My 50% equity share will be distributed to me within the eighteen (18) months of my withdrawal as the monies are received.

In addition, my partner will be continuing the business of Snitow & Pauley after my withdrawal and has agreed that the goodwill value of my business is estimated to be in Category "O" as set forth in the value codes of the financial disclosure report under the Code "T" value method. That sum will be payable to me without interest over five years beginning January 1, 2000, or the date the equity payment to me attributable to the wind-down of Snitow & Pauley is complete, whichever occurs first.

Snitow & Pauley also maintains a profit sharing plan known as the "Snitow & Pauley Retirement Plan". The value of my share of those funds is in Category "M" as set forth in the value codes of the financial disclosure report under the Code "T" value method. I will be withdrawing my interest in that Trust and transferring the entire sum to my IRA account at Prudential Bache Securities.

I currently serve as Vice President of Snapau Corp. Snapau Corp. is a New York corporation organized on July 7, 1987 for the purpose of leasing office space on the ninth floor at 345 Madison Avenue, New York, New York, and subletting that office space to my law firm Snitow & Pauley. My law firm is and has been Snapau Corp.'s only sub-tenant. The lease expires on June 30, 1998 and thereafter, Snapau will be dissolved. The principal asset of Snapau Corp. is a security deposit. When the landlord returns the security deposit, my share will be in Category "K" as set forth in the value codes of the financial disclosure report under the Code "T" value method.



2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will resolve any potential conflict of interest in accord with the requirements of 28 U.S.C. § 455 and any other applicable guidelines. Whenever a circumstance arises in which my impartiality might reasonably be questioned, I will disqualify myself from the case.

Apart from investments in U.S. Treasury Bills, my personal financial assets, as well as those of my wife, will be maintained in a managed account at Prudential Securities. Currently, neither my wife nor I make investment decisions concerning those funds and we will continue that practice. Should a financial interest be disclosed, I will either recuse myself or divest that financial interest as the circumstances may warrant.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).**

Please see attached Financial Disclosure Report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

The completed financial net worth statement is attached.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No.

AO-10 (w)  
Rev. 1/98FINANCIAL DISCLOSURE REPORT  
Nomination ReportReport Required by the Ethics  
Reform Act of 1989, Pub. L. No.  
101-194, November 30, 1989  
(5 U.S.C. App. 4, Sec. 101-112)

<b>1. Person Reporting</b> (Last name, first, middle initial) PAULEY, III, WILLIAM H.		<b>2. Court or Organization</b> Southern District of New York	<b>3. Date of Report</b> 05/22/1998
<b>4. Title</b> (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge Nominee		<b>5. Report Type (check type)</b> X Nomination, Date 05/21/1998 Initial Annual Final	<b>6. Reporting Period</b> 01/01/1997 to 04/30/1998
<b>7. Chambers or Office Address</b> 345 MADISON AVENUE NEW YORK, NEW YORK 10017		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.			

**I. POSITIONS** (Reporting individual only; see pp. 9-13 of Instructions.)**POSITION****NAME OF ORGANIZATION / ENTITY**☒ NONE (No reportable positions.)

1 \_\_\_\_\_

2 \_\_\_\_\_

3 \_\_\_\_\_

**II. AGREEMENTS** (Reporting individual only; see pp. 14-16 of Instructions.)**DATE****PARTIES AND TERMS**☐ NONE (No reportable agreements.)

1 1998 Continuation of payments agreement with my law partner, Franklyn H. Snitow, and his new law firm, Franklyn H. Snitow, LLP.

2 \_\_\_\_\_

3 \_\_\_\_\_

**III. NON-INVESTMENT INCOME** (Reporting individual and spouse; see pp. 17-24 of Instructions.)**DATE****SOURCE AND TYPE****GROSS INCOME**  
(yours, not spouse's)☐ NONE (No reportable non-investment income.)

1 1998 Snitow &amp; Pauley, partnership income \$ 150,000.00

2 1998 New York State Assembly \$ 10,000.00

3 1997 Snitow &amp; Pauley, partnership income \$ 432,000.00

4 1997 New York State Assembly \$ 35,000.00

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting	Date of Report
	PAULEY, III, WILLIAM H.	05/22/1998

**SECTION HEADING.** (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

**PART 3. NON-INVESTMENT INCOME (cont'd.)**

Line	Date	Source and Type	Gross Income
5	1996	Snitow & Pauley, partnership income	\$ 390,000.00
6	1996	New York State Assembly	\$ 35,000.00
7	1998	Hubbell & Klapper (s)	\$ 0.00
8	1998	Snitow & Pauley (s)	\$ 0.00
9	1997	Hubbell & Klapper (s)	\$ 0.00
10	1997	Snitow & Pauley (s)	\$ 0.00
11	1997	Village Properties of Garden City (s)	\$ 0.00

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

PAULEY, III, WILLIAM H.

Date of Report

05/22/1998

## IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

## V. GIFTS

(Includes those of spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate gifts received by spouse and dependent children, respectively. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1	Exempt		
2			
3			

## VI. LIABILITIES

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			
6			

\* VAL CODES: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001 to \$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000    P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
PAULEY, III, WILLIAM H.Date of Report  
05/22/1998

## VII. Page 1 INVESTMENTS and TRUSTS — income, value, transactions (Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
1 Money Market - Chase Bank	M	Interest	J	T	Exempt				
2 Money Market - Chase Bank(S)	M	Interest	K	T	Exempt				
3 Saving Account - Chase Bank (J)	B	Interest	K	T	Exempt				
4 Treasury Bills (J)	C	Interest	L	T	Exempt				
5 Treasury Bills (B)	D	Interest	M	T	Exempt				
6 Dreyfus Liquid Assets, Inc.	M	Dividend	J	T	Exempt				
7 401K Plan - TRS Fleet Bank (S)	M	Interest	J	T	Exempt				
8 Profit Sharing Keogh - Citibank	A	Interest	J	T	Exempt				
9 IRA Account - CDs - Citibank	B	Interest	K	T	Exempt				
10 IRA Account - Scudder Global and Income Fund	M	Interest	K	T	Exempt				
11 IRA Account - CDs - Chase Bank	B	Interest	K	T	Exempt				
12 IRA Account - CDs - Chase Bank (S)	C	Interest	K	T	Exempt				
13 Snitow & Pauley Retirement Plan	D	Interest	M	T	Exempt				
14 Snitow & Pauley - 50% Partnership Equity Interest	A	None	P1	T	Exempt				
15 AT&T Corp. (S)	A	Dividend	J	T	Exempt				
16 Choice Points (S)		None	J	T	Exempt				
17 Exxon Corp. (S)	M	Dividend	J	T	Exempt				
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				



**VII. Page 2 INVESTMENTS and TRUSTS—** income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(Q)" after each asset exempt from prior disclosure.		(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
							(2) Date: Month: Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income/assets, or transactions.)										
18 IBM Corp. (S)		A	Dividend	J	T	Exempt				
19 Lucent Tech. (S)		A	Dividend	K	T	Exempt				
20 Ambac Fin. (S)			None	J	T	Exempt				
21 Brightpoint (S)			None	J	T	Exempt				
22 Centex (S)			None	J	T	Exempt				
23 Chase Manhattan (S)		A	Dividend	J	T	Exempt				
24 Deere & Co. (S)			None	J	T	Exempt				
25 Digital Micro (S)			None	J	T	Exempt				
26 Gulfstream Aero (S)			None	J	T	Exempt				
27 Ingersoll Rand (S)		A	Dividend	J	T	Exempt				
28 Haytag Corporation (S)		A	Dividend	J	T	Exempt				
29 Nokia Corporation (S)		A	Dividend	J	T	Exempt				
30 Nova Care (S)			None	J	T	Exempt				
31 Premark International (S)		A	Dividend	J	T	Exempt				
32 RJR Nabisco (S)		A	Dividend	J	T	Exempt				
33 Spieker Properties (S)		A	Dividend	J	T	Exempt				
34 Sun Microsystems (S)			None	J	T	Exempt				
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) Q=\$500,001-\$1,000,000		K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
PAULEY, III, WILLIAM H.

Date of Report  
05/22/1998

**VII. Page 3 INVESTMENTS and TRUSTS— income, value, transactions**

(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "X" after each asset exempt from prior disclosure.</i>	B. Income during reporting period	C. Gross value at end of reporting period	D. Transactions during reporting period		
(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure
					(2) Date: Month-Day (3) Value Code (I-P) (4) Gain Code (A-H) (5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income/assets, or transactions.)					
35 Union Carbide (S)	A	Dividend	J	T	Exempt
36 AIM - Value (S)	B	Dividend	H	T	Exempt
37 Alliance Growth (S)	K	Dividend	J	T	Exempt
38 Davis NY Venture (S)		None	J	T	Exempt
39 Eaton Vance Tax Management (S)		None	J	T	Exempt
40 Federated Equity (S)		None	J	T	Exempt
41 Goldman Sachs Capital Growth (S)		None	J	T	Exempt
42 John Hancock Financial Industries (S)		None	J	T	Exempt
43 John Hancock Reg. Bank "A" (S)	K	Dividend	K	T	Exempt
44 John Hancock Reg. Bank "B" (S)	K	Dividend	K	T	Exempt
45 Kemper Dremam Fund (S)	K	Dividend	J	T	Exempt
46 New Perspective (S)	K	Dividend	J	T	Exempt
47 Prudential Equity B (S)	K	Dividend	L	T	Exempt
48 Prudential Equity Inc. B (S)	A	Dividend	K	T	Exempt
49 Prudential Jennison Growth (S)		None	K	T	Exempt
50 Prudential Jennison G & I (S)		None	J	T	Exempt
51 Pru Sm Cap Quantum (S)		None	K	T	Exempt
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000	
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more	
3 Val Mth Codes: (Col. C2) Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market		

**VII. Page 4 INVESTMENTS and TRUSTS**— income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by private child.</i>  <i>Place "OO" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
52 Pru Sm Co Value (S)		None	K	T	Exempt				
53 Pru World Fund (S)		None	J	T	Exempt				
54 Putnam Health Science A (S)	B	Dividend	K	T	Exempt				
55 Putnam Health Science B (S)		None	K	T	Exempt				
56 Putnam Voyager (S)	B	Dividend	K	T	Exempt				
57 Seligman Comm. "A" (S)	C	Dividend	J	T	Exempt				
58 Seligman Value (S)	H	Dividend	K	T	Exempt				
59 Washington Mutual (S)	A	Dividend	K	T	Exempt				
60 Prudential High Yield (S)	B	Dividend	L	T	Exempt				
61 Oppenheimer Quest Value (S)	H	Dividend	K	T	Exempt				
62 Low Five #16 (S)	A	Dividend	K	T	Exempt				
63 Prudential Disc Plus (S)		None	H	T	Exempt				
64 Prudential Command MM (S)	K	Interest	K	T	Exempt				
65 Prudential National MM (S)	A	Interest	J	T	Exempt				
66 Prudential Eq. Fund B (S)	C	Dividend	K	T	Exempt				
67 Prudential Jenn. Growth B (J)	A	Dividend	K	T	Exempt				
68 Chevron (S)	A	Dividend			Exempt				
1 In/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
PAULEY, III, WILLIAM H.Date of Report  
05/22/1998VII. Page 5 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.  Place "(O)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
69 General Motors (S)	A	Dividend			Exempt				
70 International Paper (S)	A	Dividend			Exempt				
71 MGH (S)	A	Dividend			Exempt				
72 Banc One (S)	A	Dividend			Exempt				
73 Boeing (S)	A	Dividend			Exempt				
74 CBS (S)	A	Dividend			Exempt				
75 Dupont (S)	A	Dividend			Exempt				
76 First Essex (S)	A	Dividend			Exempt				
77 Goodyear (S)	A	Dividend			Exempt				
78 Southern New England (S)	A	Dividend			Exempt				
79 American Greetings (S)	A	Dividend			Exempt				
80 Bell Atlantic (S)	A	Dividend			Exempt				
81 Caterpillar (S)	A	Dividend			Exempt				
82 Dean Foods (S)	A	Dividend			Exempt				
83 Lehman Brothers (S)	A	Dividend			Exempt				
84 Loews (S)	A	Dividend			Exempt				
85 Public Service Group (S)	A	Dividend			Exempt				
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

PAULEY, III, WILLIAM H.

Date of Report

05/22/1998

## VII. Page 6 INVESTMENTS and TRUSTS — income, value, transactions

(Includes those of spouse and dependent children. See pp 36-54 of Instructions)

A. Description of Assets  <i>Indicate where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.</i>  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, interest or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
86 Texas Utilities (S)	A	Dividend			Exempt				
87 USX Steel (S)	A	Dividend			Exempt				
88 Breed Tech. (S)	A	Dividend			Exempt				
89 Prudential Eq. Inc. (S)	■	Dividend			Exempt				
90 Prudential Sm. Co. (S)	■	Dividend			Exempt				
91 Prudential World G (S)	■	Dividend			Exempt				
92 Snapau Corp. (S)			K	T	Exempt				
93									
94									
95									
96									
97									
98									
99									
100									
101									
102									
1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4) F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 H2=\$5,000,001 or more		E=\$15,001-\$50,000		
2 Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000		L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000		M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000		N=\$250,001-\$500,000 P4=\$50,000,001 or more		
3 Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market				



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

PAULEY, III, WILLIAM H.

Date of Report

05/22/1998

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

*(Indicate part of report.)*

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting  
PAULEY, III, WILLIAM H.

Date of Report  
05/22/1998

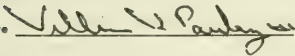
## IX. CERTIFICATION

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date 5/22/98

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Suite 2-301  
Washington, D.C. 20544

**FINANCIAL STATEMENT**  
**NET WORTH**  
**As of April 30, 1998**

**WILLIAM H. PAULEY III and KIMBERLY F. PAULEY**

**ASSETS**

Cash on hand and in banks .....	\$ 50,000
U.S. Government securities -- add Schedule A .....	\$ 225,000
Listed securities -- add Schedule B .....	\$ 954,641
Unlisted securities -- add schedule .....	0
Accounts and notes receivable:	
Due from relatives and friends .....	0
Due from others .....	0
Doubtful .....	0
Real estate owned -- add Schedule C .....	\$ 425,000
Real estate mortgages receivable .....	0
Autos and other personal property .....	\$ 100,000
Cash value -- Life insurance .....	\$ 82,500
Other assets -- itemize:	
50% partnership equity interest and goodwill value of business (estimated value) .....	\$1,250,000
IRA, Keogh, 401-K accounts and retirement plan -- add Schedule D .....	\$ 254,600
Total Assets .....	\$3,341,741

**LIABILITIES**

Notes payable to banks -- secured .....	0
Notes payable to banks -- unsecured .....	0
Notes payable to relatives .....	0
Notes payable to others .....	0
Accounts and bills due .....	0
Unpaid Income tax .....	0
Other unpaid tax and interest .....	0
Real estate mortgages payable -- add Schedule E .....	\$ 183,000
Chattel mortgages and other liens payable .....	0
Other debts -- itemize: .....	0
Total Liabilities .....	\$ 183,000
Net Worth .....	\$ 3,158,741
Total liabilities and net worth .....	\$ 3,341,741

**CONTINGENT LIABILITIES**

As endorser, co-maker or guarantor .....	0
On leases or contracts (see Schedule F) .....	\$ 85,000
Legal Claims .....	0
Provision for Federal Income Tax (see Schedule G) .....	\$600,000
Other special debt .....	0

**GENERAL INFORMATION****Are any assets pledged? (Add Schedule)**

Yes.

Sterling National Bank holds a security interest in the accounts receivable of the law firm of Snitow & Pauley to secure payment on extensions of credit that have been made to Franklyn H. Snitow, LLP. I am not a personal guarantor of any such indebtedness.

**Are you defendant in any suits or legal actions?**

Yes.

In 1994, a vehicle that I was driving was involved in a multi-vehicle accident on the Long Island Expressway. My vehicle was rear-ended by a stretch limousine and propelled into other vehicles. Nevertheless, I was named as a defendant in two personal injury actions in New York State Supreme Court (New York County) that were filed by the drivers of other vehicles, titled Roland v. Zip Limousine, Index No. 109694/95, and Kashi-Nejad v. Zip Limousine Service, Ltd., Index No. 110590/97. Those actions are pending. I am insured by Allstate Insurance Company and am currently represented by counsel assigned by Allstate. The actions are pending.

**Have you ever taken bankruptcy?**

No.

## SCHEDULES FOR FINANCIAL STATEMENT - NET WORTH

WILLIAM H. PAULEY III and KIMBERLY F. PAULEY

## SCHEDULE A

## U.S. Government Securities

U.S. Treasury Bills (J) .....	\$ 50,000
U.S. Treasury Bills (S) .....	<u>\$175,000</u>
Total .....	\$225,000

## SCHEDULE B

## Listed Securities

Prudential Securities Account (S) .....	\$907,785
-- see Sec. VII - Investments, Financial Disclosure Statement	
Prudential Securities Account (J) .....	\$ 40,656
-- see Sec. VII - Investments, Financial Disclosure Statement	
Dreyfus Liquid Assets, Inc. ....	<u>\$ 6,200</u>
Total .....	\$954,641

## SCHEDULE C

## Real Estate Owned

Market Value - Primary Residence Garden City, NY (J) .....	\$425,000
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## SCHEDULE D

## IRA, Keogh, 401K Accounts and Retirement Plan

401K Plan - TRS Fleet Bank (S) .....	\$ 14,500
Profit-Sharing Keogh - Citibank .....	\$ 6,400
IRA Account - Citibank .....	\$ 22,200
IRA Account - Citibank (S) .....	\$ 200
IRA Account - Scudder Global and Income Fund .....	\$ 29,300
IRA Account - Chase Bank (CDs) .....	\$ 23,000
IRA Account - Chase Bank (CDs) (S) .....	\$ 33,000
Snitow & Pauley Retirement Plan .....	\$125,000
Snitow & Pauley Retirement Plan (S) .....	<u>\$ 1,000</u>
Total .....	\$254,600



**SCHEDULE E**

First Mortgage on primary residence, Garden City, NY

Mortgage held by Source One, Maturity date: 2022 (J) ..... \$183,000

**SCHEDULE F**

Contingent liability on leases ..... \$ 85,000

I am a personal guarantor on certain computer equipment  
 leases in which the law firm of Snitow & Pauley is the  
 lessee.

**SCHEDULE G**

Contingent liability for provision for federal income tax ..... \$600,000

This contingent liability represents an estimate of taxes  
 on unrealized assets and gains from my interest in the  
 law firm of Snitow & Pauley, our IRA, Keogh, 401K  
 and retirement plan accounts, and our managed accounts  
 at Prudential Bache Securities.

### III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

In view of my extensive federal civil rights litigation experience and my partner's Orthodox Jewish background, my law firm committed its professional services to the Hasidic community in Crown Heights, Brooklyn, New York, following the ethnic violence that erupted there in August 1991. My law firm commenced a class action suit in the United States District Court for the Eastern District of New York titled Estate of Yankel Rosenbaum v. The City of New York, 92 Civ. 5414 (FB). My efforts were recognized by the Crown Heights community on March 26, 1995 when I received the Friends of Crown Heights Community Service Award. On April 2, 1998, the action was settled by the City of New York with an agreement to pay plaintiffs \$1.1 million.

Over the last several years, I have worked on a pro bono basis for ArtWatch International, Inc., a not-for-profit membership corporation that serves as an independent international advocate for the conservation and stewardship of culturally significant works of art throughout the world. In 1995, I filed litigation on behalf of an ArtWatch member to stop the New York Historical Society from deaccessioning significant European old master paintings. That litigation titled Gloria Hillman Valdez v. The New York Historical Society (New York County Index No. 95/100665) was settled by an agreement that several of the greatest works that were to be auctioned by Sotheby's, Inc. would instead remain in New York museum collections open to the public. Thus, paintings that could have disappeared into private collections are now part of the collections at The Metropolitan Museum of Art, The Brooklyn Museum, and Vassar College. I also advise ArtWatch on legal issues concerning art restoration in the United States and Europe.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I do not currently belong, nor have I ever belonged, to any organization that discriminates through either formal membership requirements or the practical implementation of membership policies.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

My nomination was recommended by the Judicial Screening Committee of Senator Alfonse M. D'Amato. Approximately one year ago, I contacted the Secretary of Senator D'Amato's Judicial Screening Committee and obtained a questionnaire. On October 3, 1997, I submitted answers to that questionnaire. On January 20, 1998, I was interviewed by the Judicial Screening Committee.

By letter dated March 3, 1998, Senator D'Amato advised me that he and Senator Daniel Patrick Moynihan were forwarding my name to the President for consideration for a judgeship in the Southern District of New York.

Thereafter, I was screened by the Judiciary Committee of the Association of the Bar of the City of New York. I was interviewed by a subcommittee of the Judiciary Committee and by the entire Judiciary Committee. On May 14, 1998, the Judiciary Committee approved my candidacy.

I was also interviewed by representatives of the Department of Justice, the American Bar Association and the Federal Bureau of Investigation. Those interviews occurred in the period from March through May 1998.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the**

judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The non-electoral nature of the judicial branch should sharpen and inform a federal judge's sensitivity to the danger of usurping the prerogatives of coordinate branches of the federal government as well as the States. A judge's adherence to the Article III requirements of standing and "case and controversy" alleviates this hazard by preventing federal judges from deciding questions where no individual claims would be finally adjudicated. Similarly, a federal judge should be mindful of the origins and parameters of a district court's limited jurisdiction.

In cases presenting constitutional questions, a federal judge must set aside personal views about how a constitutional provision would be best implemented. The doctrinal structures established by case law and the principle of *stare decisis*, when applied within the parameters of Article III, provide the touchstones for resolving the panoply of controversies that are heard today in federal courts.

QUESTIONS AND ANSWERS

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QUESTIONS FOR MARSHA BERSON FROM SENATOR SESSIONS

1. In your personal legal opinion, is the 199[6] Habeas Corpus Reform legislation constitutional?

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 limiting second habeas petitions are constitutional. Under the legislation, the Supreme Court may provide habeas relief on second petitions, and the statute therefore does not violate Article III, §2 of the Constitution. Felker v. Turpin, \_\_ U.S. \_\_, 116 S. Ct. 2333 (1996). Moreover, the remaining statutory restrictions on second petitions are consistent with Article I, §9, of the Constitution, the Suspension Clause. Felker v. Turpin, *supra*.

2. If confirmed, you will review many employment discrimination cases as a federal judge.

(a) In a suit challenging a government racial classification, preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

Yes. As a court of appeals judge, I will follow all United States Supreme Court precedents, including Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), with great care.

(b) In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

Extremely difficult. To survive strict scrutiny, the highest level of constitutional scrutiny, the governmental purpose must be compelling, and the program must be narrowly tailored.

(c) While you were on the Board of Directors of the ACLU of Northern California (ACLU-NC), this group filed suit challenging Proposition 209, the California Civil Rights Initiative. Your ACLU Chapter called Proposition 209 an "insidious measure."

When the lawsuit was filed, did you agree with the ACLU-NC that Proposition 209 was unconstitutional? If not, as a board



member, did you try to persuade it not to challenge the constitutionality of Proposition 209?

I note, initially, that I was not on the ACLU Legal Committee at the time the lawsuit challenging Proposition 209 was presented to that Committee by the ACLU legal staff, and was not present at the Board meeting at which there was an opportunity to discuss and vote on whether or not the lawsuit should be filed. Moreover, as a Board member I was not involved in the actual litigation of approved cases, and did not draft or approve the pleadings filed in the Proposition 209 case or any other case litigated by ACLU staff lawyers or volunteer lawyers. I was not, until informed by this question, aware that the ACLU termed Proposition 209 an "insidious measure," and did not make and do not agree with any such statement myself.

More generally, as an ACLU-NC Board member, my role was not to decide whether the ACLU-NC's legal position was correct, but whether it was based on a colorable legal argument. My role as a court of appeals judge, if confirmed, would be entirely different from my role on the ACLU Board. As a judge, I would be responsible for the actual determination of legal issues after consideration of all parties' arguments based on the law, not for the different and circumscribed task of determining whether a particular argument is sufficiently colorable that it can appropriately be presented to the courts for determination. I will therefore, if I am confirmed as a judge, necessarily reject many arguments as unsupported by precedent and by statutory and constitutional language even though the arguments are not frivolous.

In the case of the Proposition 209 suit, Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (9th Cir. 1997), the constitutional equal protection argument made by the plaintiffs was not without a basis in the constitutional precedents. That argument was, however, an extremely difficult argument that, in my legal opinion from the outset, was quite unlikely to be sustained by the courts.

Specifically, the Supreme Court had upheld constitutional challenges based upon a "political structure" equal protection analysis in several cases (Hunter v. Erickson, Washington v. Seattle School Dist. No. 1, Romer v. Evans), and had rejected

such challenges as well (Crawford v. Board of Education). And, the Court had, more recently, held in Adarand Constructors v. Peña that all preferences based on race, whether characterized as "affirmative action" policies or not, are subject to strict scrutiny. The Court's distinctions between the political structure challenges upheld and those rejected were not crystal clear. The impact of Adarand on the earlier "political structure" equal protection cases had also not been decided by the Supreme Court. There was therefore a colorable political structure equal protection argument for the plaintiffs.

The Ninth Circuit, in a well-reasoned opinion, reconciled the various strands of Supreme Court precedent and concluded that the "political structure" equal protection theory cannot, in light of Crawford and Adarand, be applied to invalidate Proposition 209. The constitutionality of Proposition 209 is therefore settled law in the Ninth Circuit. Additionally, the Coalition for Economic Equity opinion is now precedent in the Ninth Circuit on issues concerning the scope of "political structure" equal protection.

3. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

No. Both statutes and state constitutional amendments passed through voter referenda and those passed by the legislature come to the courts with a strong presumption of constitutionality.

In states, like my home state, California, that provide for referenda, the legislative authority is divided, under the provisions of the state Constitution, between the Legislature and the people voting on initiative and other referenda measures. One method of legislating is no more or less valid or definitive than the other, and the degree of judicial scrutiny for statutes and state constitutional provisions enacted under either of the two legislative routes is therefore precisely the same.

4. Do you believe that Congress has the power under Article III of the U.S. Constitution to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Yes. As the Supreme Court has held, Article III clearly so contemplates, since it makes the creation of lower federal courts discretionary. See, e.g., Lauf v. EG Shiner, 303 U.S. 323 (1938); Lockerty v. Phillips, 319 U.S. 182 (1943).

5. In 1996, Congress, using its power under Article III, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

In your personal legal opinion, is the Prison Litigation Reform Act constitutional?

Like any other statute, the Prison Litigation Reform Act of 1996, 18 USC §3626 (PRLA), enjoys a strong presumption of constitutionality. Consistent with that presumption, the PRLA has been held constitutional in opinions by all ten circuits that have addressed various constitutional challenges to the statute.

The Ninth Circuit, in particular, has held one section, limiting attorneys fees, constitutional. Madrid v. Gomez, 1998 U.S. App. Lexis 14857 (July 2, 1998). Another panel of the Ninth Circuit, however, has held that a different section of the PRLA, 18 USC §3626(b)(2), is invalid as a violation of the separation of powers, because it limits judicial power. Taylor v. United States, 143 F.3d 1178 (1998).

If confirmed as a Ninth Circuit judge, I would be bound to apply Taylor until the Ninth Circuit sitting en banc decides otherwise or the Supreme Court resolves the circuit conflict on the constitutionality of §3626(b)(2). In general, though, I would, as a Ninth Circuit judge, be extremely reluctant to find a statutory provision unconstitutional in the face of overwhelming precedent by a large number of other circuits to the contrary.

6. (a) In your personal legal opinion, is the death penalty constitutional?

The death penalty is constitutional. The Supreme Court so held in Gregg v. Georgia, 428 U.S. 153 (1976), determining that the sentence of death for murder is not a violation of the Eighth Amendment. The plurality noted in particular that several

provisions of the Constitution indicate that "the existence of capital punishment was accepted by the Framers." 428 U.S. at 177.

(b) Would you personally be reluctant to impose or uphold the death penalty?

No. I would not personally be reluctant to impose or uphold the death penalty.

7. While you were on the Board of Directors in 1997, the ACLU-NC filed an amicus brief challenging the constitutionality of the Clinton Administration's "Don't ask, Don't tell" policy for homosexuals in the military. Reportedly, the ACLU-NC argued that the "Don't ask, Don't tell" policy violated the equal protection clause of the Fifth Amendment and the free speech clause of the First Amendment.

When this lawsuit was filed, did you agree with the ACLU-NC that the "Don't ask, Don't tell" policy was unconstitutional? If so, please describe in detail which constitutional provisions this policy offends.

As a member of the board, were you aware that the ACLU-NC challenged the "Don't ask, don't tell" policy? If so, did you approve of this lawsuit?

I had no awareness of an ACLU-NC "Don't ask, don't tell" challenge before I looked into the matter as a result of this question. I did not see the ACLU-NC amicus curiae brief when it was filed and have not seen it since. On inquiry, I learned that I was not on the ACLU-NC Legal Committee at the time the lawsuit challenging the "Don't ask, don't tell" policy was presented to that committee (which was in 1996, although the brief was apparently not filed until 1997), and was not present at the ACLU-NC Board meeting at which there was an opportunity to discuss and vote on whether or not the brief should be filed. I therefore was not aware of the constitutional arguments made in that brief when it was approved or when it was filed, and had no views on those arguments.

(As these answers suggest, my attendance at ACLU Board and Legal Committee meetings was somewhat sporadic. During the period I served on those bodies my primary professional activity was my



busy law practice, which often necessitated out-of-town travel. I also served on various other boards, commissions, and bar committees, resulting in competing time obligations.)

From the reported cases, I gather that the constitutional challenges to the "Don't ask, don't tell" policy have been based on the equal protection clause and the First Amendment. These challenges have been uniformly rejected by the federal circuit courts that have addressed them. See Able v. United States, 88 F.3d 1280 (2nd Cir. 1996); Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996).

8. In your personal legal opinion, under what legal standard should federal and state courts examine government classifications regarding sexual orientation or preference? In other words, should such classifications be analyzed under the rational basis test, intermediate scrutiny, or strict scrutiny?

Government classifications regarding sexual orientation or preference are not in any way suspect, or subject to heightened scrutiny. Rather, such classifications are analyzed under the rational basis test, and, as such, are extremely unlikely to be held unconstitutional. Bowers v. Hardwick, 478 U.S. 186 (1986).

9. Last month, the voters of California passed Proposition 227 to end bilingual education in California public schools. Proponents of Proposition 227 argue that bilingual education harms immigrant children by discouraging them from learning English.

The day after Proposition 227 was passed, the ACLU-NC filed a class action lawsuit in federal court challenging Proposition 227. The ACLU-NC argues that Proposition 227 is unconstitutional and violates the Civil Rights Act of 1964.

Do you agree with the ACLU-NC that Proposition 227 is unconstitutional?

I note at the outset that I was not on the Board or the Legal Committee of the ACLU at the time the Proposition 227 suit



was filed. I was not otherwise involved in the litigation, and know of the ACLU-NC constitutional arguments only from the reported opinion.

The District Court for the Northern District of California upheld Proposition 227 in Valeria G. v. Wilson, \_\_\_ F. Supp. \_\_\_ (July 15, 1998). According to the District Court's opinion, the plaintiffs' constitutional argument was that Proposition 227 violates the Equal Protection Clause of the Constitution, because the Proposition "elevates the decision making process to a higher level of government than would otherwise be required." The District Court rejected the argument, based on the Ninth Circuit's decision disapproving a similar "political structure" equal protection argument in Coalition for Economic Equity v. Wilson, 122 F.3d 692 (1997). As noted above, Coalition for Economic Equity is, as the District Court in Valeria G. properly recognized, binding precedent in the Ninth Circuit on the very limited nature of "political structure" rights under the equal protection clause.

Since the Valeria G. v. Wilson case is currently pending in the Ninth Circuit, it would be inappropriate for me to comment further on the merits of the issues decided by the District Court. I would note that, like any other state statute or state constitutional provision, Proposition 227 is strongly presumed constitutional, and that I have no personal or legal views that would interfere with my application of that presumption to Proposition 227.

10. When you were Vice-President of the ACLU of Northern California, your group filed an amicus brief in the case of [Michale A.G. v. Nancy S.], 228 Cal. App. 3d 83 (1991)).\* This case involved two homosexual females who were involved in a child custody dispute. The legal issue addressed the custody rights of homosexuals who are not the biological parents of children.

In the description of the ACLU-NC's brief provided by the Justice Department, the ACLU-NC reportedly argued that the Constitution requires that nonbiological parents be given the opportunity to prove that they are a 'parent in fact.'

(a) Where in the United States Constitution is there a right for non-biological parents to prove they are a "Parent in fact"?

The Supreme Court has held that the Constitution protects the rights of parents to custody of their children, and to rear their children as they see fit, absent a showing of unfitness or other strong governmental interest. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923). Ordinarily, this protection is accorded only to biological parents. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

The Supreme Court has addressed, without conclusively deciding, the question whether individuals who are not biological parents but who develop a close parenting relationship with a child (such as step-parents, grandparents or other relatives who have raised the child, foster parents, or fathers married to the mother at the time of birth but not the child's biological parent) ever have any constitutionally-protected rights to custody, visitation, or other continuing contact with the child. See, e.g., Smith v. Organization of Foster Families for Education and Reform, supra; Santosky v. Kramer, 455 U.S. 745, 761 (1982). The Court's cases indicate that state law governs questions of custody and visitation, subject to limited constitutional scrutiny; that the constitutional rights of biological parents are ordinarily paramount; and that states may protect parent-child relationships developed in traditional marriages over those not created within such a formal marital relationship without violating the Constitution. Smith v. Organization of Foster Families for Education and Reform, supra; Santosky v. Kramer, supra; Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989).

From the California Court of Appeal's opinion, I do not understand the issues raised in Michele A.G. v. Nancy S. as pertaining to the particular rights of homosexual individuals who participate in parenting a child, but rather to the rights of non-biologically-related adults generally. Any constitutional issue specifically concerning protection of the right of homosexuals to parent a child would be governed by Bowers v. Hardwick, 478 U.S. 186 (1986), holding that there is no heightened protection for homosexuals or homosexuality under the Constitution. Under that standard, any limitation on custody rights or visitation rights would be subject to the lowest form of constitutional scrutiny, the rational basis test.

\* The case was reported under this name, pursuant to a court order so requiring in order to protect the privacy of the children.

(b) At the time the suit was filed, did you agree with the ACLU-NC's brief in the Michale A.G. v. Nancy S. case?

I have never seen the ACLU-NC's brief in Michale A.G. v. Nancy S. As is usual, I did not see it at the time it was filed, since my role as an outside Board member and member and Chair of the Legal Committee (and therefore one of four Vice Presidents) did not include drafting or approving pleadings prepared by ACLU staff or volunteer attorneys. Additionally, the ACLU-NC office has informed me that the brief was filed under seal by order of the Court of Appeal. The entire record of the case remains under seal. I have therefore been unable to review the brief in answering this question. The Court of Appeal's opinion, Michale A.G. v. Nancy S. does not discuss any constitutional issue, or refer to the ACLU's arguments.

As the Court of Appeal pointed out, the question of custody or visitation rights for non-biological parents who have played a major role in rearing a child raises complex, competing policy questions. The matter, concluded the Court of Appeal, is most appropriately one for the legislature, not for the courts. I agree with that assessment.

(c) As Vice-President of the ACLU-NC, were you aware of this lawsuit? If so, did you approve this lawsuit?

I had no recollection of this case until asked about it in connection with my hearing before the Senate Judiciary Committee. On checking with the ACLU-NC, I learned that I was not present at the Legal Committee meeting at which the case was considered. For that reason, although Chair of the Legal Committee, I did not make a presentation concerning the case to the Board, but turned that task over to a Legal Committee member who was present at the discussion.

There was, I also learned upon inquiry, a close vote by the over 30-member Board regarding whether or not to file a brief of the kind proposed by the staff, and there were several Board members present who did not vote. I do not recall how I voted,

or whether I voted, and the ACLU-NC has informed me that it has no record so specifying.

11. If confirmed, will you follow the Supreme Court's labor decision in Communications Workers of America v. Beck?

Yes. If confirmed I will carefully follow the Supreme Court's Communications Workers of America v. Beck decision, as well as every other Supreme Court precedent.

FOR ALL NOMINEES

Questions from Sen. Sessions

Note: Senator Sessions' Questions for Marsha Berzon contain all but two of Senator Sessions' Questions for All Nominees. So as not to be repetitive have answered here only the two questions that do not appear on the Questions for Marsha Berzon list.

Which current U.S. Supreme Court Justice do you admire most and why?

The current Supreme Court Justice I most admire is Justice David Souter. Justice Souter thoroughly researches his opinions, and writes clearly and thoughtfully. He is respectful of lawyers at oral argument, while asking probing questions that illuminate the issues before the Court. His opinions are faithful to precedent, and to the language and structure of statutes and of the Constitution.

In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

The greatest Supreme Court decision in the last thirty years, taking the word "great" as meaning significant or influential, is, in my view, Buckley v. Valeo, 424 U.S. 1 (1976). Buckley was significant because it established the basic constitutional principles governing the constitutionality of campaign finance legislation, and as such has had a major impact on the operation of democratic processes in this nation.

Buckley was also, in my view, the "worst" Supreme Court decision in the last thirty years, not in its outcome -- which I am reluctant to judge, since I will be bound to apply it if confirmed as a judge -- but in its unfortunate scope. As a general matter, I believe that incremental, narrow judicial decisionmaking, going only so far as necessary to decide a particular case, yields the best long-term results, because such decisionmaking provides the opportunity to test legal theories against different factual situations that judges are unlikely to foresee in advance. The Article III "case or controversy" requirement so recognizes.



Senator John Ashcroft

Specific Questions for Marsha Berzon

At your hearing, you said that you would follow Supreme Court precedent and uphold the death penalty. You continued, however, that if the Court were ever to declare the death penalty unconstitutional, you would follow that decision. Without restating for me current law, please explain to me whether you believe;

(A) it was the Intent of the Founders to permit the federal government and the states to impose capital punishment for certain crimes, and

(B) the text of the Constitution makes clear that capital punishment is a permissible form of punishment.

Yes. The text of the Constitution indicates that framers of the Constitution believed that the federal government and the states would be permitted to impose capital punishment for certain crimes. As the plurality in Gregg v. Georgia, 428 U.S. 153 (1976), noted, several provisions of the Constitution specifically indicate that "the existence of capital punishment was accepted by the Framers." 428 U.S. at 177.

In a 1997 speech honoring Justice William Brennan, you stated that the Frontiero v. Richardson decision "was the case in which Justice Brennan tried but was unable to muster a majority of the Court in favor of a strict scrutiny approach to gender-based discrimination." Do you agree with Justice Brennan that gender classifications should be subject to the strict scrutiny?

The statement in the speech described the Frontiero decision, but, because the speech did not address the period after 1975, did not provide a complete account of Justice Brennan's views on gender discrimination.

After Frontiero, Justice Brennan wrote the opinion for the Court in Craig v. Boren, 429 U.S. 190 (1976), holding that gender classifications are not subject to strict scrutiny but to intermediate scrutiny. It therefore appears that he changed his

mind about applying strict scrutiny to gender classifications.

My own view is that the Craig standard has been quite adequate to the task of enabling the Supreme Court and the lower federal courts to distinguish between constitutional and unconstitutional gender distinctions, resulting in invalidating some such distinctions and upholding some others. I would, if confirmed, apply the Craig standard to the constitutional gender discrimination issues to which it applies, just as I would apply all other applicable Supreme Court precedents.

#### General Questions for all Nominees

**Which current Supreme Court Justice do you most admire and why?**

The current Supreme Court Justice I most admire is Justice David Souter. Justice Souter thoroughly researches his opinions, and writes clearly and thoughtfully. He is respectful of lawyers at oral argument while asking probing questions that illuminate the issues before the Court. His opinions are faithful to precedent, and, where there is no precedent, to the language and structure of statutes and of the Constitution.

**Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?**

Justice John Marshall Harlan -- the second Justice Harlan -- has most influenced my thinking concerning the constitutional separation of powers. By example, as well as in opinions specifically addressing the subject of separation of powers, Justice Harlan made clear that the role of judges is to determine the particular disputes presented to them, not to legislate or to pronounce social policy. Justice Harlan's opinions are characterized by a careful attention to the facts of the specific case and to the language of statutes, a commitment to the avoidance of constitutional decisions where possible, and great deference to the legislative branch and the states.

**What does the discretionary power of the judiciary mean to**

you?

As an appellate judge, I would have essentially no discretionary power acting alone (other than in establishing the internal organization and operation of my own chambers). Acting as a whole, the Court of Appeals has some discretion to set its own internal operating procedures, and to set procedural rules for litigants such as limitations on the size of briefs, qualifications for admission to the circuit's bar, and so on. Acting in panels, court of appeals judges have some discretion, bounded by any applicable standards set by the circuit as a whole, regarding whether to hold oral argument, whether to allow divided argument, whether to grant continuances on briefs, and other such procedural matters. Otherwise, appellate judges have no discretion.

What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

The original Constitution and the Bill of Rights, along with infrequent amendments, have served well as this country's governing document. I do not know of any rights that should be but are not protected by the Constitution.

Which law review article or book has most influenced your view of the law?

Judge Frank Coffin's On Appeal. I once served as a co-faculty member with Judge Coffin in an Appellate Advocacy seminar. I learned a great deal from Judge Coffin about the appellate process at that time, and am pleased that he took the time to share his wisdom on the appellate process more broadly by writing On Appeal. I found the book useful in teaching appellate advocacy skills when I taught at Cornell Law School, and plan to reread the book, with particular attention to the sections concerning judging at the appellate level, if confirmed.

What role do you think legislative history - by which I mean the various committee reports, hearing transcripts and floor statements - should play in the interpretation of the text of a

statute?

I have done a great deal of work involving the interpretation of statutes. In the course of doing so, I have become convinced that a careful reading of the words and structure of a statute is almost always adequate to provide clear guidance on the interpretation of the statute if there are no binding case precedents on the particular interpretive question at hand. In my teaching at Cornell and in a speech I gave this year to the American Association of Law Schools, I stressed the need for careful reading of statutory language (and suggested that law schools do not always adequately teach that skill).

Where the enacted statute's language and structure, standing alone, do not yield an unambiguous interpretation, considering the legislative development of the actual language by looking at prior versions of the statute or the evolution of the statutory language through amendments in the legislative process is sometimes helpful. Discursive legislative history such as committee reports, hearing transcripts, and floor statements are a last resort, and, in my experience, almost never convincingly support a conclusion that would not be reached on the basis of the statute's language and evolution alone.

QUESTIONS BY SENATOR STROM THURMOND FOR MARSHA BERZON REGARDING THE JUDICIAL NOMINATIONS HEARING OF JULY 30, 1998.

1. Mrs. Berzon, you have been a strong advocate for organized labor throughout your legal career, including a position as Associate General Counsel of the AFL-CIO. How can you assure us that you can be fair and unbiased in cases involving labor and management issues?

Like other attorneys, on ascending the bench I would put aside the interests and views of my clients, and decide cases based solely on precedent and, where there is no precedent, on a careful, unbiased reading of the language of statutes and constitutional provisions. Judges who, before joining the judiciary, represented principally labor or principally management (such as Judges Lawrence Silberman (management) and Harry Edwards (labor) of the United States Court of Appeals for the D.C. Circuit) have done so. I am confident that I will have no trouble doing so as well, in cases raising labor and management issues as in any other. I am gratified that a great many attorneys who principally represent management have stated in letters to the Senate Judiciary Committee their confidence that I will decide labor-management questions in a fair and unbiased manner. (I am attaching to these answers a few of the many such letters in the Committee's files.)

Further, as a partner in a law firm, I am an employer, and have in that capacity viewed employment law issues from the point of view of an employer. Additionally, I have represented unions in their capacity as employers, and have represented defendants in employment discrimination cases.

Finally, I have served as an early neutral evaluator and mediator for the United States District Court for the Northern District of California in a great many employment cases, and have had no difficulty in appreciating and fairly evaluating the arguments of both parties.

2. Were you publicly involved in California's recent consideration of Proposition 226, which would have restricted the use of union dues for political activity?

No.

3. It appears that you have been active as a member of the Women's Legal Defense Fund. Please generally explain your interest and involvement in this organization.

I became aware of the Women's Legal Defense Fund (WLDF) in the mid-1970's when I was living and beginning the practice of



law in Washington, D.C. I was interested in the Fund because it was an organization providing free legal representation to women in the Washington, D.C. area on issues of particular interest to women, including cases brought under statutes such as the Civil Rights Act of 1964 and the Equal Pay Act, domestic violence cases, and cases concerning child custody issues.

In 1976-77, I was one of a group of lawyers who met periodically as a screening committee to assist WLDF in determining whether WLDF should, through volunteer lawyers, represent potential clients from the Washington, D.C. area seeking legal assistance. Additionally, in each case, a member of the committee was assigned as liaison for WLDF with the volunteer lawyers; I served as liaison in one case, concerning the availability under the Freedom of Information Act of certain equal employment documents filed with federal agencies.

For the last twenty years, since moving to California in 1978, I have not had an active role in WLDF. I have made some monetary contributions.

For the sake of completeness, I would also note that in the late 1970's, I represented the Women's Legal Defense Fund as a client in filing one Supreme Court amicus curiae briefs, in Cannon v. University of Chicago, 441 U.S. 677 (1979), concerning whether there is a private cause of action under Title IX of the Education Amendments of 1972. I also filed a Supreme Court amicus curiae, as a volunteer attorney representing several members of Congress, in a case in which a WLDF attorney was co-counsel; that brief was in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), concerning the application of California community property law to federal pensions in divorce situations. In both cases, the client representation was performed in my role as a private attorney.

4. Former Supreme Court Justice William Brennan once expressed his view of Constitutional interpretation as follows: "We look to the history of the time of framing and to the intervening history of Interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Do you agree with this statement? Please explain.

In interpreting the Constitution, the starting point must be the textual language and the long line of precedents that have developed regarding various provisions of the Constitution over the last two centuries. Absent an applicable precedent, the Constitution, in my view, is best interpreted according to the

intent of its Framers, by reading the language of the Constitution in light of the understanding of that language at the time it was written. I therefore disagree with Justice Brennan to the degree he suggested otherwise.

Issues of constitutional interpretation do sometimes require applying the text of the Constitution to circumstances that the Framers could not possibly have anticipated because of technological changes since the Constitution was written, such as the introduction of photography, moving pictures, television, computers, and so on. Even where the precise circumstances were not anticipated, however, the meaning of the text remains the same and does not change, and courts must therefore apply the general principles incorporated in the Constitution as the text and historical background suggest the Framers would have done had they anticipated the technological changes.

5. What is your view of mandatory minimum criminal sentences, and would you have any reluctance to uphold them as a Federal judge?

Statutes imposing mandatory minimum criminal sentences are properly within the scope of the legislature's authority to determine the appropriate punishment for particular crimes. As a federal judge, I would have no reluctance in applying mandatory minimum sentences prescribed by the legislature.

6. As you know, the sentencing of criminal defendants in Federal court is conducted under the Federal Sentencing Guidelines. Some argue that the Guidelines do not provide enough flexibility for the sentencing judge. What is your view of the Federal Sentencing Guidelines and their application?

The Federal Sentencing Guidelines are an appropriate exercise of Congress' authority to determine the punishment for crime, and to provide for consistency and certainty in sentencing. As a court of appeals judge, I would welcome the Guidelines as providing clear, ascertainable rules governing the appeal of sentences.

7. Federal judges spend a large portion of their time with criminal matters. It appears that you have virtually no criminal law experience. Do you feel you are prepared to handle criminal matters on the Ninth Circuit? Please explain.

While I have had a career focused primarily on civil law issues, I believe I am prepared to handle criminal matters on the Ninth Circuit because, at the appellate level, the skills and approaches applicable to criminal and to civil cases are essentially identical, even though the substance differs. I have found, as an appellate lawyer, that I can quickly learn and

understand new areas of the law because of the skills I have developed in reading precedents and statutory and constitutional provisions, and that these skills are readily transferable from one substantive area to another.

I will also draw on my experience in criminal matters, including a major criminal appeal, work on criminal law cases in my two clerkships, and teaching some criminal law cases when I was a practitioner-in-residence at Cornell Law School.

Finally, the Federal Judicial Center provides new judges with training in substantive areas of the law in which they may lack substantial knowledge. I intend to take advantage of that training with regard to criminal law and other substantive areas with which I am less familiar.

8. As you probably know, Federal Rule of Civil Procedure permits Federal judges to impose sanctions against attorneys for unwarranted claims or representations made in their pleadings. Some say this rule is an important tool for judges, while others believe it discourages litigants from testing the boundaries of existing law. What is your opinion of Rule 11?

Rule 11, if applied as I believe was intended, discourages frivolous arguments and careless, erroneous assertions of fact, thereby expediting the decision of cases and lessening the burden on opposing parties and the federal courts. At the same time, if so applied, Rule 11 allows lawyers to present for decision all legitimate, colorable legal arguments and factual contentions.

9. A problem exists in the Ninth Circuit due to its extremely high reversal rate before the Supreme Court, as you apparently recognized during your hearing. Do you believe that splitting the Ninth Circuit might help alleviate this problem? Please explain.

I have, as a litigator before many of the federal courts of appeals developed some concerns regarding the Ninth Circuit's reversal rate in the Supreme Court. As I observed at my hearing, that reversal rate affects not only highly visible cases but also technical, narrow cases. The time and expense of Supreme Court litigation places a great burden on the litigants, and should usually be avoidable. It may well be that the size of the Circuit contributes to the difficulties the Circuit sometimes experiences in developing law that provides adequate guidance to litigants and avoids the creation of unnecessary circuit conflicts. (There may be other, correctable internal operating procedures and habits at work as well.)

I am, however, reluctant to come to any firm conclusion regarding the splitting of the Ninth Circuit, or which, if any,

of the available new configurations make sense, until I have had experience in the actual day-to-day operations of the Court as a judge. Additionally, any definite conclusion would be premature and ill-informed until the report and suggestions of the Commission that Congress has created to look into the question of configuration of the circuits is issued. I am pleased that the Commission will consider a broad range of possible solutions to the issues raised by the unusual size of the Ninth Circuit.

As I noted at the hearing, I am interested in matters of judicial administration and, if confirmed, would actively participate in internal governance matters in an effort to expedite and improve the administration of criminal and civil justice in the Ninth Circuit.

10. What do you believe was the most significant Supreme Court decision in the past thirty years and why?

Buckley v. Valeo, 424 U.S. 1 (1976). Buckley was significant because it established the basic constitutional principles governing the constitutionality of campaign finance legislation, and as such has had a major impact on the operation of democratic processes in this nation.



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JOHN ADAM WILSON  
ATTORNEY

April 30, 1998

Senator Orrin G. Hatch  
United States Senate  
131 Russell Senate Office Building  
Washington, D.C. 20510

Re: Confirmation of Marsha S. Berzon  
for the Ninth Circuit Court of Appeals

Dear Senator Hatch:

During my service with the Reagan Administration as a Commissioner of the Equal Employment Opportunity Commission and Assistant Secretary of Labor for the Department of Labor, I came to appreciate your perspective on the proper role of judges in our constitutional system. I join you in your view that federal judges should faithfully interpret laws. In that spirit, I am writing to recommend, without hesitation, that you positively consider the candidacy of Marsha S. Berzon to the Ninth Circuit Court of Appeals.

Since I left Washington in 1989, I have resumed my management-side labor law practice in the San Francisco Bay Area and have come to appreciate the respect that Ms. Berzon commands in our legal community among management and union side lawyers alike. Ms. Berzon has been an outstanding advocate for the positions of her clients and has practiced with the highest degree of integrity. Ms. Berzon's vigorous advocacy, superb intellectual acuity, and remarkable ability to articulate her position have earned her respect from both Courts and opponents.

Because of the high caliber of her legal skills, I was delighted to join with a group of other management labor lawyers to commend Ms. Berzon to President Clinton when she was under consideration to be nominated to the Ninth Circuit. In that same vein, I am delighted to join, once again, with my colleagues on the management-side to stand up for and endorse her confirmation to that position.



WILSON SONSINI GOODRICH &amp; ROSATI

Senator Orrin G. Hatch

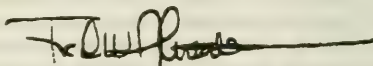
April 30, 1998

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Like others, I would be confident as an advocate on behalf of management that were I arguing a proposition of employment law on behalf of an employer client, Ms. Berzon would fairly consider, from a completely neutral stance, the legal arguments that I would present. Ms. Berzon's intellectual capabilities, coupled with her integrity, assure me that she would fully and clearly understand my clients' arguments and would apply the law as written by the Congress and interpreted by higher courts in a fair and even-handed manner. I am also confident that her decisions as a jurist would be made within the proper limitations of that role and would not be motivated by the positions that she has previously advocated in her representation of unions in the employment law area. Clearly, someone with the intellect and integrity, which Ms. Berzon has demonstrated, understands the difference between advocacy and the solemn responsibilities undertaken as a federal appellate court judge.

In conclusion, the overwhelming support for such a highly regarded employment law adversary by so many well respected management lawyers should indicate to you and your colleagues the extraordinary talent of Ms. Berzon and the esteem in which she is held by those most likely to be her harshest critics. In fact, I can think of no other union-side lawyer who would command so strong and so compelling a consensus from management lawyers on her suitability for such an important position on the Ninth Circuit Court of Appeals. Accordingly, I am delighted to join with my management colleagues to commend her to you with confidence that she recognizes the proper role of the judiciary in our constitutional system and will interpret rather than attempt to create the law.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation
  
Fred W. Alvarez

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## JELFORD H. SHAW, FAIRWEATHER &amp; GERALDSON

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April 3, 1998

The Honorable Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
United States Senate, Room SD-224  
Washington, D.C. 20510

Re: Candidacy of Marsha S. Berzon for the Ninth Circuit Court of Appeals

Dear Senator Hatch:

The undersigned are attorneys from Southern California law offices having substantial management-side labor law practices. We write in support of the candidacy of Marsha S. Berzon for appointment to the United States Court of Appeals for the Ninth Circuit.

Marsha Berzon has a well-deserved, national reputation as a brilliant appellate advocate. Her work on behalf of unions and employees has not only brought praise from the union-side bar, but she is admired as well by her adversaries for her consummate professionalism, exceptional analytical skills, and extraordinary intellect.

We write to convey both the breadth and depth of the management bar's esteem for Marsha. Frequently, but not always, we advocate against the positions Marsha advances. She is, however, principled in her approach to labor and employment law issues. Most importantly, Marsha is not dogmatic; she approaches the law of the workplace with a profound desire to find simple, practical solutions to complex problems. She believes, as do we, that cooperation between labor and management is preferable to antagonism.

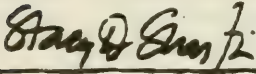
We know Marsha from personal experience, either in connection with litigation or through her extensive involvement in bar association and continuing education activities. Without reservation, we recommend Marsha as a worthy candidate for nomination to the Ninth Circuit. If nominated and confirmed, she will be a valuable, constructive contributor to the development of labor and employment law.

SEYFARTH, SHAW, FAIRWEATHER &amp; GERALDSON

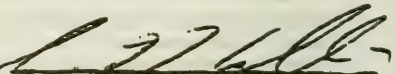
The Honorable Orrin G. Hatch, Chairman  
 April 3, 1998  
 Page 2

We set forth below our names and firm affiliations. However, the views we express are our own; we do not purport to speak for our respective firms.

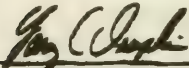
Respectfully submitted,



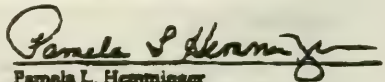
Stacy D. Shardin  
 Seyfarth, Shaw, Fairweather & Geraldson



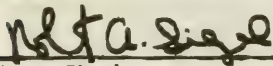
James N. Adler  
 Irell & Manella LLP



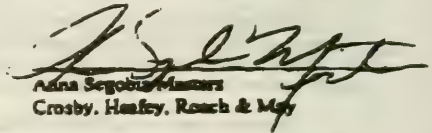
Larry C. Drapkin  
 Mitchell, Silberberg & Knapp



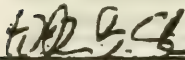
Pamela L. Hamminger  
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(202) 955-8552

March 9, 1998

The Honorable Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
United States Senate, Room SD-224  
Washington, DC 20510

Re: *Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals*

Dear Senator Hatch:

I am writing to urge you to support the nomination of Marsha S. Berzon to the United States Court of Appeals for the Ninth Circuit. I am a member of the Bar of the State of California and the Ninth Circuit, among others.

Before moving to Washington in 1981 to become senior partner in the Firm's D.C. office, I spent many years practicing at Gibson, Dunn & Crutcher in Los Angeles. Since then, I have continued to work closely with the attorneys in our Los Angeles office. The Ninth Circuit therefore has always been extremely important to me, and I have litigated numerous cases there. Although this letter is written entirely in my individual capacity as the immediate past President of The College of Labor and Employment Lawyers and the Chair-Elect of the ABA's Section of Labor and Employment Law, I have had a unique opportunity to be aware of the professional reputation of lawyers in these fields throughout the country.

As an attorney representing the management side in labor and employment disputes and a Republican, I firmly believe Marsha Berzon will be a very worthy addition to the Ninth Circuit bench. She is admired and respected throughout the legal community for her intellectual honesty, open-mindedness and keen sense of fairness. Moreover, I am confident that she has a clear understanding of the proper role of the judiciary in our governmental system.

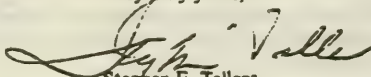
The Honorable Orrin G. Hatch, Chairman  
March 9, 1998  
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Marsha Berzon is very much a bi-partisan, consensus nominee for the Ninth Circuit. Prior to her nomination, attorneys from virtually every major California law firm that represents the management side in employment cases, including my partner Pamela Hemminger, Chair of the Labor and Employment Law Section of the Los Angeles County Bar Association, joined together to write the President urging Marsha Berzon be named to the Ninth Circuit. In supporting Marsha's nomination "without reservation," they pointed not only to "her consummate professionalism, exceptional analytical skills and extraordinary intellect" but stressed that she is "principled in her approach" and "not dogmatic," and that she approaches the law "with a profound desire to find simple, practical solutions to complex problems."

I concur whole-heartedly in their assessment, and would add that an additional consideration favoring Marsha's confirmation is that the federal courts of appeals have relatively few judges with broad backgrounds in labor and employment law, although a large percentage of the courts of appeals' workload involves such cases. Those of us who practice in the area find that court decisions sometimes display a lack of understanding of labor and employment law and of the practical realities of the workplace. I therefore urge Marsha Berzon's prompt confirmation.

Thank you for your consideration.

Very truly yours,



Stephen E. Tallent

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HANSON  
BRIDGETT  
MARCUS  
VLACHOS  
RUDY-LLP

March 6, 1998

The Honorable Orrin G. Hatch  
Chairman  
Senate Judiciary Committee  
United States Senate  
Room SD-224  
Washington, D.C. 20510

Re: *Confirmation of Marsha S. Berzon for the Ninth Circuit Court of Appeals*

Dear Senator Hatch:

I'm writing to express my strong support for the candidacy of Marsha S. Berzon for appointment to the United States Court of Appeals for the Ninth Circuit. She is extremely well-qualified for this position and will be a welcome addition to the Ninth Circuit. I urge you to schedule hearings concerning her appointment so that you and other Senators will have the opportunity to see for yourselves what an outstanding choice she is.

I am presently the Managing Partner of the Hanson, Bridgett firm, a firm of 85 attorneys representing a wide array of public and private entities in most areas of practice. I myself have practiced labor and employment law for 30 years, for the last 27 of which I have represented management. My practice and that of others in my firm includes a great deal of litigation in both state and federal courts. I have appeared many times before the Ninth Circuit.

Because Marsha Berzon's law firm represents primarily unions and employees, I and others in my firm have had numerous cases in which Marsha Berzon's firm has represented clients adverse to the clients I have represented. I myself have had the opportunity to get to know Marsha Berzon quite well because we both have been active on the Executive Committee of the Labor and Employment Law Section of the Bar Association of San Francisco, which includes over 600 lawyers practicing labor and employment law in the San Francisco Bay Area. I was Chair of that Section for a two-year term several years ago. I have, therefore, had extensive opportunity to interact with Marsha one-on-one and in committee discussions about cases and legal issues. My opinions about her are, as a consequence, well-grounded in personal experience.

She is, in my opinion, not only a person of extraordinary intellect and proven legal ability but also one who is highly principled, objective, and fair-minded. Even though she has typically

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The Honorable Orrin G. Hatch  
March 6, 1998  
Page 2

represented clients and interests which are often adverse to the clients and interests I have represented, I have never found her to be doctrinaire or ideological in her approach to legal issues. She is willing and able to entertain and understand opposing points of views and to reexamine her own views in light of them.

Marsha is widely known and highly respected by a large number of lawyers in this area. They and I will welcome her confirmation to the Ninth Circuit. I and other attorneys who typically represent employers and corporate interests will look forward to appearing before her because we know she will entertain our arguments and examine them on their merits in a completely fair and impartial manner. I certainly endorse her without reservation and hope that you and your Committee will be able to proceed quickly with confirmation hearings.

Respectfully submitted,

HANSON, BRIDGETT, MARCUS,  
VLAHOS & RUDY, LLP

01-15

Douglas H. Barton  
Managing Partner

DHB/adg



# The Superior Court

808 W. COMPTON BOULEVARD  
COMPTON, CALIFORNIA 90220  
CHAMBERS OF  
MICHAEL M. JOHNSON, JUDGE

TELEPHONE  
(213) 682-7741

April 17, 1998

Hon. Orrin G. Hatch, Chairman  
Committee on the Judiciary  
United States Senate, Room SD-224  
Washington, D.C. 20510

Re: Nomination of Marsha Berzon for the  
Ninth Circuit Court of Appeals

Dear Senator Hatch:

I am writing to support the President's nomination of Marsha Berzon to the United States Court of Appeals for the Ninth Circuit.

Prior to my appointment to the Los Angeles Superior Court, I was a partner with the firm of Baker & Hostetler specializing in the representation of management in labor and employment disputes. I worked closely with Marsha during the period 1991 through 1997 when I was the Chair and Marsha and I were both members of the Executive Committee the California State Bar Labor and Employment Law Section. Even before that, I was familiar with Marsha's reputation as an outstanding attorney in the field of labor and employment law.

Based upon my experience I can say without hesitation that Marsha is well qualified to be a member of the Ninth Circuit Court of Appeals. She is fair, open minded and has high standards of excellence and integrity. Marsha is widely respected by all attorneys (management and labor) in California and other parts of the country.

As a Republican, I do not always support to the President's nominations. In Marsha's case, however, I do so without qualification. Marsha is a brilliant appellate attorney, and she would be an excellent addition to the Ninth Circuit. I urge you and the other members of the Judiciary Committee to approve her nomination.

Very truly yours,

Michael M. Johnson  
Superior Court Judge

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E-Mail Address: Cashen@DMS.com

April 14, 1998

The Honorable Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
United States Senate, Room SD-224  
Washington, D. C. 20510

Dear Mr. Chairman:

It is my understanding that President Clinton has nominated Marsha S. Berzon of California to the position of Circuit Judge on the United States Court of Appeals for the Ninth Circuit. In this regard, I am pleased to support her nomination without reservation.

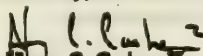
As you know, I have been active on behalf of the Republican party for more than thirty-eight years and take great pride in having served several Republican Presidents and devoted substantial time and effort to many Republican Congressional campaigns. I applaud and am proud of the leadership you have demonstrated in the confirmation process on federal judges throughout the United States. Once again, standards of excellence and commitment to the law have become the primary focus for confirmation.

I mention all of this in that Ms. Berzon is not typical of someone who would naturally receive volumes of loyal Republican support. She, however, should receive just such support. She is truly an exceptional person and an outstanding lawyer. She would bring to the Court qualities of exceptional experience, judgment and legal scholarship all of which would be brought to bear without prejudice or bias when rendering legal opinions.

I am hopeful that the Committee will schedule an early confirmation for Ms. Berzon and I am confident she will perform with distinction.

My thanks to you Senator and congratulations for the job you are doing as Chairman and best wishes for the success I know you will continue to enjoy.

Sincerely,

  
Henry C. Cashen II

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MEMBER OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Detroit Office  
February 26, 1998

Senator Orrin G. Hatch  
United States Senate  
131 Russell Senate Office Building  
Washington, DC 20510

Re: **Confirmation of Marsha S. Berzon  
for the Ninth Circuit Court of Appeals**

Dear Senator Hatch:

I am an attorney who has practiced in the labor and employment area for 21 years. I am writing to urge you to schedule confirmation hearings and support the confirmation of Marsha S. Berzon to the Ninth Circuit Court of Appeals.

I spent my first ten years of practice with the National Labor Relations Board in Washington, D.C. in the Division of Enforcement Litigation. In that capacity, I argued before the Courts of Appeals across the country. Based on that experience, I know the difference that a bright, dedicated, and committed judge can make. Marsha possesses all of those qualities. Hers is a name that is recognized by labor practitioners across the country. She is known for her extraordinary intellect and proven legal ability.



Senator Orrin G. Hatch  
February 26, 1998  
Page 2

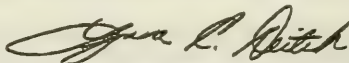
For the past 11 years, I have been a management labor lawyer. Based on my experiences, I can say that Marsha has the respect and admiration of labor lawyers from all sides - union, management, and government. She is not doctrinaire in her approach to labor and employment law issues. Rather, she understands legitimate employer interests and the need to work together.

I have also been fortunate enough to get to know Marsha on a personal level. She lives up to her high reputation in all respects. My only regret is that now that my practice is based primarily in Michigan, it is unlikely that I will have the opportunity to appear before Marsha if she is confirmed to the Ninth Circuit.

I hope that you will see to it that Marsha's confirmation is handled expeditiously and that you will vote for her confirmation and urge others to do so. Thank you for your consideration.

The views set forth in this letter are my own and I do not purport to speak for my firm.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Lynne E. Deitch". The signature is fluid and cursive, with the first name "Lynne" being more prominent.

Lynne E. Deitch

July 29, 1998

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Attention Michael O'Neill, Counsel

Dear Mr. Chairman:

This responds to your request that I identify cases brought by the American Civil Liberties Union (ACLU) of Northern California during the periods in which I was a board member. In a previous submission, I forwarded copies of the ACLU's "Legal Dockets," which list and summarize cases brought during each year.

The ACLU of Northern California office informs me that no such "Legal Docket" was prepared for 1990. During that period of time, however, there were quarterly case reports, which I have enclosed. I am also told that the 1997-1998 annual docket has not yet been completed. The following is a list of the names of cases instituted during that period, insofar as I have been able to find the names of those cases.

Cases brought by the ACLU during the period July 1 - December 30, 1997.

Lazenby v. City of Vallejo

Air Transportation Association of America v. City and County of San Francisco.

Free Speech Coalition v. Reno.

Ho v. San Francisco Unified School District.

Bernstein v. United States Department of State.

Thank you for your attention to this.

Sincerely,



Marsha S. Berzon

## LEGAL ACTIVITY REPORT

(January - March 1990)

**Death Penalty Project:** In February, ACLU's Death Penalty Project joined the defense team of Charles Sevilla and Michael McCabe and enlisted the support of legal experts from death penalty attorneys in California and the rest of the country in an effort to develop a comprehensive habeas corpus strategy. Michael Laurence also coordinated an extensive factual investigation in three states. The activities are described in the administrative activity report.

**High Tech Gays v. DISCO:** The U.S. Court of Appeals (9th Circuit) decided in February that classifications which disadvantage lesbians and gay men generally do not violate the federal constitution. That pronouncement came in a challenge to a defense department policy of subjecting all gay people who apply for security clearances to longer background investigations and mandatory appeals. The ACLU filed a brief and argued *amici*. The plaintiff filed a petition for a rehearing in mid February and the ACLU (joined by national) filed a statement in support of the petition.

**Johnetta J. v. Municipal Court:** In March, the California Court of Appeal upheld the forced testing provisions of Proposition 96, an initiative passed in November 1988. The proposition says that if there is reason to think any "bodily fluid" of a criminal defendant came into contact with a police officer, firefighter or emergency medical worker, and if the defendant is accused of interfering with the duties of anyone of the three, the defendant can be tested for HIV without consent. The case involved a distraught mother at a custody hearing who bit a courtroom deputy. The court accepted expert testimony provided by the ACLU (acting as *amici* in the trial court) that there was no more than a theoretical possibility that the virus could be transmitted. However, the court said, the test was permissible under the Fourth Amendment as long as the possibility of transmission could not conclusively be eliminated. Even though the test results won't tell the deputy if she was infected, the court said, the results might help to reduce anxiety. A petition for review is unlikely.

**ACLU v. Jordan:** We received a largely favorable ruling in the California Court of appeal which ordered the S.F. Police Dept. to release its guidelines governing its intelligence gathering activities under the Public Records Act. The Court also ordered the release of some investigatory records we sought relative to the Department's surveillance of the Ku Klux Klan during the 1984 Democratic National Convention. The decision ended six years of litigation.

**Connelly v. Horner:** The Federal District Court permanently enjoined post-accident testing of employees of the Office of Personnel Management, but upheld the OPM's "reasonable suspicion" testing program. The Court previously ruled the random testing portion of the program unconstitutional.

**Luck v. Southern Pacific Transportation:** The California Court of Appeal upheld damages awarded to a computer programmer fired for refusing to submit to a random drug test. The Court reinforced the right to privacy under the state constitution.

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**Luck v. Southern Pacific Transportation:** The California Court of Appeal upheld damages awarded to a computer programmer fired for refusing to submit to a random drug test. The Court reinforced the right to privacy under the state constitution.



LEGAL ACTIVITY REPORT  
(April — June 1990)

CARPENTER v. SAN FRANCISCO. On June 28, we filed a case challenging the constitutionality of the City and County of San Francisco's maintenance and display of the Mt. Davidson cross. The case, which we are litigating together with American Jewish Congress and Americans United for Separation of Church and State, was filed on behalf of a diverse coalition of plaintiffs. Plaintiffs include a Baptist pastor, a Buddhist priest, a Unitarian minister, a Jewish rabbi, and people of differing faiths who live and work in San Francisco. A trial date has been set for April 1991, before U.S. District Judge Stanley Wiegel.

DOE v. ATTORNEY GENERAL. We argued our appeal of an adverse District Court decision in May. The case involves a medical doctor fired by the FBI because he has AIDS. He had performed routine physicals on agents and applicants. The District Court held that the federal government can not be sued under the Rehabilitation Act, and that firing a person because he refuses to say if he or she has AIDS is not a violation of privacy. The oral argument focused on whether the case has been mooted since the Doctor is now too sick to work, and on the Rehabilitation Act question.

ERTAG v. WESTERN UNION. The San Francisco Superior Court ruled in April that the San Francisco Municipal Ordinance which prohibits discrimination based on sexual orientation is not preempted by state law. Western Union argued that the Fair Employment and Housing Act (FEHA), which prohibits race, gender, religious, disability, marital status and other forms of discrimination "occupies the field" of employment discrimination to the exclusion of local laws. The FEHA does not prohibit sexual orientation discrimination. The plaintiff, supported by the ACLU and the City of San Francisco, argued that the state law only preempts municipal laws which cover the same forms of employment discrimination which state law prohibits. The court apparently agreed with the plaintiff. It also rejected Western Union's argument that cities can not pass laws that are enforced in civil suits by private parties. Western Union has announced that it will not seek review of the decision in a higher court. The ACLU filed a brief and argued as amicus.

SPRINGER v. GRAHAM-NEWLIN. In April we filed an amicus brief in this case involving the rights of children and nonbiological coparents. The plaintiff and the defendant lived together over 10 years. Together they decided to have a family, and the plaintiff gave birth to two children. County social services later found that both were equal coparents. When they separated, the older child went to live with defendant and the younger lived with plaintiff. Each child visited regularly with the

noncustodial parent. The custodial parent took sole financial responsibility for the child living with her. After almost four years, plaintiff (the biological mother) sought and obtained a court order giving her exclusive custody of both children and sole discretion over visitation with defendant. Our brief argues that for constitutional purposes, the question of whether a person is a "parent" turns on the existence of a parent/child relationship in fact, not on either legal definitions or biology (which sometimes lead to different results). We argue that the Constitution requires that defendant should be given the opportunity to prove that she is a parent in fact, and that it is in the children's best interest to maintain a continuing relationship with her.

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## LEGAL ACTIVITY REPORT

July - September 1990

Ban on NCAA Drug Testing Upheld.

Hill v. National Collegiate Athletic Association. The Sixth District of the California Court of Appeal affirmed the Superior Court's permanent injunction against mandatory drug testing by the NCAA of Stanford athletes. We filed this case in 1987 on behalf of Simon Levant, captain of the Stanford women's diving team, challenging the NCAA's post-season drug testing program. The program required random drug testing of college athletes involved in post-season play such as bowl games and finals. After obtaining a preliminary injunction, the case was tried in Santa Clara Superior Court. After an extensive trial, the Superior Court issued a permanent injunction enjoining testing in all sports. In upholding the Superior Court's injunction, the Court of Appeal found that the NCAA failed to demonstrate there was a substantial drug problem among college athletes, that it failed to demonstrate that the drugs which are tested for (which includes over 3,000 different compounds) in fact enhance athletic performance, that drug testing does not substantially further the NCAA's purported goal of ensuring the integrity of competition and protecting the health of athletes (since the program was so broad that it actually deterred student athletes from taking beneficial medication), and that the NCAA had failed to pursue the alternatives of drug education and for cause testing.

Lesbian\Gay C.I.A. Clearance Case to go to Trial.

Dubbs v. C.I.A. In August we got a very good decision in this challenge to the C.I.A.'s refusal to grant a security clearance to a lesbian. Last spring, the government moved to dismiss the case, claiming that if it had a policy of discriminating against lesbians and gay men, the policy would be constitutional as long as a court could think of a rationale for it. The government suggested several conceivable arguments to support a discriminatory policy, including the arguments that gay people are subject to blackmail and are likely to be lawbreakers. As a friend of the court, we argued that even under the lowest possible constitutional standards, the government would have to say whether or not it actually has a discriminatory policy and produce some evidence to support the rationale for it. District Judge Eugene Lynch agreed and denied the C.I.A.'s motion to dismiss. The case is now in discovery.

Final Outcome Unfavorable in Lesbian\Gay Defense Clearance Case.

High Tech Gays v. D.I.S.C.O. During the first quarter, the Ninth Circuit decided that discrimination against lesbians and gay men is legal if it passes the most minimal constitutional standards. It then upheld the Defense Department's policy of subjecting all gay people who seek security clearances to searching background investigations to which others are not subject. In July, the Ninth Circuit turned down the plaintiff's petition for rehearing and en banc consideration. We had supported the request and

filed a brief.

#### Injunction Permitting Fleet Week Demonstration Upheld.

Bay Area Peace Navy v. U.S. Navy. The Ninth Circuit upheld a District court decision enjoining navy attempts to move Fleet Week protestors 75 yards away from their intended audience. The protestors, the "Peace Navy," pilot ships carrying protest signs in a line in front of the reviewing stand for the Navy's "parade" of ships into the bay. Rejecting the government's reliance on terrorism in the middle east, the Ninth Circuit said the Navy had failed to show any threat to observers. However, the court reversed an award of attorneys fees to the ACLU, saying that while the government was wrong, its position had been "substantially justified," precluding a fee award.

#### Nonprofit Fair Housing Group Can't Challenge Bias Policy.

Midpenninsula Citizens for Fair Housing v. Westwood. The Sixth District Court of Appeal ruled that fair housing organizations do not have standing under the state's Unruh Civil Rights Act to challenge discriminatory policies. The court agreed with a San Francisco Court of Appeal decision allowing consumer groups to get injunctions against such policies under the Unfair Business Practices Act, but it declined to extend that ruling to the Unruh Act. The Unruh Act allows recovery of costs and fees. The ACLU argued as a friend of the court that standing under the Unruh Act ought to be the same as it is under the federal Fair Housing Act, which allows fair housing organizations to sue.

#### Supreme Court Hears Arguments in Prop. 115 Case.

We filed an amicus brief in the California Supreme Court arguing that Proposition 115 violated the revision and single subject clauses of the California Constitution, and, alternatively, that if the initiative were validly enacted, it should be interpreted to have no effect on fundamental civil liberties. Raven v. Deukmejian. The Court heard oral argument in the case on October 2.

#### Headshaving of Protestors Challenged.

We filed a complaint in Redwood Summer v. Humboldt County challenging the Humboldt County Sheriff's Department's conduct in shaving the heads of four Redwood Summer political protestors. Although the Sheriff contends their heads were shaved because they were infested with lice and their hair was too matted for treatment by shampoo, the evidence indicates that these individuals were not examined in accordance with standard medical procedure and that the Sheriff's Department were simply punishing the protestors for their political views.

FOURTH QUARTER STAFF ACTIVITY REPORTS

February, 1991

ACLU OF NORTHERN CALIFORNIA  
1663 Mission Street, Suite 460  
San Francisco, CA 94103

LEGAL ACTIVITY REPORT

Domestic Partnership Law Finally Passes

In November, voters approved Proposition K, the San Francisco Domestic Partnership law, by 54% to 44%. The law allows two people who live together in an intimate, committed relationship and who have agreed to be responsible for each other's food and shelter to become domestic partners. To officially register their domestic partnership, the couple either files a declaration with the county clerk or signs on in front of a notary. We drafted the text for this law (as well as its unsuccessful predecessor) and are working now on implementation.



Attorney's Fees Awarded in Gates Case

The U.S. District Court in Sacramento awarded the ACLU the full amount of attorney's fees that it had requested in Gates v. Deukmejian. The case was a broad challenge to medical conditions at the California medical facility at Vacaville. Our portion of the case involved a challenge to the segregation of HIV-infected prisoners. We settled the case in February, after a four-month trial.

Raven v. Deukmejian

In this challenge to Proposition 115, the California Supreme Court unanimously ruled on December 24, 1990 that Section 3 of the initiative, which prohibits California courts from independently interpreting the state Constitution in criminal proceedings, accomplished a constitutional revision that is beyond the authority of the initiative process. By a 6 - 1 vote, the Court also rejected the contention that Proposition 115 was invalid because it embraced multiple subjects. The effect of the ruling is to strike down the section that threatened California constitutional rights such as the confidentiality of medical records, access to shopping centers as a forum for free speech, and the right to choose abortion. We filed an amicus curiae brief.

Ringel v. City of Monterey

We obtained a temporary restraining order on December 26 against the solitary display of a Nativity Scene outside municipal buildings in Monterey. United States District Judge William Ingram ordered the city to have the display removed or modified by the addition of secular seasonal symbols. The display was removed. Our suit was brought on behalf of a 13-year-old Jewish boy, a Unitarian resident, an Episcopalian priest, and two Unitarian ministers. The case is being handled by cooperating attorney Ethan Schulman of Howard, Rice, as well as by Monterey Chapter Legal Committee chair Michelle Welsh, together with ACLU-NC staff.

Hill v. NCAA

On December 20, 1990, by a 4-3 vote, the California Supreme Court granted review sought by the NCAA in Hill v. NCAA. Previously, the Court of Appeals had upheld a sweeping

injunction issued by the Santa Clara Superior Court which barred the NCAA from performing drug tests on Stanford athletes in post-season competition. This will be the first drug-testing case to be decided by the California Supreme Court.

Redwood Summer v. Humboldt

On December 4, 1990, the U.S. District Court issued an injunction prohibiting the Humboldt County Sheriff's Department from shaving the heads of pre-trial detainees unless officials strictly complied with specific medical procedures. In particular, the order required that the detainee first be closely examined by a medical professional. If lice are found, medicated shampoo is to be used as an initial treatment. Only if the shampoo proves ineffective may haircutting be ordered. The defendants have since stipulated that only a physician can actually order head shaving.

## SENATE JUDICIARY

Additional questions for Marsha Berzon from Senator Hatch

1. Have you taken positions before the Supreme Court or any federal circuit courts with respect to "Beck" related issues that vary from or are more expansive than the Court's opinion in Ellis v. Railway Clerks, 466 U.S. 435 (1984)? If so, please describe those positions and provide copies of those briefs.

Since Ellis (in which I filed a brief amicus curiae), I have filed briefs on behalf of clients in the following cases in the United States Supreme Court and the federal circuit courts concerning union dues and fees issues related to those decided by the Supreme Court in Ellis: Lenhart v. Ferris Faculty Association, 500 U.S. 507 (1991) (amicus curiae brief limited to multiunit financing issue); Crawford v. Air Line Pilots Association, 992 F.2d 1295 (4th Cir. 1993) (briefs amicus curiae limited to multiunit financing issue); Kidwell v. Transportation Comm. International Union, 946 F.2d 283 (4th Cir. 1991); cert. denied 503 U.S. 1005 (1992); Jerabek v. Public Employment Relations Board, 2 Cal. App. 4th 1298, cert. denied, 506 U.S. 815 (1992) (Opposition to Petition for Writ of Certiorari); Mitchell v. United Teachers-Los Angeles, 963 F.2d 258 (9th Cir.), cert. denied, 506 U.S. 940 (1992). In each of those cases, the positions I have presented on behalf of my client followed the Ellis opinion carefully, and in each instance the final court decision agreed with the position I advocated for my clients, based in part on Ellis.

2. Do you believe that employers should continue to maintain membership or dues-payments requirements in agreements that unions cannot lawfully enforce under Beck? Do you believe employers have standing to challenge such union-shop agreements?

(a) Employers and unions should not enter into legally unenforceable membership or union dues or fee-payment requirements in collective bargaining agreements, just as they should not enter into any other invalid, unenforceable clauses. (Collective bargaining membership or union dues or fee-payment requirements are commonly called union security requirements; I use that term in answering these questions for conciseness). Where contract provisions have been entered into and later become invalid because of intervening legislation or litigation, those provisions may not, of course, be enforced; collective bargaining agreements often have provisions providing for renegotiation of invalid provisions.

The question of the wording a collective bargaining agreement union security clause must include to be legally enforceable is a separate issue, on which federal courts of appeals have recently split. The issue is now pending in the United States Supreme Court. See Marquez v. Screen Actors' Guild, 124 F.3d 1034 (1997), cert. granted 118 S. Ct. 1298 (Mar. 23, 1998); see also IUE v. NLRB, 41 F.3d 1532 (D.C.Cir. 1994); Nielsen v. Machinists, 94 F.3d 1107 (7th Cir. 1996); Bloom v. NLRB, 1998 U.S. App. Lexis 18271 (8th Cir. 1998); Buzenius v. NLRB, 124 F.3d 788 (7th cir. 1997)..

(b) Employers have standing to challenge union shop agreements before the National Labor Relations Board. Whether they have standing to do so in federal court is an undecided question on which there is, as far as I can determine, no federal court of appeals decision..

In Beverly Enterprises v. District 1199C, 90 F.3d 93 (3rd Cir. 1996), the district court held that the employer lacked standing to challenge a union shop agreement that the employer had agreed to. (I was associated as co-counsel in Beverly in the Court of Appeals.) The Third Circuit held that the federal courts do not have subject matter jurisdiction under §301 of the Taft-Hartley Act to decide a case in which an employer enters into a union security clause and then sues to have the clause declared invalid and therefore did not address the standing question. Beverly Enterprises v. District 1199C, 90 F.3d 93 (3rd Cir. 1996). I am not aware of any federal appellate case to the contrary on the subject matter jurisdiction issue. See Textron v. UAW, 66 U.S. L.W. 4356 (May 19, 1998) (holding, in another case in which I was co-counsel, that, as a general matter, federal courts have jurisdiction under §301 "not [over] suits that claim a contract is invalid, but over suits that claim a contract has been violated.") As both Beverly and Textron indicate, there would be §301 jurisdiction over a case in which a union tries to enforce a collective bargaining agreement union security provision and the employer defends on the ground that the provision is invalid.

3. Have you taken any positions regarding the limits that can be placed on unions compelling dues payments for use in bargaining units other than that of an objecting employee? If so, please provide copies and indicate whether you have since changed any of your positions.

On behalf of clients, I have taken positions before the United States Supreme Court and a federal circuit court concerning whether unions may "pool" the fees collected from objecting non-members as long as the fees are spent only on collective bargaining-related purposes and as long as each unit can call on the pooled fund for bargaining expenses as needed. Lenhart v. Ferris Faculty Association, 500 U.S. 507 (1991); Crawford v. Air Line Pilots Association, 992 F.2d 1295 (4th Cir. 1993) (en banc). I am attaching copies of the briefs filed in Lenhart and in Crawford.

Both the Supreme Court in Lenhart and the Fourth Circuit in Crawford agreed with my client's basic position on the pooling issue. See Crawford, 992 F.2d at 1300 ("the Court [in Lenhart] specifically rejected the agency-fee objectors' contention that the 'local union may not utilize dissenters' fees for activities that, although closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong.") In explanation of its decision, the Supreme Court in Lenhart stated that where a local union is affiliated with a national union, "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular year." 500 U.S. at 523. See also 500 U.S. at 561-562 (opinion of Scalia, J.) (applying a different test for determining which union expenditures are chargeable to objecting employees, but



agreeing that pooled collective bargaining expenditures can be charged because "[i]t is a tangible benefit . . . to have expert consulting services on call, even in the years when they are not used.")

In Crawford, the brief we filed on behalf of our client also discussed separately the question of whether or not Lenher precluded the use of an objecting employee's mandatory fees for collective bargaining-related litigation in other units on a pooled basis. That brief relied upon Justice Kennedy's concurrence in Lenher on the litigation question, and argued that the divided opinion in Lenher did not settle questions concerning pooling of litigation expenses pertaining to the enforcement of particular collective bargaining agreements or grievance decisions. The Fourth Circuit did not reach the litigation expenditure question.

Since I have not filed any briefs on any union security "pooling" question since Crawford, I have had no occasion to review the post-Crawford law in this area, or to consider whether in any future representation the positions advocated for clients in Lenher and Crawford would have to be modified in any regard in light of more recent developments.

I have answered these questions with regard to positions I have taken as an advocate. (I have previously submitted to the Committee a book chapter on union security and related issues for California public employees that I wrote as a scholar, reviewing the law, rather than as an advocate for a client. See Zenger, Berzon, Bogue et al., California Public Sector Labor Relations, Matthew Bender (1989 and 1990, 1991, & 1992 cumulative supplements, Chapter 31 on Organizational Security.) As a judge, my role would be entirely different from my role as an advocate. If confirmed, my task would be to consider the factual and legal arguments of advocates for both sides, and then come to a neutral, balanced conclusion on the basis of the facts, and applicable precedents, statutes, and constitutional provisions if any. In doing so, I would expect, as many lawyers have done on becoming judges, to reject many positions I have advocated on behalf of clients.



Additional questions for Marsha Berzon from Senator Thurmond

1. In response to my first set of questions, you noted that you have been active in the Women's Legal Defense Fund. If you were a member of this organization I did [not] notice [WLDF] listed on your questionnaire. Please explain.

I did not list WLDF (now the National Partnership for Women and Families) under Question 6 because I never served as an officer or director of the organization. I did not list WLDF/National Partnership under Question 9 because WLDF/National Partnership is not a Bar Association or similar organization. I did not list WLDF/National Partnership under Question 10 because that question asks for organizations to which I currently belong, and in recent years, my only connection to WLDF/National Partnership has been to make some financial contributions. WLDF/National Partnership is not classified by the IRS as a membership organization, because contributors simply donate money but have no other role in the organization, including its governance.

As noted in my answer to your first set of questions, during the late 1970's I participated in a committee of the Women's Legal Defense Fund, and worked with the organization in filing two Supreme Court briefs, including one, in Hisquierdo v. Hisquierdo, for a bipartisan group of members of Congress that included Representatives Jim Leach and Millicent Fenwick.

2. You co-authored the union's unsuccessful brief in TWA v. Flight Attendants, 489 U.S. 426 (1989). Please describe and explain the views expressed in that brief and whether you still believe that junior employees must be laid off after a strike in favor of more senior striking employees.

(a) Representing the Independent Federation of Flight Attendants (IFFA), I was co-author of a brief in the Supreme Court concerning the rules applicable under the Railway Labor Act (RLA) for determining the active workforce after a strike. (I was not counsel for IFFA in the lower courts.)

The Supreme Court had previously stated, in NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), that under the National Labor Relations Act (NLRA) employers may hire permanent replacements from outside in order to operate during a strike, and may not discriminate among pre-strike employees on the basis of their union activity or failure to engage in union activity in distributing available job opportunities after a strike is over. In NLRB v. Erie Resistor, 373 U.S. 221 (1963), the Supreme Court held that under the NLRA an employer may not grant super-seniority to nonstrikers persisting into the post-strike period in order to induce employees not to strike, because of the likely impact upon employees' exercise of their right to

strike.. The Court had never decided under the RLA any question concerning the rights of nonstrikers (called "crossovers" in the TWA v. IFFA opinion), strikers, and permanent replacements after a strike. The Court also had never decided under the NLRA whether a promise to retain "crossovers" in available positions after a strike rather than strikers is consistent with the permission to hire replacements approved in Mackay, or impermissibly interferes with the right to strike in a manner analogous to the practice held invalid in Erie Resistor.

The Eighth Circuit in TWA v. IFFA held that retaining the "crossovers" rather than more senior strikers in the positions remaining after the retention of permanent replacements was discrimination against the strikers, and impermissible under the RLA. Our task as advocates retained for purposes of the Supreme Court case after certiorari was granted was to develop arguments supporting the Eighth Circuit's conclusion.

The issue was a very difficult one in my view. The "crossovers" had a right to refrain from participating in the strike co-equal with the strikers' right to strike, so that any rule regarding retention of one group or the other after the strike was likely to influence the exercise of statutory rights. Our argument was that the RLA requires the use of a neutral rule, not favoring one group or the other, and that because the RLA evidences a special concern for continuity in the bargaining relationship use of the seniority principles that govern distribution of job opportunities under the collective bargaining agreement is appropriate in the fluid job circumstances of flight attendants.

In making our argument, we explicitly did not rely on one aspect of the Eighth Circuit's rationale, based on the contract's union security provision, because we believed that aspect of the court of appeals' opinion to be clearly incorrect; the Supreme Court agreed with our concession in that regard. We also explicitly confined our argument to the Railway Labor Act, discussing National Labor Relations Act precedents only to demonstrate that the "crossover"/seniority issue fell somewhere between the poles of Mackay on the one hand and Erie Resistor on the other, and that there was no reason to decide which of those cases would govern in an analogous NLRA case because the case before the Court involved the somewhat different provisions of the RLA. The Supreme Court, 6-3, reversed the Eighth Circuit, holding that the RLA did not invalidate TWA's crossover retention policy.

(b) My role in writing the brief in TWA v. IFFA was as an advocate. I did not make the arguments on the basis of my personal policy or legal beliefs or assessments. The positions advanced in that brief represent my best judgment, and those of my colleagues, about the arguments that best advanced our client's interests while presenting a fair reading of the applicable precedents and statutes.

Since the Supreme Court has now decided the legal issues in TWA v. IFFA, I would of course no longer argue otherwise as an advocate. If confirmed as a judge, I would carefully follow both the holding and reasoning of TWA v. IFFA in any case concerning the retention of

striking employees, crossovers, or permanent replacements.

Further, as a judge, my role would be entirely different from my role as an advocate. As a judge, my task would be to consider the factual and legal arguments of advocates for both sides, and then come to a neutral, balanced conclusion on the basis of the facts, precedents, statutes, and constitutional provisions if any. In doing so, I would expect, as many lawyers have done on becoming judges, to reject many positions I have advocated on behalf of clients.

**3. Will your long advocacy on behalf of the AFL-CIO-CIO and other labor organizations affect your ability to review claims of dissident members or former members on the authority of labor organizations to discipline them for conduct contrary to the interest of those organizations, such as working during strikes?**

No. If confirmed I will not be influenced by the interests of any of my former clients in any cases, including cases concerning union discipline of members or former members. Rather, in those cases as in all others, I will carefully apply precedent, statutory language, and, if applicable (as would be unusual in a union discipline case) constitutional provisions to decide the case.

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**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS  
*AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, with the consent of the parties as provided for in this Court's Rules.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

Without exception, so far as we are aware, labor relations statutes in this country permit employees in an appropriate collective bargaining unit to choose—by a majority vote in a democratic election—a labor organization as their exclusive representative for that unit that provides collective-bargaining-related services to more than one bargaining unit, and that sets its dues in a way that requires the represented employees in all the represented units to pay a pro rata share annually of all of the union's chargeable expenses or a labor organization confined to the employee's own unit.

Petitioners maintain, *inter alia*, that objecting fee-payers have a constitutional right to opt out of a multi-bargaining unit economic system for providing collective-bargaining-related services chosen by the unit as a whole, and to insist, instead, upon paying an agency fee that only covers such collective-bargaining related services as are directly rendered to the particular bargaining unit in which the fee payers work within a particular year.<sup>1</sup>

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<sup>1</sup> In this case, the Ferris Faculty Association-MEA-NEA is a local labor organization affiliated with a state and a national organization, each of which provides collective-bargaining-related services to a large number of bargaining units.

In other instances, a local labor organization may itself represent two, or many, bargaining units. Or a national labor organization may itself be the bargaining representative, and may either operate as a unitary national organization or be split into local

Petitioners are wrong; the Constitution no more enacts their "direct costing by bargaining unit" theory (Brief for Petitioners, 21) than Mr. Herbert Spencer's Social Statics. We proceed to demonstrate as much by first considering the economics of this matter and by then turning to the First Amendment precedents.<sup>2</sup>

I. As the result of thousands of representation-election determinations by millions of employees, multiunit labor organizations that set their dues and fees on a cost-sharing basis have come to be the predominant type of American trade union.<sup>3</sup> Such organizations provide employees in each unit with access to greater resources, at lower cost, and with more assurance of availability when needed. A wide variety of labor organizations in both the public and private sectors have chosen some variant of the multiunit

organization for certain administrative purposes. See pp. 16-19, *infra*.

We do not believe, however, that the difference between a unit that has chosen as its representative a local union affiliated with a national union and a unit that has chosen a representative organized on another of these multiunit lines is significant for present purposes. In all these instances, the majority of employees has chosen an organization that is capable of generating larger resources, of producing economies of scale and of risk-sharing across bargaining units, and presumably has made the choice in part because of those capabilities.

<sup>2</sup> As to the remaining issues raised by appellants, the AFL-CIO concurs in the submissions of the respondent unions and the other *amici curiae* supporting respondents so as not to burden the Court with redundant argument.

<sup>3</sup> This case arises in the public employment context. However, the general models of union organization, and the economic principles and valuing considerations underlying those models are in large part the same whether the covered employees work in the public or private sector. Nor, to the extent that constitutional considerations apply at all to private sector employees (see *Communications Workers v. Beck*, 487 U.S. 735, 761-762 (1988); compare *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956)), do those considerations vary fundamentally depending upon the public or private context. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). Consequently, in this brief, we draw upon examples from both the public and private sectors.

cost-sharing model, adapting the model to the particular circumstances of the industry in which the union operates. Thus, the multiunit method of providing and financing collective-bargaining-related services is one “normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.” *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).

Where a group of employees chooses a multiunit approach to providing and funding collective-bargaining-related services, objecting fee payers as well as union members share in the distinct added economic benefits of that approach: The efficiencies of integrating the provision of services into a single entity and the risk-sharing benefits provided by insurance principles. These economic benefits are *not* taken into account in petitioners’ “direct costing” approach. In contrast, Michigan in establishing its public employee labor relations system *has* taken these economic benefits into account. Michigan has done so by permitting employees to elect representation by unions organized and financed in whole or in part on a multiunit/cost-sharing basis, and to require fee payers as well as union members to be charged for collective-bargaining-related services not on a fee-for-direct-services-rendered-to the unit basis, but on a uniform, flat fee basis.

The state has done so because such a system advances the interest in industrial peace and does so in a way that prevents free riding. Pp. 4 to 19, *infra*.

II. This Court’s precedents made it plain that the Constitution permits “the legislative enactment of ‘agency shop’ laws . . . to prevent ‘free riders’—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit.” *Keller v. State Bar of California*, — U.S. —, 110 S.Ct. 2228, 2235 (1990). Having held the “agency shop” constitutional as a general matter, this Court’s decisions further teach that the question to



be answered in passing on the constitutionality of one form of agency shop or another is "whether the[] expenses [at issue] involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Ellis v. Railway Clerks*, *supra*, 466 U.S. at 456. And in making this assessment, the Court has expressly recognized that "[t]he very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Id.* at 456. All this being so, Michigan's conclusion that the agency fee should be based on a multiunit union's total collective-bargaining-related expenditures is plainly constitutional. Pp. 20 to 30, *infra*.

## ARGUMENT

### I. MULTIUNIT FINANCING OF COLLECTIVE-BARGAINING-RELATED SERVICES IS A METHOD COMMONLY USED BY LABOR ORGANIZATIONS, AND ONE WITH A DISTINCT ADDED ECONOMIC VALUE NOT FAIRLY REFLECTED IN THE DOLLAR COST OF THE DIRECT SERVICES PROVIDED TO A PARTICULAR BARGAINING UNIT IN A PARTICULAR TIME PERIOD.

We begin our examination of petitioners' contention that the *Constitution* requires that all union expenses for collective-bargaining-related activities be calculated on a bargaining-unit-by-bargaining-unit basis for agency fee purposes by considering some basic economic principles that have application not only in the agency fee context but in many other analogous areas.

Petitioners recognize, as they must, that objecting fee payers in a particular collective bargaining unit can constitutionally be required to pay for such collective-bargaining-related services as are directly provided to that unit by the union chosen to be the exclusive bargaining representative by a majority vote of the unit em-



ployees. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The bargaining representative in this instance is a local union affiliated with large multiunit state and national unions, the Michigan Education Association (MEA) and the National Education Association (NEA). By the terms of the affiliation, MEA and NEA provide certain collective-bargaining-related services to represented employees through the local union.

In common with most state and national unions, MEA's and NEA's basic income is derived from per capita fees paid by the employees represented by all their affiliated local unions. MEA and NEA aggregate those fees for the purpose of making collective-bargaining-related services available to all their local affiliates. Indeed, the ability to amalgamate resources in this way for this purpose has been one of the primary forces propelling the growth of national, as opposed to local, labor organizations from the mid-nineteenth century on.<sup>4</sup>

Petitioners contend that it is unconstitutional to rely on this traditional method of sharing the costs of collective-bargaining-related activities among all employees represented by a multiunit union in calculating the agency fee charged to objecting employees. According to petitioners the Constitution requires "direct costing by bargaining unit." Brief for Petitioners (Pet. Br.) 21. Under the "direct costing" method, an objector's fee would "only include costs which an exclusive representative, and its affiliates, incur in performing its statutory duties as bargaining agent for the dissenters' unit in dealing with their employer on labor-management issues." Pet. Br. 19. And petitioners would have it that the traditional method of financing collective-bargaining-related activities

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<sup>4</sup> See, e.g., R. Dulles & M. Dubofsky, *Labor in America: A History* 84-85, 94-95, 143-145 (4th ed. 1984); L. Ulman, *The Rise of the National Trade Unions* 176-89 (1966); Windmuller, *Concentration Trends in Union Structure*, 35 Ind. & Lab. Rel. Rev. 43, 44-45 (1981).

“charg[es] the nonmembers for those activities on behalf of persons not employed in their bargaining units. . . .” *Id.* at 18-19. Indeed, petitioners base their constitutional objection to the traditional method entirely on this perception: “Coerced subsidization of even non-unit bargaining adds substantially to th[e] interference [with First Amendment rights], because the labor relations of *other persons* ‘are matters of public concern,’ speech and association concerning which are fully protected by the first amendment.” *Id.* at 20 (emphasis in original).

Petitioners fundamentally misstate the situation by asserting that the method of providing and funding collective-bargaining-related services at issue here charges one group of employees for “the labor relations of *other persons*.” The proposition that groups of employees would regularly choose a form of union representation that systematically charges them for someone else’s collective bargaining is intuitively unlikely. Not surprisingly, that is not at all what occurs.

In the balance of this section we show that by choosing to “operate on a cost-sharing basis” (Pet. App. 56a), employees obtain for themselves two kinds of economic benefits that the petitioners’ “direct costing” theory wholly fails to take into account. The first are the efficiencies achieved by assembling and maintaining an expert staff ready and able to serve any represented bargaining unit as need requires. A fee that “only include[s] costs . . . incur[red] . . . in dealing with [the objector’s] employer” (Pet. Br. 19), does not take into account the benefits and costs of maintaining the union’s collective bargaining apparatus. Second, the availability of the union’s total multiunit resources for use in representing a particular bargaining unit has a present economic value—similar to that of insurance coverage—even when the unit is not presently drawing on those resources. Again, the petitioners’ “direct costing” theory factors out any “premium” for this coverage.

In short, we show that by operating on the traditional "cost-sharing basis" (Pet. App. 56a), NEA and MEA are not compelling petitioners to pay for "the labor relations of *other persons*" (Pet. Br. 20 (emphasis in original)), but rather are providing each represented bargaining unit, including the petitioners' unit, with two distinct, economically valuable benefits that are fairly taken account of by charging each fee payer a pro rata share of the unions' total collective-bargaining-related costs and that are simply ignored by petitioners' "direct costing" theory.<sup>5</sup>

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<sup>5</sup> Since petitioners' fundamental submission is that objecting fee payers can insist upon contributing only to those collective-bargaining-related expenses actually incurred in the "bargaining unit" in which the fee payer works in a given year, the concept of the "unit" for collective bargaining purposes bears some examination.

As a general matter, the "unit" is simply the group of employees for whom negotiations are conducted, and who are covered by the resulting collective bargaining agreement. The size and scope of the "unit" is, under most labor relations statutes, determined according to a combination of flexible factors; consequently, there can be a number of different possible "appropriate" units for a given group of employees. See *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950).

Thus, under the National Labor Relations Act, a "unit" for collective bargaining purposes can be a subgroup of employees in a particular plant of a particular employer, all the employees of that plant, a craft or departmental group on a multiplant, single employer basis, a craft group on a multiemployer, regional basis, or a regional or nationwide single employer group, including all employees of that employer or a subgroup organized either by department or by craft. See generally R. Gorman, *Labor Law*, 66-92 (1976). The precise choice is governed in part by the National Labor Relations Board's standards for different industries, and in part by the choice of the employees and, to some extent, the employers involved. Gorman, *supra*, 68-74.

The same variety obtains in the public sector. For example, while the particular unit in this case covers only a single campus of Michigan's public higher education system, in other instances all the campuses of a higher education institution statewide have been determined to comprise a single unit. See *Minnesota State*



*A. Economies Achieved Through Aggregation of Resources:* By aggregating fees from many bargaining units, MEA and NEA, like other state and national unions, are able to assemble and maintain a specialized and experienced staff that the typical local union could not afford to assemble on its own.

For example, while the average bargaining unit of community college employees would not have the wherewithal to support an in-house economic analysis staff—familiar with the economics of public education generally and public higher education particularly, as well as with the applicable laws and current collective bargaining situation—MEA and NEA can and do maintain such staffs. As a result, the employees in any MEA-NEA bargaining unit have available to them, *at no extra cost*, the services of that staff should a need for economic analysis occur. In addition, unit employees benefit from research conducted by such analysts on a state or nationwide basis, research that no individual unit could afford to finance.

State and national unions, in other words, are the primary means for providing the “lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel” necessary to effectively represent employees working for sophisticated employers functioning in a complex national or international economy. *Aboud v. Detroit Board of Education, supra*, 431 U.S. at 221. For it has proved beyond the financial capacity of the employees in most bargaining units and in most local unions to develop and maintain such expert staffs.

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*Board for Community Colleges v. Knight*, 465 U.S. 271, 276 n.2 (1984) (all community colleges in Minnesota, by statute, comprise a single bargaining unit).

What this variety means, for present purposes, is that the number, identity and diversity of interests of employees who are in a given unit, and who, even under petitioners’ theory, would be obliged to share equally in the costs of providing collective-bargaining-related services is, from a constitutional point of view and the point of view of an individual objecting fee payer, in large part a fortuity.

See D. Bok & J. Dunlop, *Labor & the American Community*, 153-54 (1970).

Moreover, even if an individual bargaining unit had the resources to do so, the unit ordinarily has no *need* for a *permanent* professional collective bargaining staff, for example, since collective bargaining agreements typically last for several years. See, e.g., *General Cable Corp.* 139 NLRB 1123, 1127 (1962) (under the NLRA, three-year collective bargaining agreements are the norm.) Similarly, while a unit may upon occasion become involved in a major lawsuit regarding the interpretation of its collective bargaining agreement, such litigation is relatively rare, and would not justify the hiring of a full-time staff attorney.

If such expert personnel could not be continuously employed on a statewide or nationwide basis—shifting their attention from bargaining unit to bargaining unit as issues requiring their attention arise—then the only—and highly disadvantageous—option would be to retain consultants on an as-needed basis. That option entails substantial costs.

First, it is improbable that consultants with the necessary training and experience would be available on a contract basis when needed. Second, the transaction costs involved in locating and retaining the best available consultants would be considerable. Third, engaging consultants in this manner is likely to be more expensive than employing staff experts because continuous employment offers a measure of financial security in exchange for lower hourly recompense. Finally, and perhaps most importantly, the intermittent use of outside consultants almost certainly will not be as effective, for the consultants will not have the opportunity to develop expertise on the particular problems that face the particular employees.

The special advantages of efficiency and effectiveness derived from aggregating union resources and making staff experts available at no additional cost on an as-



needed basis are recognized in an extensive economic literature on the reasons business organizations—faced with similar practical problems of operating in a complex environment—choose the similar solution of vertical integration into the firm.

In essence the economic learning is that it is more efficient to employ staff members than to contract for their services where the services required are “highly specific to the transaction, there is a high degree of uncertainty involved and, to justify the costs of setting up a system of internal organization, the transaction recurs frequently.” S. Davis, “Vertical Integration,” in R. Clarke & T. McGuinness, eds., *The Economics of the Firm* (Clarke & McGuinness) 87 (1987). See O. Williamson, *Markets and Hierarchies*, 20-31 (1975).

There are, most importantly, significant savings in transaction costs if the organization is not repeatedly required to locate experts and negotiate for their services. See Sawyer, *The Economics of Industries and Firms* 201 (1985) (“These [transaction] costs would include the time and financial costs of discovering a supply, finding out the price and the nature of the goods or services which the seller has to offer, and the difficulties of ensuring that the goods or services are of the type and quality required.”)

As the economic literature also points out, another factor making vertical integration more efficient than employing outside consultants as needed is that staff experts, by working repeatedly on a recurrent set of problems arising in a particular industry or employment context (in this case, public education), gain knowledge that substantially lowers the cost, and increases the quality, of their work over time.<sup>6</sup> If the expert is work-

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<sup>6</sup> That is why, for example, clients seek lawyers who specialize in a very specific area of practice, such as wills and estates or admiralty.

ing for an organization, that knowledge becomes an *organizational* asset for as long as the expert is employed. If, however, the expert provides services only as an independent contractor, the knowledge remains the *expert's* asset, that can be used to his or her advantage in renegotiating the consulting contract. See McGuinness, "Markets and Managerial Hierarchies," in Clarke & McGuinness, *supra*, 46-47.

Thus, in labor organizations as in businesses, so long as a "transaction recurs frequently" and is "highly specific" to a particular situation (Davis, "Vertical Integration," in Clarke & McGuinness, *supra*, at 87), providing services from within the organization is likely to be more efficient and effective than seeking out independent contractors on an intermittent basis. And, as we have emphasized, the required condition of frequency is not likely to prevail on a local bargaining unit basis, but will prevail only if costs can be aggregated over a sufficient number of local units.

B. *Assurance of Adequate Resources to Meet Extraordinary Demands*: A distinct but closely-related advantage of providing certain collective-bargaining-related services on a statewide, nationwide, or other multiunit basis is that the union is able to provide employees in each unit with an assurance that an extraordinary cost incurred in that unit in any given year will be covered. The applicable principle is the one upon which any insurance system operates: Such a system assumes that while each unit faces a *risk* of catastrophic costs in a given time period, only a small percentage of the units will actually incur such a cost. Each unit is nonetheless willing to pay a pro rata share of the probable catastrophic cost to the group as a whole (a "premium"), so that if the event insured against occurs in the unit, the unit's financial exposure will be limited to the amount of the premium.<sup>7</sup>

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<sup>7</sup> Somewhat similarly, businesses often pool the risk of business failure through conglomerate mergers. By linking together the

Risk-sharing is as economically rational in the collective bargaining context as elsewhere: In buying insurance, an economic unit is purchasing the assurance that the unit will be able to meet unusually high costs, should such costs eventuate. That assurance obviates the need to place a substantial share of present income in a holding account in order to protect against the risk; allows rational economic planning; and induces third persons with whom the insured deals to proceed on the understanding that the costs will be covered if incurred.<sup>8</sup>

The essence of the matter is this: Carrying insurance has *present* economic value even if the risk insured against never occurs. That is why individuals who buy term life insurance have not thrown away their money if, as usually occurs, they do not die during the period of coverage.

By a parity of reasoning, by choosing to be represented by a national union that funds its collective-bargaining-related activities on an aggregate national

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economic fortunes of companies in diverse lines of endeavor, a corporation is able to reduce the risk that catastrophic losses of one company in a given year will force that company into bankruptcy:

If we assume that in any given year (or run of years) there exists for each individual firm some positive probability of suffering losses large enough to induce financial failure, it can be readily shown that the joint probability of such an event is reduced by a conglomerate merger. Clearly, the possibility that the critical level of losses will occur simultaneously for each of the component companies making up the merger is less (and often very much less) than the individual probabilities. [Levy & Sarnat, *Diversification, Portfolio Analysis and the Uneasy Case for Conglomerate Mergers*, 25 *The Journal of Finance* 795, 801 (1970).]

See also, e.g., Lewellen, *A Pure Financial Rationale for the Conglomerate Merger*, 26 *The Journal of Finance* 521 (1971); Higgins & Schall, *Corporate Bankruptcy and Conglomerate Merger*, 30 *The Journal of Finance* 93 (1975).

<sup>8</sup> For example, many states require that each driver carry liability insurance, in order to protect those whom a driver may injure against the driver's financial insolvency.



basis, a bargaining unit assures itself, at a reasonable periodic cost, against the possibility that in a given year (for example, a year in which the unit is negotiating a new collective bargaining agreement), its costs will be so large that the unit could not, as a practical matter, raise the necessary funds by itself.

That assurance has value not only in years in which very large costs are incurred, but at *all times*, and even if the costs are never incurred: For one thing, the unit employees need not cut back on such services as grievance and arbitration assistance to individual employees in order to save for years in which unit-wide costs are likely to be extremely high, such as those in which agreements are negotiated. For a second, the assurance that the unit can call on such resources has the added economic value that any third party dealing with the unit—most importantly, in this instance, the employer—will be on notice that the resources are available, and will take account of that fact in his own economic behavior.<sup>9</sup>

*C. Analogous Economic Models:* As the foregoing suggests, and contrary to petitioners' proclamation that "[i]n the free market no one who provides services would be in business long if he charged all customers the same average fee for different services" (Pet. Br. 24), the general method of providing and funding services used by multiunit state and national unions is in no way unique in our economy. Rather, many other organizations provide and price specialized services on an average

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<sup>9</sup> Strike funds, prevalent in private sector national unions, are an excellent example, although far from the only one, of this risk-sharing phenomena: Strike benefits obviously cannot be drawn from the employees in the bargaining unit that is currently on strike. Strikes *must*, therefore, be financed either by the accumulation of funds by a single unit for use in the future or, much more prevalently, by the accumulation of funds on a multiunit basis. Ulman, *The Rise of the National Union*, *supra*, 176. In either case, given the turnover of employees within an individual unit, the employees funding the strike are, in the short run, different from the employees directly benefitting from those funds.

cost, or risk-sharing, basis in preference to a fee-for-direct-services-rendered basis.

Service contracts for computers and copiers, prepaid legal services plans, homeowners' warranty programs covering electrical, plumbing, heating, and similar systems, and extended warranties on automobiles are only a few of the situations in which consumers pay a flat fee for the right to call upon expert services in the future should the need arise, and in which the economic value of that promise cannot be measured by *retrospectively* tracing the actual use made of that available service by a certain consumer in a certain year.

Health maintenance organizations ("HMOs"), because of their internal complexity and the extent to which the organization provides both an "insurance" benefit and an "aggregation of resources-efficiency benefit," provide a particularly close analogy. These organizations "provide[] a wide range of health care services to a defined, enrolled population for a predetermined, prepaid premium . . . . unrelated to the actual number of services utilized by an enrollee in a particular time period." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, 93 Cong., 1st Sess., 2 (1973).

By so doing, the HMO provides this range of health services at a per-unit cost "as much as one-fourth to one-third lower than traditional care in some parts of this country." *Id.*<sup>10</sup> In addition, the HMO approach allows for a more rational integration of the services provided; permits extensive services to be provided in areas that

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<sup>10</sup> The reasons why individual medical personnel may charge more than the cost to the HMO of providing the same health service have nothing to do with overreaching. Doctors and other medical personnel operating in small units, like consultants hired intermittently by single-unit unions, are likely to incur larger per capita overhead costs, including rent, support personnel, equipment, and so on. In addition, personnel employed by an HMO, like personnel employed by a national union, have a security of employment not available to those providing service on a fee basis; their salary will tend to reflect this increased security.



cannot support a broad range of medical care as traditionally structured; and provides the assurance that even catastrophic costs will be covered if incurred. *Id.*

While it continues to be true that many individuals nonetheless prefer to obtain medical services on a fee-for-service basis, millions of people have made the perfectly rational economic decision to procure their health services through advance, *pro rata* funding of a delivery system by many individuals.<sup>11</sup> Indeed, national health policy explicitly supports and encourages the availability of this means of procuring and funding health services, Health Maintenance Act of 1973, 42 U.S.C. § 300e *et seq.*

Thus, the wide variety of situations in which consumers are offered, and choose, prepaid access to expert services rather than fee-for-service access to those services, support the conclusion that charging objecting fee payers as well as union members for a *pro rata* share of a multi-unit union's collective-bargaining-related activities is a method for financing such activities "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984). As *Ellis* teaches, while Congress and the

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<sup>11</sup> Even the individuals who do not join HMOs, of course, purchase health insurance when possible to cover the cost of those services. Thus, the choice between an HMO and traditional fee-for-service health care is really a choice between *delivery systems*, and *not* one between per unit-costing and cost sharing over many units. The situation is further complicated by the fact that in many places of employment, participation in a group health plan is mandatory rather than permissive. (The reason for this mandatory requirement is that if lower risk individuals cannot opt out, group insurance can be provided at a lower per capita cost than individual insurance.)

In other words, the health care system in this country is funded for the most part through the very cost-sharing principles that appellants claim are unconstitutional in this instance. We have chosen the HMO example in the text only because it is an even closer analogy to national unions than an ordinary health insurance scheme in that, through group action, HMO's provide economic advantages *in addition to* insurance against risk.

state legislatures are under no constitutional compulsion to accept the "normal" method of financing union representation, where the legislature chooses to do so to further the governmental interest in industrial peace, the Constitution is not an impediment to that decision. *Id.* at 455-456.

D. "*Normal*" *Union Practices*: We briefly consider the ways in which three specific unions provide and fund collective bargaining services to represented units. The three examples we discuss confirm that, while the range of possible relationships between bargaining units and levels of union organization is as wide as the range of job markets and employment settings in which people work, each variation "reasonably" reflects the structure of the particular industry in which the union operates, and each "normally" provides for a mixture of single unit and multiunit provision and funding of collective-bargaining-related services. This range of possibilities is reflected in the factual settings of this Court's most recent objecting fee payer decisions.

(i) The most recent of these decisions, *Communications Workers v. Beck*, 487 U.S. 735 (1988), arose out of bargaining units at the American Telephone and Telegraph Company ("AT&T") and the former AT&T subsidiary Chesapeake and Potomac Telephone Company of Maryland ("C & P Telephone"). The exclusive representative in *Beck* was the Communications Workers of America ("CWA"), a national labor organization.

CWA itself represents over 700 bargaining units of widely varying sizes in the communications industry alone; signs the applicable collective bargaining agreements; and has overall responsibility for administering those agreements through its central and regional staffs, including complete responsibility for handling grievances at the highest steps of the contractual procedures.<sup>12</sup>

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<sup>12</sup> With respect to the employers involved in *Beck*, there are several national AT&T bargaining units, each covering a different aspect of AT&T's operations, such as sales, manufacturing, in-

In addition, there are over a thousand local unions affiliated with the CWA. Those locals typically aid CWA in fulfilling its collective-bargaining-related activities by participating in the formulation of bargaining demands and in enforcing agreements at the lower levels of the grievance procedure. Many CWA locals represent employees in more than one bargaining unit.

The structure of the CWA and of the bargaining units CWA represents reflect the organization of the telephone industry: The telephone companies providing local service are generally organized along state lines, and given the highly integrated nature of their operations, employees have been generally required to organize on a company-wide basis to secure NLRB certification. *See, e.g., New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950). And, of course, AT&T until quite recently held a virtual national monopoly in the industry.

(ii) The situation of the Chicago Teachers Union ("CTU"), the defendant in *Teachers Union v. Hudson*, 475 U.S. 292 (1986), is at the opposite extreme from that of the CWA: The CTU represents a single bargaining unit in the Chicago city school system. Within that unit are various groupings of professional, para-professional and non-professional employees, each of which could have formed a separate bargaining unit under Ill. Rev. Stat. Ch. 48, ¶ 1707, § 7.

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stallation, and research. The various national collective bargaining agreements between CWA and AT&T have common terms, and all are negotiated at once in a two-tiered discussion: The highest officers of CWA and the highest labor relations officials of AT&T engage in national bargaining to set the general economic terms of the agreements while, simultaneously, other representatives for the union and the employer hammer out the actual terms of the unit by unit collective bargaining agreements.

C&P Telephone is comprised of four different companies—one for each of the States of Maryland, Virginia and West Virginia and the District of Columbia. The agreement covering these four employers is negotiated in joint discussions between the CWA and the four C&P Telephone companies.



The CTU, however, meets certain of its collective bargaining-related responsibilities by drawing on its affiliates, the Illinois Federation of Teachers ("IFT") and the American Federation of Teachers ("AFT"). The IFT has some 140 local affiliates, and the AFT has over 2,000 local affiliates, some of which represent more than one bargaining unit.

As with the CWA, the CTU's structure reflects the nature of the employer with which the union bargains: The Chicago school system is a large employer centered in one location. Against that background, it makes sense for a local organization to have relatively more direct bargaining responsibility than the state or national organizations. However, just as is the case with the respondent Ferris Faculty Association, the employees who chose the CTU found it desirable to be represented by a local union that could draw on the resources of affiliated state-wide and nation-wide unions.

(iii) Our final example is the Transportation-Communications International Union ("TCIU"), formerly the Brotherhood of Railway and Airline Clerks ("BRAC"), the defendant in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). The Railway Labor Act, which governs the industries in which TCIU most commonly operates, mandates single employer-wide craft or class bargaining units. 45 U.S.C. § 152, Ninth. Thus, the bargaining unit out of which *Ellis* arose encompassed the entire passenger service craft at Western Airlines.

The TCIU (then BRAC) was the recognized representative of this system-wide unit, and chartered System Board No. 451 as an intermediate body whose primary responsibility was serving the Western Airlines unit. That International also chartered a number of locals to represent Western Airlines employees at various work sites. Operating generally in this manner, the TCIU, either alone or jointly with its various system boards, is the representative of some 750 large and small craft-oriented bargaining units.

Again, it is the nature of the industry that determined the economic and structural relationship between the bargaining unit configuration and the structure of the union representing each unit: The nature of the railroad and airline industries, as reflected in the RLA itself, requires centralized collective bargaining. The employees at Western Airlines initially decided that this role could be best filled by a labor organization that represented employees in many such system-wide units, and chose the TCIU to perform that function (and later determined that a single unit Western Airlines union would be preferable).

Despite their wide variety and complexity, all three of these national unions have been organized on a multi-level basis, and all three provide collective-bargaining-related services in part through a multiunit system financed by pro rata payments from union members and fee payers.<sup>13</sup> Thus, these examples confirm that providing some or all collective-bargaining-related services through a multiunit union able to provide each unit with access to greater and more diverse resources, at a lower cost and with assurance of availability at times of crisis, is a method for providing those services "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, *supra*, 466 U.S. at 448.<sup>14</sup>

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<sup>13</sup> At the same time, these examples indicate that funding such services on a single unit basis no less than a multiunit basis can be said to result in an objecting fee payer being required to finance services for individuals whose economic interests may diverge from his own: The CWA units encompass diverse geographical areas, and sometimes more than one employer; the CTU unit is geographically limited, but occupationally diverse, including both professionals and non-professionals; and the TCIU units are occupationally limited but geographically dispersed.

<sup>14</sup> So that we are not misunderstood, we note that, since petitioners do not take issue with the proposition that collective-bargaining-related activities are chargeable to objecting fee payers, *in theory* the "direct costing" advocated by the petitioners should only affect



## II. REQUIRING OBJECTING FEE PAYERS TO PAY THEIR PRO RATA SHARE OF A UNION'S MULTI-UNIT SYSTEM FOR FUNDING COLLECTIVE-BARGAINING-RELATED EXPENDITURES IS CONSTITUTIONAL

We now return to petitioners' legal contention in this case: that objecting fee payers have a constitutional right to opt out of fair and equal participation in the multiunit/cost-sharing system for providing collective bargaining-related services chosen by the majority of the unit in which the fee payers work, and to fund those services instead as if the services were provided on a single unit, fee-for-direct-services-rendered basis. We show that permitting objecting fee payers to choose for themselves a fundamentally different method of funding collective-bargaining-related services than that selected by the majority of employees in the unit would produce precisely the economic free-riding the agency fee system is designed to prevent and would do so without serving any First Amendment values whatever.

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the way collective bargaining costs are divided among objecting fee payers, both over time and from unit to unit. *See* Pet. Br. 23 n.17 (suggesting that statutes could be amended to allow agency fees to exceed dues).

Assuming that the following conditions are satisfied, "direct costing" in other words, should only shift the share of the chargeable amount from some groups of objectors to other groups of objectors: *If* the objectors' share of collective-bargaining-related costs could be calculated in such a way as to assign to objectors as a group their share not only of the marginal cost of their representation but their share of the cost of assembling and maintaining the group resources available to their bargaining units on call, *if* the costs of calculating the agency fee on this basis were not prohibitive, and *if* employees could not opportunistically change status depending on whether the fee charged objectors was greater or less than normal dues, *then* it would be a matter of indifference to the other employees whether the objecting employees financed their share of collective-bargaining-related costs on a "direct-costing" or a multi-unit "cost-sharing" basis.

Because not one of these three conditions prevails in the real world, the actual result of "direct costing" is, however, to permit objectors to free ride.

1. As we have seen (pp. 8-13, *supra*), the multiunit cost-sharing method of providing services generates substantial economic benefits in addition to the provision of a discrete service at a discrete time. Where this method obtains, the services that are provided are likely to be more diverse, more effective, and less expensive than those a single unit could purchase for itself on the open market. These benefits also include assurance of future access to greater resources than would otherwise be available, a factor of significant *current* economic value whether or not the unit actually uses the resources in a given year, or ever.

Thus, an individual who simply pays the direct costs of such collective-bargaining-related services as are rendered in a given year to a given unit, and does *not* otherwise contribute toward maintaining the union structure that provides services of enhanced quality and at a lower-than-market cost necessarily reaps the special economic benefits provided *without paying for those benefits*.<sup>15</sup> That being so, Michigan has determined, in its

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<sup>15</sup> A return to the HMO analogy may help to clarify this point: An HMO might choose to provide health services to members of the general public who are not regular subscribers. If so, however, the HMO would *not* simply charge nonsubscribers the directly traceable dollar costs of providing those services, likely to be "as much as one-fourth to one-third lower than traditional care in some parts of this country." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, *supra*, 2.

Rather, the HMO would seek to set its price to reflect the quite different economic value of the discrete services provided if purchased on the open market on a fee-for-service basis. To do otherwise would be unfair to the regular subscribers, who would then be shouldering for an individual who chose not to participate in this group economic endeavor the costs of maintaining a system capable of producing low-cost high-quality services when needed.

Further, where that cost in a particular instance exceeded the flat fee paid annually by subscribers, the subscribers would not be expected to absorb that extra cost, but instead would pass it on to the nonsubscriber. And nonsubscribers would not have the

public employee collective bargaining statute, that objecting fee payers *cannot* in this fashion refuse to provide their full pro rata economic support to the system for providing collective-bargaining-related services actually chosen by the bargaining unit as a whole. *Bridgeport-Spaulding Community Schools*, 1986 Mich. Emp. Rel. Comm'n 1024; *Garden City School District*, 1978 Mich. Emp. Rel. Comm'n 1145; *Swartz Creek Community Schools*, 1971 Mich. Emp. Rel. Comm'n 645, 653.

2. The central premise of this Court's agency fee cases is that states may, *consistent with the Constitution*, "prevent 'free riders'—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the process from which they benefit." *Keller v. State Bar of California*, — U.S. —, 110 S. Ct. 2228, 2235 (1990). As Michigan has recognized, employees who reap the economic benefits of union representation on a multiunit/cost-sharing basis without sharing all the relevant costs *are* "avoiding their fair share of the process from which they benefit."

Moreover, because the Michigan statute limits the periodic fees of objecting nonmembers to the amount paid in dues and assessments by union members, objecting fee payers *cannot* be charged the full cost of such services as are actually supplied to their bargaining unit, where that cost in a given year is higher than the unit income realized from the pro rata fee. That being so, a unit-by-unit allocation of union expenditures would further frustrate the governmental interest in preventing free riding. For objecting fee payers could avoid paying even the union's immediate direct costs of providing collective-bargaining-related services to their unit in the

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assurance available to subscribers against very high health costs in a single year.

In short, a nonsubscriber could *not* claim the special economic values created by the prepaid funding system without contributing on a continuing basis to the support of the system.



years those costs *exceed* the unit income based on the dues charged to union members.

To be sure, in theory at least, Michigan *could* avoid this problem by permitting agency fees to fluctuate according to direct bargaining unit costs with no regard to the dues charged union members. But the judgment made in the Michigan statute (as well as in the NLRA, RLA, and all state labor relations statutes of which we are aware) is that placing a ceiling upon the fees paid by nonmembers at the level members charge themselves is the best assurance that collective bargaining costs are fairly allocated between members and nonmembers. To permit nonmembers to be charged *more* than members would lead to questions of equitable distribution potentially much more serious than those raised under the present scheme.

The judgment of every legislature that has looked at the question is entitled to respect in this regard, absent some clear Constitutional reason for favoring a system mandating entirely different schemes for members and nonmembers to pay for collective bargaining-related expenditures.<sup>16</sup>

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<sup>16</sup> Further, by insisting upon the right to have the union trace costs and calculate fees based upon an entirely different economic model than the one a majority of employees in the unit have chosen as the best one for their workplace, objecting fee payers would require of the union an administrative task that would be extremely costly to the extent it could be performed at all.

For example, to determine its expenditures in one bargaining unit, CWA would have to determine its own direct expenditures in each of the more than 700 units that union represents, and would have to allocate between units those expenditures benefitting less than all represented employees but more than one unit, such as joint bargaining, industry-specific economic research, and so on. In addition, CWA would have to calculate the expenditures for each unit made by each local representing unit employees; this task would be exceedingly complex, since many of the locals, like CWA itself, provide services to members of more than one unit, and for large units, many different locals provide representation. For a nation-

3. Thus, petitioners' argument comes down to the claim that the Constitution erects a mandatory preference for unit-by-unit funding of collective-bargaining-related services, so that objecting fee payers can *either* avoid paying their full share of the collective bargaining benefits made available to them *or* force the unit as a whole to forego its choice of a national union or its affiliate as the unit's representative in favor of a single unit bargaining representative. But just as "a Constitution is not intended to embody a particular economic theory" (*Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting)), so it is clear under this Court's cases that the First Amendment erects no preference for one "reasonable" and "normal" economic model for providing and funding collective-bargaining-related services, and for preserving labor peace by preventing "free-riding," over another.

(a) Petitioners' overall constitutional theory here is that First Amendment doctrine requires that *each and every* type of expenditure that a union seeks to charge to objecting fee payers be judicially scrutinized to determine whether that expenditure is *essential* to the representation of employees, rather than simply appropriate and useful toward that end. Pet. Br. 10-12. In other words, petitioners' argument is that a conscientious union that goes beyond the statutory minimum in fulfilling its representational responsibilities must allow objecting nonmembers to be "free riders," and to reap the benefits, without sharing in the burden, of such expenditures.

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wide unit in AT&T, this could require analyzing in detail the expenditures of hundreds of local unions.

Tasks of this kind could well prove so costly that complex multiunit unions would have to choose between foregoing collection of agency fees from dissenting fee payers entirely and using up much of the per capita savings achieved through a multiunit organization on the administrative costs of calculating those fees. In either case, the problem of "free-riding" would be greatly exacerbated.



This Court's recent First Amendment cases show as a general matter that legislation that serves a sufficiently strong overall governmental interest is not to be invalidated through strict judicial scrutiny of each *specific* application of the statute. *Board of Trustees v. Fox*, — U.S. —, 109 S.Ct. 3028, 3033 (1989) (least restrictive means standard does not apply, despite some interference with First Amendment interests, in testing the validity of time, place and manner restrictions, regulation of expressive conduct, or restrictions upon commercial speech.) See also, e.g., *Clark v. Community for Creative Non-Violence* 468 U.S. 288, 293, 299 (1984) (although "sleeping in connection with [a] demonstration is expressive conduct protected to some extent by the First Amendment," the Court nonetheless upheld a ban upon sleeping overnight in certain parks, because the Court "[did] not believe that [the First Amendment] assign[s] to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."); *Buckley v. Valeo*, 424 U.S. 1, 29, 30 (1976) (applying a "rigorous standard of review" the Court upheld a particular contribution limitation because "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a \$2,000 ceiling might not serve as well as \$1,000'. . . . Such distinctions in degree become significant *only when they can be said to amount to differences in kind*" (emphasis added)).

(b) As is only to be expected then, it is perfectly clear that the Constitution does *not* as a general matter straitjacket Congress or the state legislatures into requiring unions to adhere to one method of providing collective-bargaining-related services to employees as a condition for requiring objecting fee payers to provide pro rata financial support for those services:

The very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of com-

pelled funds. "The furtherance of the common cause leaves some leeway for the leadership of the group." *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 221-222. . . . [*Ellis v. Railway Clerks*, *supra*, 466 U.S. at 456-57.]<sup>17</sup>

Where the group has determined that collective-bargaining-related services are most effectively provided on a multiunit/cost-sharing basis rather than a unit-by-unit, fee-for-direct-services-rendered basis, that determination is one to "promote the cause which justified bringing the group together," and "the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 223.

*Ellis*, moreover, makes it clear that there is *no* constitutional basis for treating multiunit collective-bargaining-related expenses any differently from single-unit expenses:

By allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. . . . It has long been settled that such interference with First Amendment is justified by the governmental interest in industrial peace. . . . *At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining."* . . . The issue is whether [any other] expenses involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest. [466 U.S. at 455-456 (emphasis supplied).]

As the italicized language in the above quotation indicates, there is *no* difference of constitutional significance

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<sup>17</sup> In recognition of this flexibility, for example, the Court in *Ellis* refused to "fault" BRAC for "choosing to elect its officers at a convention rather than by referendum." 466 U.S. at 449.

between "uniform exactions . . . in support of activities germane to collective bargaining" calculated on multi-unit/cost-sharing basis, and such exactions calculated on a unit-by-unit, fee-for-direct-services-rendered basis. In either case, the objecting fee payer's First Amendment interest in limiting payments stems from financing the bargaining activity in which the union is engaged. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring).

Precisely because the multiunit/cost-sharing method for providing and funding collective-bargaining-related activities *does not vary the kinds of activities supported one whit*, "the fact that the employee is forced to contribute does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union." *Ellis v. Railway Clerks*, *supra*, 446 U.S. at 456. An individual's First Amendment interest in refusing to "support financially an organization with whose principles and demands he may disagree" (*id.* at 455), does *not*, in other words, change *qualitatively* because of the way in which that organization chooses to calculate and allocate that financial support, as long as the *nature* of the activities supported remains the same.

3. Despite the foregoing, petitioners maintain that *Ellis* compels the conclusion that collective-bargaining-related activities can only be charged to nonmembers on a single unit, fee-for-direct-service-rendered basis. That contention is untenable, both on the basis of *Ellis*' basic rationale, just discussed, and for two additional reasons.

(a) First, the *Ellis* Court necessarily *rejected* the position petitioners suggest *Ellis* adopted. The central contention of the *Ellis* plaintiffs throughout that litigation was that as nonmembers, they constitutionally could "be compelled to contribute [to the exclusive representative] *no more than* their pro rata share of the expenses of negotiating agreements and settling grievances *with Western Airlines*." 466 U.S. at 439 (emphasis supplied).



The *Ellis* district court, although upholding the contention that chargeable expenses are limited to those incurred in collective-bargaining-related activities, did *not* exempt the *Ellis* plaintiffs from contributing to the actual negotiation and contract administration expenses of units other than the ones at Western Airlines. See *Ellis v. Brotherhood of Railway, Airline & S.S. Clerks*, 685 F.2d 1065, 1075 (1982) (Whelan, J. dissenting) (quoting verbatim the district court's list of nonchargeable expenses). In this Court, the *Ellis* plaintiffs reiterated, both generally and with respect to the particular expenses the district court had held chargeable, their contention that objecting fees payers could be charged only the direct costs of bargaining in the unit in which the fee payers are employed.<sup>18</sup>

This Court, however, *rejected* the general principle that national unions must charge objecting fee payers on a fictional single-unit basis. Chargeable costs, the Court held, include “*not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.*” 466 U.S. at 448 (emphasis supplied); see also *id.* (emphasis supplied) (test is whether challenged expenditures are “*necessarily or reasonably incurred.*”)

On this basis, the *Ellis* Court went on to approve as chargeable expenses social activities and conventions of the *national* union without regard to the connection of

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<sup>18</sup> See *Ellis* Petitioners' Br. at 22 (only those convention expenditures “directly related in fact to representation of the Western Airlines bargaining unit [are] chargeable to plaintiffs”); *id.* at 24 (social expenses should not be chargeable unless “attended by the employer”); *id.* at 27 (contending that because “BRAC did not prove its costs of collective bargaining with Western Airlines” and “has [not] maintained accounting records to isolate the costs of collective bargaining with Western Airlines”, the union did not meet its burden of proof).

such expenses to a particular bargaining unit, as well as publications that communicate "collective bargaining, contract administration, and employees' rights to *employees represented by BRAC*, 466 U.S. at 450, and not only those at Western Airlines." 466 U.S. at 450. Moreover, the Court necessarily rejected as well the *Ellis* plaintiffs' insistence that the union had not met its burden of proof with regard to those expenses that specifically concern negotiations and grievance adjustment, albeit not directly to Western Airlines bargaining. *Cf.* 466 U.S. at 457 n.15.<sup>19</sup>

(b) Second, reading *Ellis* as petitioners do would put *Ellis* at odds with this Court's pre-*Ellis* discussions of the proper remedial accommodation between the interests of the majority and those of objectors.

From the outset, this Court's opinions have stressed that in allocating bargaining-related costs to dissenting feepayers, any economically sensible approach is allowable. Thus, *Railway Employees' Dept. v. Hanson*, *supra*, 351 U.S. at 238, stated that, so long as "[t]he financial support required relates . . . to the work of the union

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<sup>19</sup> The *Ellis* Court did hold two categories of expenses—for "general litigation and organizing efforts"—not chargeable to objecting fee payers. 466 U.S. at 41. While the *Ellis* Court did not explain in constitutional terms why some litigation and all organizing expenses were treated differently than other expenses for purposes of the *Ellis* plaintiffs' unit-by-unit argument, we surmise that the reason is this:

Both litigation "not involving the negotiation of agreements or settlements of grievances" (466 U.S. at 440)—which we take to be short hand for litigation that is not collective-bargaining-related—and organizing implicate heightened First Amendment interests, separate from those involved in requiring support of union activity germane to collective bargaining generally. *See In re Primus*, 436 U.S. 412 (1978); *Ellis v. Railway Clerks*, *supra*, 466 U.S. at 452 & n.13 (organizing involves proselytizing on behalf of the union, not engaging in representation of employees for bargaining purposes); *id.* at 456 (where "the communicative content is . . . inherent in the act," union expenditures with some relationship to collective bargaining may be held to a stricter First Amendment standard than where the objection is simply that it is a *union expense*).



in the realm of collective bargaining[,] [n]o more precise allocation of union overhead to individual members [than charging uniform dues] seems to us to be necessary." *Machinists v. Street*, 367 U.S. 740 (1961), after holding that a union could not expend fees received from an objecting employee on politics, suggested as a remedy for such expenditures a refund of a portion of the objector's payments "in the same proportion that the expenditures for political purposes . . . bore to the total union budget" (*id.* at 775), and specifically stated there was no requirement "to trace [the objector's] money up to and including its expenditure," (*id.*). *Railway Clerks v. Allen*, 373 U.S. 113 (1963), reiterated the remedy suggested in *Street*, noting that to carry out this remedy "two determinations will have to be made: (1) what expenditures disclosed by the record are political; (2) what percentage of *total* union expenditures are political expenditures. . . ." *Id.* at 121 (emphasis supplied). The *Allen* Court emphasized that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required. . . ." *Id.* See also *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 237-242 (following the foregoing precedents).

Petitioners' unit-by-unit accounting requirement cannot be squared with any of these statements by the Court concerning the appropriate remedy in agency fee cases. By petitioners' lights, even a union that spent *all* of its funds on collective bargaining would have to make a "precise allocation of union overhead to individual members" (*Railway Employees' Dept. v. Hanson*, *supra*, 351 U.S. at 238) on a unit-by-unit basis. And, under petitioner's theory, the proper remedy for the use of an objector's payments for nonchargeable expenditures could not be the one spelled out in *Street* and *Allen*, since the "practical decree" suggested there does *not* require a further, unit-by-unit breakdown of the union's total expenditures.

### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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NO. 88-2083

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PETER CRAWFORD, et al.,

Appellants,

v.

AIR LINE PILOTS ASSOCIATION,

Appellee.

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On Appeal From The United States District Court For  
The Eastern District Of Virginia, Alexandria Division

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SUPPLEMENTAL BRIEF FOR APPELLEE

This Court, having held this case in abeyance to await the Supreme Court's decision in Lehnert v. Ferris Faculty Association, 111 S. Ct. 1950 (May 30, 1991), entered an order on June 21 requesting the parties to file "supplemental briefs addressing the effect of the Supreme Court's decision in LEHNERT on this case." Defendant-Appellee Air Line Pilots Association (ALPA) respectfully submits this brief in response to the Court's order.



## I.

LEHNERT MAKES CLEAR THAT ALPA MAY ALLOCATE ITS COLLECTIVE BARGAINING COSTS EVENLY AMONG ALL OF ITS BARGAINING UNITS.

The effect of Lehnert on this case can be simply stated. The plaintiffs in Lehnert (like appellants here) contended that their union "may not utilize dissenters' [agency shop] fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 111 S. Ct. at 1959. The Court, while divided over other issues, was unanimous in its rejection of this contention.

Justice Blackmun, writing for the Court, reasoned as follows:

While we consistently have looked to whether nonideological expenses are "germane to collective bargaining," Hanson, 351 U.S. at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.

We think that to require so close a connection would be to ignore the unified-membership structure under which many unions, including those here, operate. Under such arrangements, membership in the local union constitutes membership in the state and national parent organizations. . . .

The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

\* \* \* \*

We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees bargaining unit.

111 S. Ct. at 1961.

The separate opinion filed by Justice Scalia, while disagreeing with the majority on other issues in the case, agreed with the portion of Justice Blackmun's opinion quoted above. Justice Scalia stated:

Another item relating to affiliated organizations that the Court allows to be charged consists of a pro rata assessment of NEA's costs in providing collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance) to its affiliates nationwide, and in maintaining the support staff necessary for that purpose. It would obviously be appropriate to charge the cost of such services actually provided to Ferris [the local bargaining unit] itself, since they relate directly to the union's collective-bargaining duty. It would also be appropriate to charge non-union members an annual fee charged by NEA in exchange for contractually promised availability of such services from NEA on demand. As Ferris conceded at argument, however, there is no such contractual commitment here. The Court nonetheless permits the charges to be made, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them." Ante, at 1961. I think that resolution is correct. I see no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by usage.

111 S. Ct. at 1980-81 (emphasis in original).

Lehnert is thus dispositive of appellants' contention in this case that their agency fees should not be burdened with collective bargaining expenses incurred by ALPA at other airlines. The Court's decision clearly allows ALPA to charge all represented employees with the pro rata cost of the collective bargaining services that ALPA makes available to all bargaining units, regardless of which bargaining units may happen to benefit from those services in any particular year.

Plaintiffs, in their supplemental brief, attempt to avoid the force of the unanimous holding in Lehnert by focusing on an entirely different issue on which the Court was divided. As plaintiffs point out, the Court was divided 5-4 on the

standard to be applied in determining whether certain specific union activities at issue in that case were chargeable to agency-fee objectors. Plaintiffs contend that under the narrow test (which plaintiffs call the "statutory duty" test) adopted by the minority, employees at one bargaining unit cannot be charged with collective bargaining costs at other bargaining units unless those costs were incurred in the performance of the union's "statutory duty" to the first bargaining unit. Plaintiffs then urge this Court to adopt the minority's "statutory duty" test rather than the broader three-part test adopted by the majority, because, they say, the majority's opinion was based solely on the First Amendment and is thus not binding in a case such as this one arising under the Railway Labor Act.

Each element of this argument is fallacious. First, nothing in Lehnert or any previous case suggests that the standard for determining chargeability is different under the Railway Labor Act than under the First Amendment. On the contrary, both the majority and minority opinions in Lehnert relied interchangeably on statutory cases ( Street, Allen, Ellis, and Beck) and constitutional cases (Hanson and Abood). Thus, the majority stated:

Although they are cases of statutory construction, Street and Allen are instructive in delineating the bounds of the First Amendment in this area as well. Because the Court expressly has interpreted the RLA "to avoid serious doubt of [the statute's] constitutionality" [Citations to Street and Ellis], the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance . . . ."

111 S. Ct. at 1957. Even more to the point, the majority expressly based its three-part test on "Hanson and Street and their progeny":

Hanson and Street and their progeny teach that chargeable activities must (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding

"free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Id. at 1959. Since Hanson was a constitutional case while Street was decided under the Railway Labor Act, it couldn't be clearer that the majority's three-part test is to be applied both under the Constitution and under the statute.

Justice Scalia, who wrote the minority opinion on the standards issue, also recognized that the same standard would be applicable under the Constitution and the statute:

Street, Ellis, and Beck were statutory cases, but there is good reason to treat them as merely reflecting the constitutional rule suggested in Hanson and later confirmed in Abood. Street adopted a construction of the Railway Labor Act nowhere suggested in its language, to avoid "serious doubt of [its] constitutionality." [Citation omitted]. As Justice Black argued in dissent, "Neither § 2, Eleventh nor any other part of the Act contains any implication or even a hint that Congress wanted to limit the purposes for which a contracting union's dues should or could be spent . . . [N]o one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality." [Citation omitted].

Id. at 1978.

Thus, while it is true that the Lehnert Court split 5-4 on the formulation of the standard for determining chargeability, both the majority and the minority agreed that the standard must be the same under the First Amendment and the Railway Labor Act. Plaintiffs' effort to limit the majority's opinion to First Amendment cases only, and to have this Court apply the minority standard to Railway Labor Act cases such as this one, must therefore be rejected.

Moreover, the debate in Lehnert over the applicable standard had to do with whether certain specific costs at issue in that case were chargeable at all, not how costs that are chargeable may be allocated among bargaining units. As



demonstrated by the portion of Justice Scalia's opinion quoted above (p. 3, supra), the minority in Lehnert agreed that a national union may use the principle of cost-pooling to spread the costs of its collective bargaining services evenly across all bargaining units. Indeed, Justice Scalia objected strongly to the suggestion in the majority opinion (see 111 S. Ct. at 1966 n.6) that there is an inconsistency between Justice Scalia's standard for determining chargeability and his willingness to permit employees in one bargaining unit to be assessed for collective bargaining services provided to other bargaining units. See 111 S. Ct. at 1981 n.4. There is simply no difference between the majority and minority in Lehnert on a national union's right to allocate evenly among all represented employees the cost of bargaining-related services that are made available to all bargaining units as needed.<sup>1</sup>

In a recent decision applying Lehnert, the Tenth Circuit has upheld ALPA's practice of allocating its collective bargaining costs evenly to all bargaining units.

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<sup>1</sup> Plaintiffs also attempt to distinguish Lehnert on the basis that the union in that case was a local organization whose connection with its state and national parent bodies was merely one of affiliation, while ALPA is "a national union without any subordinate or affiliated unions at the local or state level." (Plaintiffs' Supplemental Brief at 23). The effect of this difference, of course, is to make the cost-pooling practice approved in Lehnert even more justifiable, not less so, in this case. ALPA has only one treasury, to which all represented pilots contribute on an equal basis, and out of which all costs incurred at all bargaining units are paid. Moreover, as plaintiffs recognize, ALPA's bargaining activities at each airline "are to a large extent directed and coordinated by its national officers and governing bodies." (Id. at 2). ALPA provides the same collective bargaining services to all bargaining units it represents, although in any given year those services may be needed more extensively in some units than in others. The teaching of Lehnert is that, in such a situation, the costs of collective bargaining may properly be charged to all units, because in that way employees pay equally for services that are equally available to all, whether or not they may be needed in any particular year.



Pilots Against Illegal Dues (PAID) v. Air Line Pilots Association, No. 89-1053, (10th Cir.) decided July 11, 1991 (reproduced in the Appendix to this Brief).<sup>2</sup> In that case, a group of pilots employed by United Air Lines challenged ALPA's right to burden their agency fees with the costs of collective bargaining at other airlines. Like the plaintiffs in the present case, the PAID plaintiffs focused their attack particularly on the costs of ALPA's strike at Continental Air Lines and the costs associated with ALPA's Major Contingency Fund. The Tenth Circuit held that these expenditures were properly chargeable under the principles annunciated in Lehnert:

Although negotiations at other airlines are not undertaken directly on behalf of the plaintiffs, the costs of such activities can be said to contribute to "the pool of resources potentially available" to the United unit. Cf. [Lehnert, 59 U.S.L. Week] at 4548. The evidence here suggests that a contract negotiated on behalf of one ALPA unit is subsequently used as a bargaining tool for another unit. In light of this relationship, it is not unreasonable to determine the plaintiffs' agency fee by pooling the negotiating expenses of these units and dividing the costs among the represented employees.

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Appellants' next objection relates to the Major Contingency Fund. This large reserve fund was financed by a one percent dues increase imposed on all pilots represented by ALPA. . . . Based on the [district] court's findings, we agree that the contingency fund is sufficiently germane to collective bargaining that it is fair to require the plaintiffs to bear a portion of the costs of funding it. The fund is available to United pilots in the event of a strike against United. This directly enhances the ability of ALPA to negotiate on the

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<sup>2</sup> The Court treated litigation expenses differently, apparently holding that such costs even if related to collective bargaining may only be charged to employees in the particular bargaining unit in which the litigation arises. ALPA has petitioned for rehearing with respect to this single issue. We discuss the litigation issue at greater length below.

plaintiffs' behalf. The contingency fund was shown to be reasonably employed to effectuate the duties of ALPA in representing the plaintiffs.

(Slip Opinion at 9-10 & 15-16).

The Tenth Circuit's disposition of these issues is clearly a correct application of Lehnert and should be followed by this Court.

## II.

### LITIGATION COSTS ARISING DIRECTLY OUT OF COLLECTIVE BARGAINING MUST BE TREATED LIKE ANY OTHER COLLECTIVE BARGAINING COSTS.

The only other issue requiring discussion is whether litigation costs, if they are incurred as part of the collective bargaining process, are to be treated the same as other collective bargaining costs. In PAID, the Tenth Circuit refused to apply the Lehnert cost-pooling principle to litigation costs. Instead, that court held that, "[i]n order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit." (Slip Opinion at 13). As we shall explain, we believe the Tenth Circuit's treatment of litigation costs is fundamentally inconsistent with Lehnert. We are making the same arguments to the Tenth Circuit in a petition for rehearing addressed to this single issue.

We begin with the proposition, which we believe to be indisputable, that the performance of a union's collective bargaining responsibilities sometimes unavoidably involves litigation. The object of collective bargaining, after all, is the negotiation of binding collective agreements concerning rates of pay, rules, and working conditions. See 45 U.S.C. § 152 First. If litigation becomes necessary to enforce such an agreement, such litigation must be viewed as an integral part of the collective bargaining process. Although the Railway Labor Act mandates

arbitration as the means for settling grievances arising under collective bargaining agreements, 45 U.S.C. § 184, employers sometimes refuse to arbitrate, or refuse to comply with an arbitrator's award. In such circumstances, the only means available to the union to enforce the collective bargaining agreement is to initiate litigation. See International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963). Such litigation is certainly a continuation of the collective bargaining process.

Similarly, suits are sometimes brought against unions by dissatisfied employees who claim that an agreement (or grievance settlement) the union has negotiated is somehow unlawful (e.g., under the duty of fair representation, or some theory of race or sex discrimination). In such a case, the union, if it believes the suit lacks merit, must defend it in order to protect the fruits of its collective bargaining activities.

Litigation of the kind described above clearly meets Lehnert's three-part test for determining chargeability. First, it is obviously "germane" to collective bargaining, for the reasons already explained. Second, it certainly promotes "the government's vital policy interest in labor peace" by resolving labor-management issues that could otherwise lead to labor unrest; indeed, the Supreme Court has repeatedly recognized the strong federal policy favoring peaceful resolution of disputes of the type described above through litigation. E.g., Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); International Ass'n of Machinists v. Central Airlines, *supra*; Groves v. Ring Screw Works, 111 S. Ct. 498 (1990); Vaca v. Sipes,

386 U.S. 171, 182-83 (1967). Third, it does "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 111 S. Ct. at 1959.

The logic of Lehnert dictates that a national union such as ALPA, which finances litigation for all of its bargaining units, is entitled to spread the cost of bargaining-related litigation among all such units, just as it may spread the cost of other collective bargaining activities. The funds received from all employees constitute a "pool of resources" from which all bargaining units may draw if they should become involved in litigation in connection with their collective bargaining activities.<sup>3</sup>

The Tenth Circuit refused to apply the cost-pooling principle to litigation costs because it believed Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 453 (1984) precluded it from doing so. It found support for its interpretation of Ellis in Justice Blackmun's opinion in Lehnert. The Tenth Circuit, however, made no effort to reconcile its treatment of litigation costs with its general interpretation of Lehnert, and we believe these two simply cannot be reconciled. If, as Lehnert clearly holds, a national union may charge all bargaining units for bargaining-related services that the union makes available to all units as needed, there is no

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<sup>3</sup> A union may also find itself embroiled in litigation as a result of the normal administration of its business. As a property owner and an employer, a union is as susceptible as any other entity to the normal run of tort and contract litigation. For example, if the union rents office space it may find itself litigating a dispute under its lease. A union may be sued because a staff member, while engaged in union business, was involved in an automobile accident. Disputes between unions and their own employees may occasionally lead to litigation. Costs of these types of litigation are properly chargeable to all bargaining units on the same basis as other administrative costs.

reason why this principle should not be as applicable to litigation services as any other bargaining-related services.

The one-paragraph discussion of litigation costs in Ellis does not require the result reached by the Tenth Circuit. Indeed, the language of that paragraph is quite ambiguous. It is possible to read it as merely attempting to distinguish between litigation that is sufficiently related to collective bargaining to be chargeable and litigation that is not. It may be that the Ellis Court did not intend at all to suggest that litigation, if related to collective bargaining, can only be charged to employees in the bargaining unit in which it arises. But even if that is what the Court intended in Ellis, there is no hint that the Court was thinking at that time of the cost-pooling concept that it has now approved in Lehnert. Now that the Court has recognized cost-pooling as valid, it is simply illogical not to apply it to litigation costs on the same basis as any other costs.

It is true that Justice Blackmun stated in Lehnert that the cost-pooling "rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit. . . ." 111 S. Ct. at 1963. This part of Justice Blackmun's opinion, however, represents a minority view, supported by only four justices.<sup>4</sup> Five justices refused to join this portion of the opinion,

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<sup>4</sup> It is also noteworthy that Justice Blackmun's discussion of litigation costs is mere dicta, since, as Justice Marshall points out, 111 S. Ct. at 1972, the issue was not raised in the record, and was not discussed either in the opinions below or in the parties' briefs. Moreover, it appears that Justice Blackmun may not have been thinking about the kind of litigation that is an integral part of collective bargaining, but rather advocacy litigation aimed at establishing some constitutional or statutory protection for employees. Justice Blackmun's characterization of litigation as "more akin to lobbying," and his reference to NAACP v. Button, 371 U.S. 415 (1963), suggest that this is what he had in mind. Many public employee unions, especially the National Education Association (the union involved in



presumably because they disagreed with it. Justices Marshall and Kennedy made their disagreement explicit. 111 S. Ct. at 1972-75 (Marshall), 1982 (Kennedy).

Moreover, Justice Kennedy at least implies that on this score he is expressing the view of all four justices who supported the separate opinion of Justice Scalia.

Thus, Justice Kennedy wrote:

Justice BLACKMUN removes litigation . . . from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with "otherwise chargeable" expenses of affiliate unions. This makes little sense if we acknowledge, as Justice SCALIA articulates, ante, at 1980-1981, that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncontractual consulting or legal services plan. Will a local bargaining unit now be permitted to charge dissenters for collective bargaining-related litigation so long as the unit enters into a contractual arrangement or insurance policy with its affiliate? If so, Justice BLACKMUN's distinction has little meaning. If not, then why not, for I discern no additional burden on free speech from such an arrangement, as long as the litigation is undertaken in the course of the union's duties as exclusive bargaining representative.

Justice Kennedy then criticizes Justice Blackmun for placing "unfounded reliance upon Ellis v. Railway Clerks . . . , where we disallowed some expenses for extra-unit litigation." Ellis is not controlling, he points out, because it "contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' 466 U.S., at 453, 104 S. Ct., at 1895, through a cost sharing arrangement under the auspices of the affiliate."

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Lehnert), frequently engage in advocacy litigation similar to that engaged in by the NAACP. That kind of litigation, however, is quite different from the kind of "bread and butter" litigation that routinely arises in the course of collective bargaining, and that does not resemble lobbying at all.

We submit that Justice Kennedy's views are far more persuasive on the litigation-costs issue than those expressed by Justice Blackmun. Since there is no majority opinion on this issue, this Court is free to adopt the position that it believes is most consistent with the other parts of the Lehnert decision, which did command a majority. For all the reasons we have stated, we urge the Court to adopt Justice Kennedy's views on this issue.

#### CONCLUSION

For the reasons stated above and in appellee's original brief, the judgment below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

## APPENDIX

FILED  
United States Court of Appeals  
Tenth Circuit

PUBLISH

JUL 11 1991

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

ROBERT L. HOECKER  
Clerk

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PILOTS AGAINST ILLEGAL DUES (PAID), et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	No. 89-1053
v.	)	
	)	
AIR LINE PILOTS ASSOCIATION (ALPA),	)	
	)	
Defendant-Appellee.	)	

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Appeal from the United States District Court  
for the District of Colorado  
(D.C. No. 86-Z-410)

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Franklin A. Nachman, Semple & Jackson, P.C., Denver, Co., (Martin Semple and Dwight L. Pringle, of the same firm, with him on the brief), for plaintiffs-appellants.

Jerry D. Anker, Air Line Pilots Association, Washington, D.C., (Felice Busto, ALPA, Washington, D.C., and Donald D'Antuono, Tallmadge, Tallmadge, Wallace & Hahn, P.C., Denver, Co., with him on the brief) for defendant-appellee.

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Before McKAY and ANDERSON, Circuit Judges, and BROWN, District Judge.\*

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BROWN, District Judge.

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\* The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

Plaintiff-appellants are twenty-one nonunion pilots employed by United Airlines. The defendant-appellee Air Line Pilots Association (ALPA) is the exclusive bargaining representative of all United pilots. In 1983, United Airlines and ALPA entered into an "agency shop" arrangement, under which United pilots were required either to become ALPA members or to pay ALPA an agency fee for expenses incurred in representing the pilots. Such arrangements are authorized by Section 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. § 152.

The plaintiffs brought this action alleging that ALPA violated the RLA and plaintiffs' constitutional rights in 1983 and subsequent years by using agency shop fees for purposes not "germane to collective bargaining." Plaintiffs also alleged that ALPA was impermissibly charging them for expenses incurred in activities at other airlines. Furthermore, the plaintiffs sought relief for what they contended were inadequate procedures for challenging ALPA's determination of the agency fees owed by non-members. Judgment was entered for the defendants after a trial to the district court. The district court found that ALPA had rebated to the plaintiffs the portion of agency fees that were used for purposes not germane to collective bargaining. The district court also found that ALPA had established adequate procedures to allow challenges to agency fees. The court found the plaintiffs' claims concerning the rebate for 1983 to be barred by the applicable statute of limitations. Finally, the court dismissed plaintiffs' constitutional claims under 42 U.S.C. § 1983. Appellants contended

in arguments before this court that the district court committed several errors. We held our opinion in this matter in abeyance pending the Supreme Court's decision in Lehnert v. Ferris Faculty Association, 59 U.S.L.W. 4544 (May 30, 1991) because the Lehnert case raised several issues nearly identical to those raised by appellants.

a. Union Expenditures Generally Under Section 2, Eleventh.

We first examine the federal law concerning the authority of a union to charge expenditures to dissenting employees under the Railway Labor Act. The agency shop<sup>1</sup> was first given a stamp of approval by Congress in 1951 when the RLA was amended to permit such arrangements. The 1951 amendment was an attempt to deal with "free riders"--employees who benefitted from a union's representation but did not contribute to the costs of that representation. The constitutionality of this amendment was upheld in Railway Employees' Department v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), in which the Supreme Court rejected the contention that the amendment's effect of forcing contributions from unwilling persons was a violation of the First Amendment or the Due Process Clause of the Fifth Amendment. The Court found it was within Congress' power to require financial support for a

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<sup>1</sup> An "agency shop" agreement generally provides that while employees are not required to join the union, they are required to pay the union an amount equal to union dues. A "union shop" agreement provides that no one will be employed who does not join the union within a short time after being hired. See Oil Workers v. Mobil Oil Corporation, 426 U.S. 407, 409 n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976). As far as the issues raised in this case are concerned, there is no material difference between the two.



collective bargaining agent from those who benefitted from the work of the agent. Hanson, 351 U.S. 225, 238. The Court observed that "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining." Id. at 235. The Court noted, however, that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." Id. In International Association of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Supreme Court held that the RLA did not authorize a union to use agency fees from objecting employees to support political candidates. The Court stated that Congress did not intend to vest the unions with unlimited power to spend exacted money. Although the Court did not set forth a standard to distinguish between proper and improper uses of agency fees, it stated:

Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.

Street, 367 U.S. at 768. In Railway Clerks v. Allen, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), the Court again distinguished between political expenditures and those expenditures that were "germane to collective bargaining."

More recently, in Ellis v. Railway Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court addressed the issue of

whether a union could charge objecting employees for expenses that fell in the grey area between expenses clearly germane to collective bargaining and expenditures that are clearly political. The Court stated that:

[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, 466 U.S. at 448.

In Lehnert v. Ferris Faculty Association, 59 U.S.L.W. 4546 (May 30, 1991), a case dealing with a public sector union, the Court declared that in determining what expenses a union may constitutionally charge dissenting members, Hanson and Street and their progeny teach that chargeable activities must (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. Id. at 4547. These same characteristics presumably are required for chargeable expenses under the Railway Labor Act, since the Court has consistently interpreted the RLA to avoid serious doubt of the statute's constitutionality. Street, 367 U.S. at 749.

b. Expenditures by ALPA.

Appellants first contend that the district court applied an erroneous standard of law to determine which of ALPA's expenditures were germane to collective bargaining. Appellants believe that the district court gave the union's determination of what was germane and what was not germane "undue deference." We disagree. In findings made from the bench, the district court clearly cited the Ellis case and recognized that the governing standard was whether the union's expenditures were shown to be germane to collective bargaining. Tr. Vol. XIII at 13. The court recognized that the burden of proving that the expenditures were germane was on the defendant. Id. Appellant suggests that the court's remark at one point that "the court merely has to look at this to see whether the union used good judgment, . . ." Id. at 15, shows that the court applied an erroneous standard of law. Perhaps this particular comment was intended to reflect that the nature of the free rider problem requires that the union "have a certain flexibility in its use of compelled funds." Ellis, 466 U.S. at 456. At any rate, the balance of the court's analysis shows that the court generally applied the proper standard and determined that the expenditures in question were germane to ALPA's duties as a collective bargaining agent.<sup>2</sup> We cannot agree that the district court gave undue deference to ALPA's determination of what was germane and what was not germane.

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<sup>2</sup> As set forth on Pp. 10-14, *infra*, we find that the court erroneously determined that all litigation expenses could be charged to the plaintiffs.

In addition to challenging the standard applied by the district court, appellants challenge the court's findings that the various expenses incurred by the union were germane to collective bargaining. In particular, appellants object to the court's finding that ALPA could properly charge agency fee payers at United for expenses incurred by ALPA in representing other airlines. In calculating the amount of agency fee that each of the plaintiffs owed, ALPA did not attempt to determine what expenses it incurred on behalf of each airline. Instead, ALPA calculated the total amount of its chargeable expenses at all airlines and then divided that amount by the total number of employees at all of the airlines. Thus, the agency fee was determined by combining and averaging expenses from all bargaining units rather than by charging employees in each specific bargaining unit only for expenses incurred representing that unit. Appellants argue that the Supreme Court's decision in Ellis made clear that expenses incurred by a union outside of a particular bargaining unit are not considered germane to collective bargaining as far as the employees in that unit are concerned.

Whatever ambiguity Ellis created with regard to expenses incurred by a union outside of a particular bargaining unit was cleared up by the Court in Lehnert. Like the plaintiffs here, the plaintiffs in Lehnert objected to helping pay for union expenditures outside of their bargaining unit because those expenses did not produce a direct benefit to them. The Lehnert Court concluded that "a local bargaining representative may charge objecting

employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees bargaining unit." Lehnert, 59 U.S.L.W. at 4548. The Court declared that it had never interpreted the test for germane expenses to require a direct relationship between the expense at issue and some tangible benefit to the dissenter's bargaining unit and that to do so would "ignore the unified-membership structure under which so many unions . . . operate." Id. The Court cautioned that this did not give a local union carte blanche to charge dissenters for activities wholly unrelated to the employees in their unit, such as a contribution in the nature of a charitable donation from a local union to its parent. The only connection required is that "there must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." Id. at 4549. This is so because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." Id. at 4548.



When these standards are applied to the facts of this case, it is clear to us that ALPA properly charged the plaintiffs for negotiating and administrative expenses incurred outside of the United bargaining unit. The district court found that it was reasonable for ALPA to divide its negotiation costs among all of the employees it represents because of the effect negotiations at one airline have upon others. The court found persuasive the argument that when certain terms are negotiated at one airline they very quickly become incorporated into agreements with other airlines. Although the plaintiffs vigorously contested this assertion, the court was persuaded otherwise.<sup>3</sup> This factual finding has considerable support in the record and we cannot say that it is clearly erroneous. ALPA's method of pooling negotiation expenses is permissible under Lehnert because "the payment is for services that may ultimately enure to the members of the local union by virtue of their membership in the parent organization." Lehnert, 59 U.S.L.W. at 4549. Although negotiations at other airlines are not undertaken directly on behalf of the plaintiffs, the costs of such activities can be said to contribute to "the pool of resources potentially available" to the United unit. Cf. id. at 4548. The evidence here suggests that a contract negotiated on behalf of one ALPA unit is subsequently used as a bargaining tool

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<sup>3</sup> The district court cited with approval Crawford v. Airline Pilots Assoc. Int'l., No. 87-891-A (E.D.Va. 1988), aff'd, 870 F.2d 155 (4th Cir. 1989), reh'g en banc granted, a similar case in which the district court found that the circumstances of negotiating collective bargaining contracts for pilots made it reasonable for ALPA to divide its costs equally among all of its constituents.

for another unit. In light of this relationship, it is not unreasonable to determine the plaintiffs' agency fee by pooling the negotiating expenses of these units and dividing the costs among the represented employees. This method does not run afoul of Ellis, which states that objecting employees "may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." Ellis, 466 U.S. at 448. Similarly, the union may spread its administrative costs to all of the bargaining units, including that of the plaintiffs. Administrative costs by their nature contribute to the pool of resources potentially available to each affiliated bargaining unit. These expenses are necessary to maintain the union's existence and ultimately enure to the benefit of all represented employees. Cf. Ellis, 466 U.S. at 448 ("Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence . . .").

Although Lehnert and Ellis pose no obstacle to spreading the costs of administration and negotiation among various bargaining units, some of the litigation expenses incurred by ALPA may not be charged to objecting United pilots. ALPA spent large sums of money for litigation after Continental Airlines filed for bankruptcy in 1983. ALPA challenged Continental when the airline declared that

its bankruptcy filing abrogated its collective bargaining agreement. The plaintiffs object to paying any of the costs of the Continental litigation because it did not involve the United Airlines bargaining unit. In Ellis, the Supreme Court had this to say about the propriety of charging objecting employees for litigation expenses:

The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. Contrary to the view of the Court of Appeals, therefore, unless the Western Airlines bargaining unit is directly concerned, objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

Ellis, 466 U.S. at 453 (emphasis added). Under this standard, ALPA may not charge objecting United pilots for expenses incurred in litigation on behalf of the Continental bargaining unit. The plaintiffs here were not directly concerned by the bankruptcy litigation at Continental. The district court found that the litigation was a "very important part of keeping this union

strong." Tr. Vol.XIII at 15. ALPA failed to show, however, that this litigation benefitted the United bargaining unit in any significant way. No concrete evidence was presented as to how the bankruptcy litigation concerned United employees. The suggestion that challenging one airline might prevent other airlines from declaring bankruptcy amounts to little more than a hypothesis. The argument that the litigation helped to "make the union stronger" is too nebulous to support charging the plaintiffs for those expenses. This argument is analogous to the situation in Ellis, where the union contended that organizing expenses could be properly charged to objecting nonmembers because organizing efforts helped to strengthen the union's overall bargaining position. The Ellis Court observed that § 2, Eleventh of the Railway Labor Act was not intended to be a tool for the expansion of overall union power. Id. at 451. Moreover, the Court found that the free-rider rationale was not aimed at such expenses:

If one accepts that what is good for the union is good for the employees, a proposition petitioners would strenuously deny, then it may be that employees will ultimately ride for free on the union's organizing efforts outside the bargaining unit. But the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee.

Id. at 452. Because ALPA has failed to show that the litigation involving Continental was related to the plaintiffs' bargaining unit, the free-rider rationale does not mandate that plaintiffs share in the costs associated with it.



ALPA argues that Ellis was not intended to express any opinion on how a union should allocate litigation expenses among its various bargaining units. Appellee points out that other courts have read Ellis in a restrictive manner. See Crawford v. Airline Pilots Association International, 870 F.2d 155 (4th Cir. 1989), reh'g en banc granted. At bottom, appellee's argument boils down to a contention that the Supreme Court did not mean what it said in Ellis. We think the Court meant what it said. The Court must be presumed to know the meaning of the term "bargaining unit." The Ellis case makes no exception for litigation that helps the union in a general way or that benefits other bargaining units represented by the union. In order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit. "The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." Ellis, 466 U.S. at 453.

This reading of Ellis is bolstered by the recent Lehnert decision. In an opinion representing the view of four justices, Justice Blackmun concluded in Lehnert that although a union could generally charge dissenters for expenses incurred on behalf of other bargaining units,

"[t]his rationale does not extend . . . to the expenses of litigation that does not concern the dissenting employees' bargaining unit . . . . While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extra-unit litigation to be more akin to lobbying in both kind and effect. We have long recognized the important political and



expressive nature of litigation. [cite omitted] Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. See Ellis, 466 U.S. at 453. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in Ellis determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extra-unit litigation, ibid., we hold that the Amendment proscribes such assessments in the public sector.

Lehnert, 59 U.S.L.W. at 4550. In view of the fact that this section of Justice Blackmun's opinion was not adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation.<sup>4</sup> The Railway Labor Act, however, is consistently construed in order to relieve doubts concerning the statute's constitutionality. See Id. at 4557 (Scalia, J. dissenting in part) ("Street adopted a construction of the Railway Labor Act nowhere suggested in its language, to avoid 'serious doubt of [its] constitutionality.'") In light of the interpretation of the RLA stated in Ellis and the further constitutional problems suggested in Lehnert, we conclude that the RLA does not allow ALPA to charge

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<sup>4</sup> The portion of Justice Blackmun's opinion dealing with extra-unit litigation expenses was joined by Chief Justice Rehnquist and Justices White and Stevens. Additionally, three other justices would have adopted a test for chargeable expenses that required "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." Id. at 4559 (Scalia, J., concurring in part and dissenting in part). As we noted supra at p. 12, ALPA failed to show such a relationship with regard to its litigation expenses outside of the United bargaining unit. Thus, it appears that a majority of the Supreme Court would not allow ALPA to charge these litigation expenses to the plaintiffs.

the plaintiffs for the litigation expenses objected to that arise outside of the plaintiffs' bargaining unit. Such a construction is consistent with Congress' intent in amending the RLA to eliminate the problem of the free rider while at the same time protecting freedom of dissent. See Street, 367 U.S. at 767. As Justice Blackmun recognized, an association for litigation often constitutes the most effective form of political association. Lehnert, 59 U.S.L.W. at 4550 (citing NAACP v. Button, 371 U.S. 415, 411, 93 S.Ct. 308, 9 L.Ed 2d 405 (1963))

On remand the district court should direct the union to redetermine the amount of the agency fee owed by the plaintiffs for the period covered by this suit. The union must exclude from chargeable expenses any litigation expenses that did not concern the United bargaining unit. Expenses relating to the bankruptcy of Continental Airlines must be excluded, as well as any litigation expenses arising from the bankruptcy of any employer other than United. The costs of any litigation associated with the Continental matter, such as the RICO suit against ALPA, should also be excluded because ALPA has failed to show the requisite connection with the United bargaining unit. Under Ellis, the expenses of any other litigation that does not directly concern the United Airlines bargaining unit must also be excluded.

Appellants' next objection relates to the Major Contingency Fund. This large reserve fund was financed by a one percent dues increase imposed on all pilots represented by ALPA. ALPA decided to establish the fund because it believed that its vulnerability to

a prolonged strike significantly weakened its bargaining position with management. Appellants take issue with two features of the Major Contingency Fund. First, they object to ALPA's practice of accumulating agency fees in a "war chest." The district court's findings show, however, that the contingency fund had a direct impact on the union's ability to negotiate a collective bargaining agreement. Based on the court's findings, we agree that the contingency fund is sufficiently germane to collective bargaining and it is fair to require the plaintiffs to bear a portion of the costs of funding it. The fund is available to United pilots in the event of a strike against United. This directly enhances the ability of ALPA to negotiate on the plaintiffs' behalf. The contingency fund was shown to be reasonably employed to effectuate the duties of ALPA in representing the plaintiffs. Cf. Ellis, 466 U.S. at 448.

Plaintiffs' second objection concerning the fund is that it was used for an impermissible purpose because payments were made to flight attendants and others who honored ALPA's strike against United Airlines. Whatever the plaintiffs' beliefs may be regarding the propriety of a strike against their employer, however, the simple fact is that a strike is a conventional practice in the realm of collective bargaining. We cannot say the court erred in determining that such payments were reasonably employed by the union to effectuate its duties as the exclusive representative of the bargaining unit.

In addition to the requirement that expenses be "germane to collective bargaining" in order to be chargeable, Lehnert also indicated that such expenses must be justified by the government's interest in labor peace and avoiding "free riders," and they must not add to the burdening of free speech inherent in the allowance of the agency shop. Because Lehnert was not decided until after the appeal was taken in this case, the district court did not have the benefit of that opinion in making its findings. Inasmuch as the record before us is sufficiently complete and the facts underlying the plaintiffs' claim are undisputed, we have examined the union expenses found to be germane in light of the additional requirements of Lehnert. We find that the expenses at issue here are in fact justified by the government's interest in eliminating the free rider problem. ALPA's negotiation and administrative expenses (as well as those other expenses taken to effectuate its duties as the exclusive bargaining representative) presumably created a benefit to all those represented by ALPA; it is therefore fair to require the plaintiffs to share in those costs. Moreover, these expenses create little additional interference with the First Amendment interests of the plaintiffs beyond that already countenanced by allowing the agency shop arrangement. By an overwhelming margin, the expenses relate to the union's duties of negotiation and administration of collective bargaining contracts rather than to expressive and ideological activities. Clearly, compulsory financial support of a union does not, without more, violate the First Amendment. Lehnert, 59 U.S.L.W. at 4547. We

find no statutory or constitutional barriers to charging the plaintiffs for those expenses shown to be germane to collective bargaining.

C. Procedures.

Appellants next contend that the procedures adopted by ALPA regulating challenges to the agency fee determination were constitutionally inadequate. In Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court held that the Constitution required certain procedural safeguards in connection with an agency shop arrangement between a teachers' union and a school board. The constitutional requirements set forth by the Court included an adequate explanation of the basis for the agency fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending. Hudson, 475 U.S. at 310. In the instant case, the district court found that the procedures established by ALPA met the requirements set forth by the Supreme Court in Hudson.

A threshold issue in this case is whether the Hudson procedures apply to an agency shop agreement between private parties. Both the Hudson case and its predecessor, Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), found that procedural safeguards were required in an agency shop arrangement involving a public employer. The Supreme Court has not expressly stated whether the same procedures would be required under an agency shop arrangement with a private employer.



We find that it is not necessary to resolve the issue in this case because, although we assume Hudson does apply, appellants have not shown they are entitled to any relief beyond that required by the RLA.

There appears to be no challenge to the rebate procedures currently in place at ALPA. Instead, appellants focus on ALPA's procedures in past years. Appellants raise three principal objections concerning past procedures. First, they argue that the rebate reports were not specific enough to allow objections to the calculation of the agency fee. We agree with the district court, however, that the reports met the minimum level of specificity required by Hudson. The Court noted in Hudson that a union "need not provide nonmembers with an exhaustive and detailed list of all of its expenditures," but that adequate disclosure "surely would include the major categories of expenses." Hudson, 475 U.S. at 307, n.18. Although ALPA's initial rebate reports were somewhat sketchy, they outlined the major categories of expenses and gave potential objectors sufficient information to gauge the propriety of the union's fee.

Appellants' second objection relates to the lack of an arbitration procedure in connection with the 1984 rebate. The rebate report for 1984 was not issued until shortly after the Hudson case was decided in 1986. As the Hudson Court made clear, the opportunity for prompt review by an impartial decisionmaker is

a requirement in an agency shop arrangement.<sup>5</sup> Although the union here did not have adequate procedures relating to the 1984 rebate, we do not think Hudson would require the relief requested by appellants. Appellants suggested that the district court order the union to refund all agency fees paid for 1984. In assessing what remedy was appropriate for the union's inadequate procedures, however, the district court first observed that plaintiffs did not request arbitration for 1984 or even when the procedure was available in connection with the 1985 rebate. The court felt that the union's failure to provide arbitration normally would require the court to order the issues to be submitted to arbitration, but found that this would be superfluous under the present circumstances because the issues had already been presented to and ruled on by the court. Although the procedure for challenging the 1984 rebate clearly did not measure up to Hudson, under the circumstances the district court chose a permissible course. The Hudson procedural scheme evidently contemplates that challenges to agency fee determinations will be reviewed initially through an arbitration procedure. Hudson, 475 U.S. at 307 and n.20. It would be redundant at this point, though, to order the matter to be submitted to an arbitrator. Cf. Hudson v. Chicago Teachers Union, 1991 U.S.App. Lexis 214 (7th Cir. Jan. 9, 1991) ("Were we to . . . provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the

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<sup>5</sup> As noted on page 19, *supra*, we assume for purposes of this opinion that the Hudson requirements would apply to the agency shop provision at United.

requirement that an impartial decisionmaker hear the dispute . . . ."). Under the circumstances of this case, including the fact that appellants did not request arbitration, the hearing before the district court was adequate to protect the rights of the plaintiffs. Cf. Gilpin v. American Federation of State, County, and Municipal Employees, 875 F.2d 1310, 1313-15 (7th Cir. 1989) (Plaintiffs must show some harm to recover for inadequate union procedures). To the extent plaintiffs seek a return of agency fees plus interest that were used for purposes not germane to collective bargaining (e.g. for litigation expenses on behalf of Continental employees), that harm will be remedied under the RLA by the recalculation of agency fees by the union when the case is remanded.

Appellants final objection to ALPA's rebate procedures concerns the practice of placing disputed agency fees in an interest bearing escrow account pending determination of the appropriateness of the fee. We find that the district court did not err in determining that the escrow procedure now used by ALPA is adequate under Hudson. The procedure ensures that agency fees will not be used even temporarily for improper purposes. Cf. Hudson, 475 U.S. at 305.

d. Admission of Evidence.

Appellants contend that the district court abused its discretion by excluding certain evidence. The evidence in question indicated that ALPA officials may have believed that some of the plaintiffs were not obligated to pay agency fees. The district

court excluded this evidence on the ground that it sought to inject new issues into the trial in an untimely fashion. Up until shortly before the trial began, plaintiffs' contentions focused primarily on whether the union's expenditures were germane to collective bargaining. A challenge to the obligation of the plaintiffs to pay any agency fees obviously would have changed the issues in dispute quite significantly. The defendant indicated that the inclusion of these issues would require it to call additional witnesses to testify. There is no indication that these issues were included in the pretrial order, although plaintiffs apparently had some awareness of the underlying facts during discovery. The plaintiffs did not seek a continuance or leave to amend the pleadings to allow the inclusion of these issues in the trial. Under the circumstances, the district court's exclusion of this evidence was not an abuse of discretion.

e. Plaintiffs' Section 1983 Claims.

Appellant argues that the district court erred by dismissing their claims brought under 42 U.S.C. § 1983. The basis for the court's decision is not made clear from the record. Nevertheless, we affirm the dismissal because § 1983 applies only to actions taken under color of state law. The authorization for the agency shop at issue here was based on a federal statute, the Railway Labor Act, and § 1983 is therefore inapplicable.

f. Denial of Class Certification.

Appellants next argue that the trial court's refusal to certify this matter as a class action or to allow additional

plaintiffs was reversible error. The district court evidently denied class certification on the ground that the plaintiffs would not adequately represent the class. See Fed.R.Civ.P. 23(a)(4). Appellants do not allege that the district court applied an improper standard in denying certification; we therefore review the court's decision only for an abuse of discretion. Adamson v. Bowen, 855 F.2d 668, 675 (10th Cir. 1988). The district court concluded that the plaintiffs were inadequate representatives because one of the plaintiffs sent out a misleading letter to potential class members. Based on this episode, the court surmised that a conflict of interest existed among potential class members.

The district court clearly had a basis for finding that a potential conflict of interest existed among the class. The burden of showing the adequacy of representation was on the plaintiffs below and appellants have not demonstrated to us that they met this burden. We therefore reject the argument that the district court abused its discretion. See Gilpin v. American Federation of State, County, and Municipal Employees, 875 F.2d 1310, 1313 (7th Cir. 1989). Similarly, appellants have not demonstrated an abuse of discretion in the court's refusal to allow additional plaintiffs to be added to the suit. The court denied the motion to add additional plaintiffs after securing a stipulation from the union that it would treat other objecting nonmembers in the same fashion as the named plaintiffs. Tr.Vol.III at 23.

g. Statute of Limitations.



Finally, appellants contend the district court erred in ruling that their claims arising out of agency fees collected in 1983 were barred by the statute of limitations. The district court applied what it found to be the most analogous statute of limitations under the circumstances--the six month period governing duty of fair representation claims--and held that any challenge concerning the 1983 rebate was barred. Appellants do not quarrel with the selection of this particular statute of limitations; instead they contend that the time for filing suit should have been tolled because ALPA did not notify them until 1986 that they could challenge the amount of the agency fee. We reject this argument. The rebate report in question was issued to the plaintiffs in November of 1984. As of that date the plaintiffs were in possession of the facts underlying a possible claim against the union. Consequently, any claim arising out of the 1983 rebate is barred because the plaintiffs' claim was not brought within six months of receiving the report. See Crawford v. Air Line Pilots Association International, 870 F.2d 155, 159 (4th Cir. 1989), reh'g en banc granted, (The statute of limitations began to run on the date the rebate report was distributed).

#### Conclusion

The district court is reversed insofar as the court allowed the union to charge the plaintiffs for litigation expenses that did not directly concern the United bargaining unit. The matter is

remanded to the district court for further proceedings not inconsistent with this opinion. The district court is affirmed in all other respects.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

## CERTIFICATE OF SERVICE

I hereby certify that on August 2, 1991, I served two copies of the foregoing Supplemental Brief for Appellee by first-class mail, postage prepaid, upon:

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

\_\_\_\_\_  
No. 88-2083  
\_\_\_\_\_

PETER CRAWFORD, et al.,

Appellants,

v.

AIR LINE PILOTS ASSOCIATION,

Appellee.

\_\_\_\_\_  
SUPPLEMENTAL BRIEF AMICUS CURIAE  
OF THE TRANSPORTATION COMMUNICATIONS  
INTERNATIONAL UNION  
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SUPPLEMENTAL BRIEF AMICUS CURIAE  
OF THE TRANSPORTATION COMMUNICATIONS  
INTERNATIONAL UNION

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By the Court's order of June 27, 1990, this case was held in abeyance pending the Supreme Court's decision in Lehnert v. Ferris Faculty Ass'n, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1950 (May 30, 1991). And, by the Court's order of June 21, 1991, parties were directed "to file supplemental briefs addressing the effect of the Supreme Court's decision in Lehnert on this case." This brief amicus curiae responds to the latter order.

The basic question addressed in Lehnert is what classes of union expenditures may be charged to objecting agency fee payers in the public sector. Of particular relevance to the instant case, the Lehnert opinion discusses the extent to which objecting fee payers may be charged for collective bargaining expenditures incurred in bargaining units other than their own. With the consent of the parties, the Transportation Communications International Union (TCU) filed an amicus curiae brief in this case addressed to this issue. By separate motion filed herewith, TCU has requested leave to supplement its previous submission with this brief addressed to Lehnert's effect on the analysis set forth in the earlier TCU amicus curiae brief.

1. The Instant Controversy: The panel decision in this case described as follows the plaintiffs' challenge to the Air Line Pilots Association's classification of certain expenditures as chargeable:

The pilots challenge several specific expenditures that the Association classified as germane to collective

bargaining and therefore not reimbursable to agency fee payers. They maintain that expenditures in 1985, 1986, and 1987, in support of strikes at United Airlines and Continental Airlines, and in preparation for a possible strike at Eastern Airlines, should not be charged to agency fee payers who are not United, Continental, or Eastern employees. They also object to use of their agency fees for the creation and maintenance of a strike reserve fund called the war chest or major contingency fund. The pilots assert that use of agency fees for bargaining expenses outside of the immediate bargaining unit, or airline, for which the fee payer works, violates both the Railway Labor Act and their constitutionally protected free association rights. [870 F.2d at 157.]

The plaintiffs' petition for rehearing similarly described the issue of chargeability as follows:

[D]oes the "union-shop" provision of the RLA--as interpreted by the Supreme Court in Ellis--sanction a labor union's demand that nonunion employees of one airline financially support strikes and other militant union activity at another airline as a condition of continued employment? [Pet. for Rehearing 2-3.]

The plaintiffs acknowledge that objecting fee payers can be charged for the cost of strikes waged against their own employer, but maintain that such fee payers cannot be required to contribute to ALPA's strike expenditures in general:

[The plaintiffs] do not assert that they cannot be charged for "strike preparations" within their own bargaining unit. Under the RLA, unions may lawfully strike a carrier after having first exhausted the major dispute resolution procedures of the Act. Plaintiffs do not believe, however, that they can lawfully be charged for ALPA strikes at other airlines. [Appellants' Supp. Br. 22.]

Thus, the chargeability issue presented on rehearing is whether objecting fee payers can be required to contribute to the pool of resources -- the Major Contingency Fund -- maintained by ALPA for financing such strikes as may occur in any Railway Labor Act bargaining unit and without regard to whether a strike occurred in the objector's bargaining unit during the period in question.

2. The Lehnert Decision: Lehnert holds that a union that uses its income from dues and fees paid by employees in several bargaining units to finance chargeable activities potentially available to all the contributing units "may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities..., even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 111 S.Ct. at 1961.

"The essence of [such] affiliation relationship[s] is the notion that the [union] will bring to bear its often considerable economic, political, and informational resources when the [bargaining unit] is in need of them." Id. Each bargaining unit's "affiliation fee...contributes to the pool of resources potentially available to the [unit]...." Id. The payment into this common pool "is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." Id.

In these circumstances, once an expenditure has been shown to be "germane to collective bargaining[, ]...[n]o greater relationship is necessary" to justify charging objectors for their share. 111 S.Ct. at 1963. This is so, because "general collective bargaining costs," id., are incurred in every bargaining unit, and thus by definition every bargaining unit has the potential to draw on the resources pooled to finance that class of union expenditure. 111 S.Ct. at 1961.

In contrast, however, a union "may not ... charge objecting employees [in one bargaining unit] for a direct donation or an

interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally." For such payments do not have the same hallmarks of necessity and regularity.

3. Lehnert's Lessons For This Case: It is plain that Lehnert's holding mandates a decision upholding the chargeability of ALPA's strike fund. As the plaintiffs themselves recognize, Appellants Supp. Br. 22, under the Railway Labor Act, strike expenses are part of "general collective bargaining costs." 111 S.Ct. at 1963. And, as the Supreme Court recently noted, "Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement." Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 452 (1987), quoting Chicago & North Western R. Co. v. Transportation Union, 402 U.S. 570, 597 (1971) (Brennan, J., dissenting). In other words, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system...." NLRB v. Insurance Agents, 361 U.S. 477, 489 (1960).

The costs of supporting strikes in various bargaining units, and of maintaining a fund to support such strikes are precisely the costs of keeping "economic weapons in reserve, and [of] their actual exercise on occasion...." NLRB v. Insurance Agents, supra, 361 U.S. at 489. That being so, as the Lehnert opinion notes, it is common for labor unions to finance such costs through a "unified-membership structure," 111 S.Ct. at 1961, in which



various units join together to contribute to a common pool from which each may draw in time of need.

As we demonstrated in our initial brief, "contribut[ing] to [a] pool of resources...for the bargaining unit's protection," 111 S.Ct. at 1961, is a rational and prudent method for financing union representation and one commonly used in various segments of our society to achieve economies of scale and to insure against catastrophic costs. TCU Amicus Br. 6-12. As we also demonstrated, this method is particularly appropriate for financing strikes. Id. at 8-11. Strikes often entail great expense, going beyond the immediate financial resources of the employees on strike. Moreover, strikes occur only intermittently and often unpredictably, making it difficult for a single unit to amass the necessary resources over time. Indeed, it was the desire to create a sufficient pool of resources to finance strikes that led to the formation of national unions in this country. Id. at 17 n. 14.

For just such reasons, the Tenth Circuit recently held that objecting fee payers can be required to contribute to ALPA's Major Contingency Fund--the pool of strike resources challenged by the plaintiffs in the instant case. Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass'n, \_\_\_ F.2d \_\_\_, (10th Cir. No. 89-1053, July 11, 1991). The Tenth Circuit recognized that "ALPA decided to establish the fund because it believed that its vulnerability to a prolonged strike significantly weakened its bargaining position with management." Slip op. 15-16. That court agreed with the district court's conclusion "that the contingency fund had a direct impact on the union's ability to negotiate a collective bargaining

agreement." *Id.* at 16. The Tenth Circuit recognized, too, that the plaintiffs in that case could be required to contribute to the fund in years when there was no strike against their employer, United Airlines, because "[t]he fund is available to United pilots in the event of a strike against United." *Id.*<sup>1</sup>

3. The plaintiffs maintain that since Lehnert was decided under the Constitution and not under the RLA, this Court is free to disregard the Lehnert majority opinion and to adopt Justice Scalia's concurring and dissenting opinion instead. Appellants' Supp. Br. 17. This argument is trebly flawed.

First, and in our view dispositively, the Lehnert majority based its constitutional rulings in large part on RLA precedents. The majority opinion begins its discussion of whether the collective bargaining costs charged to an objector must have been incurred in the objectors bargaining unit by considering the "germane to collective bargaining" test developed in the RLA cases from Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956), through Ellis v. Railway Clerks, 466 U.S. 435 (1984). 111 S.Ct. at 1961. With respect to the RLA standard of chargeability, the Lehnert Court states, "we have never interpreted that test to require a direct relationship between the expense at issue and some

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<sup>1</sup> The trial in PAID took place before the Supreme Court definitively resolved the question of unit-specific accounting in Lehnert. Thus, out of what turned out to be an excess of caution, in PAID the union-defendant presented "evidence...that a contract negotiated on behalf of one ALPA unit is subsequently used as a bargaining tool for another unit." Slip op. 9-10. Under both the majority and the dissenting opinions in Lehnert, this showing is unnecessary. Rather, as the Tenth Circuit noted, what the union need show is that "[t]he fund is available to [dissenting] pilots in the event of a strike against [their employer]." Slip 16. See Lehnert v. Ferris Faculty Ass'n, *supra*, 111 S.Ct. at 1962-63.

tangible benefit to the dissenters' bargaining unit." Id. And the Court cites Ellis as a precedent for not requiring a direct relationship between an expenditure and the dissenter's bargaining unit. Id.

Thus, the difference the plaintiffs note between Lehnert's legal setting and this case's does not serve to distinguish that case from the instant one. That being so, the plaintiffs' unprincipled suggestion that this Court follow the minority position in Lehnert rather than the Lehnert Court's position fails on its own terms.

Second, the plaintiffs point to nothing in the language or the legislative history of the RLA to suggest that the statutory test for what is chargeable to objectors is any stricter than the constitutional test when it comes to showing some relationship to the bargaining unit. In fact, as we have shown at some length, the structure and legislative history of the RLA led to the conclusion that Congress intended to facilitate the sort of cost-sharing arrangements sanctioned in Lehnert. TCU Amicus Br. 22-28.

Third, the plaintiffs are wrong in their suggestion that there is a relevant difference for this case between the Court's opinion in Lehnert and Justice Scalia's concurring and dissenting opinion. In fact, Justice Scalia's opinion expressly agrees with the Court's opinion that unions may allocate chargeable collective bargaining costs across bargaining units. In this regard, Justice Scalia stated:

Another item relating to affiliated organizations that the Court allows to be charged consists of a pro rata assessment of NEA's costs in providing collective-bargaining services (such as negotiating advice, economic

analysis, and informational assistance) to its affiliates nationwide, and in maintaining the support staff necessary for that purpose. It would obviously be appropriate to charge the cost of such services actually provided to Ferris itself, since they relate directly to performance of the union's collective-bargaining duty. It would also be appropriate to charge to nonunion members an annual fee charged by NEA in exchange for contractually promised availability of such services from NEA on demand. As Ferris conceded at argument, however, there is no such contractual commitment here. The Court nonetheless permits the charges to be made, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them." Ante, at 13. I think that resolution is correct. I see no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage. If and when it becomes predictable that requested assistance from the NEA will not be forthcoming, the nonunion members would presumably have cause to object to the charges, just as they would have cause to object if written contracts for the services would predictably not be honored. [111 S.Ct. at 1980-81 (Scalia, J., concurring in part, dissenting in part) (footnote omitted; emphasis added).]

See also id. at 1982 (Kennedy, J., concurring in part, dissenting in part).

As Justice Scalia explains, while the Lehnert Court concludes that "chargeability does not require 'a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit,'" it is his position that it is necessary to show "a tangible benefit relating to the union's performance of its representational duties." 111 S.Ct. at 1981. But Justice Scalia then goes on to state that "it is a tangible benefit...to have expert consulting services on call, even in the years when they are not used." Id. at 1981; emphasis added. It is patent that it is equally a "tangible benefit" to have strike support services "on call". And there is not even a suggestion in this case that ALPA's



collective bargaining resources, including its capacity to finance strike activities, are not fully available to the plaintiffs' bargaining unit.<sup>2</sup>

Thus, while we do not minimize the importance of this difference in general approach between the Lehnert Court's opinion and Justice Scalia's opinion for other purposes, for present purposes all nine Justices reached the conclusion that the class of expenditure at issue here is chargeable across unit lines.

4. The Special Case of Litigation Expenses: While disavowing Justice Blackmun's Lehnert opinion insofar as it is an opinion for the Court, the plaintiffs rely on his opinion to assert that "[t]he Lehnert decision reiterates the holding of Ellis that objecting employees may not be charged for litigation costs of other

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<sup>2</sup> The union in Lehnert was forbidden by state law from striking in support of its bargaining demands. 111 S.Ct. at 1965. Both the Lehnert majority, id., and the dissent, id. at 1981, therefore, agreed that objecting nonmembers could not be required to support an illegal strike. The Lehnert Court, however, allowed the union to charge objectors for the costs of preparing for such a strike, because Justice Scalia would only allow unions to charge objectors for expenditures within the scope of their statutory duty of representation and because strike preparation was legal and arguably advanced the union's position in negotiations. Id. at 1965. In contrast, because the strike weapon was not an integral part of the state collective bargaining system in Lehnert, Justice Scalia would not have allowed the union to charge for strike preparation. Id. at 1981.

In contrast to the state system in Lehnert, the RLA proceeds on the premise that strikes are an integral part of the collective bargaining system and that unions are under a duty to represent the interests of nonmembers in conducting a strike. See Airline Pilots Ass'n v. O'Neill, \_\_ U.S. \_\_, 111 S.Ct. 1127 (1991). Thus, even Justice Scalia's standard for chargeability would allow objecting nonmembers covered by the RLA to be charged their share of strike expenses. And, it follows a fortiori that the Lehnert majority would allow such charges. Indeed, the plaintiffs recognize as much, and maintain only that objectors may not be required to contribute to the pool of resources used for conducting strikes in other bargaining units.



bargaining units." Appellants' Supp. Br. 22. The plaintiffs' argument in this regard overreads Justice Blackmun's Lehnert opinion and disregards the limited reach of Ellis' discussion of litigation expenses.

(a) In Lehnert, Justice Blackmun, writing for himself and three other Justices, did state that it is unconstitutional to charge for "the expenses of litigation that does not concern the dissenting employees' bargaining unit...." 111 S.Ct. at 1963. In so doing, Justice Blackmun distinguished litigation expenses from other chargeable union expenses -- which, as we have seen, do not have to be broken down by bargaining unit -- on two grounds: "the important political and expressive nature of litigation;" and the fact that "union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination." Id.

For the reasons we develop now, there can be no doubt that Justice Blackmun's Lehnert opinion is intended to mean that "general litigation" can only be charged on a unit-by-unit basis. His intent is less clear, however, with regard to litigation to compel arbitration or to defend the union's interpretation of a collective bargaining agreement; viz., with regard to litigation that is an integral part of the collective bargaining process and that does not cover "a diverse range of areas" and does not have an "important political or expressive nature." But we believe that Justice Blackmun addressed only "general litigation" and leaves the status of collective bargaining litigation to be determined in future cases.

(b) Justice Blackmun rests his position in Lehnert on the

relevant portion of the Court's earlier Ellis opinion. See 111 S.Ct. at 1964 citing and discussing 466 U.S. at 456. And Ellis addressed only whether "general litigation," 466 U.S. at 441 -- in the words of the Ninth Circuit there, litigation that "did not pertain to any specific collective bargaining agreement or grievance," 685 F.2d at 1073 -- may be charged to objectors. The Ellis Court held, with respect to such "general litigation," that the union must show that "the Western Airlines bargaining unit is directly concerned." 466 U.S. at 453.<sup>3</sup>

Thus, the critical point for present purposes, as Justice Kennedy pointed out in his Lehnert concurrence, is that Ellis "contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative,' 466 U.S., at 453, through a cost sharing arrangement...." 111 S.Ct. at 1982; emphasis added. It follows that Justice Blackmun's discussion of litigation as a special case does not govern with regard to collective bargaining litigation and that the status of such litigation remains to be established through the application of Lehnert's general test. That test is as follows:

[C]hargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the

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<sup>3</sup> The parties to the Ellis case referred to the unit-by-unit accounting issue as "The 'Western Airlines' Limitation." Br. for Respondents 40-41. See also Br. for Petitioners 15. The Court picked up this usage in its opinion, describing the petitioners' claim as that they could "be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances with Western Airlines." 466 U.S. at 439. Where the Court accepted this argument, i.e., with respect to "general litigation," it expressly imposed a "Western Airlines" limitation. Id. at 453.

government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. [111 S.Ct. at 1959.]

Under this test, a union clearly may charge for litigation that is directly related to enforcing or implementing collective bargaining agreements or that arises directly out of the union's role as an exclusive representative in collective bargaining.<sup>4</sup>

(c). As we have noted, common examples of litigation related to contract enforcement or the union's role as exclusive representative are suits to enforce the collective bargaining agreement and the defense of suits challenging the union's administration of the agreement.

In terms of the first prong of the Lehnert test, such litigation is obviously germane to collective bargaining. Collective bargaining is not an end in itself. The process is meant to result in legally enforceable contractual obligations. See H.J. Heinz Co. v. Labor Board, 311 U.S. 514, 524-526 (1941). Indeed, one of the Railway Labor Act's stated goals is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. §151a(5). And to this end, the statute imposes a judicially enforceable obligation to establish and abide by contractual arbitration procedures. Machinists v. Central

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<sup>4</sup> While not directly at issue here, it is our position, too, that a union may charge for litigation that is directly related to maintaining its corporate or associational existence as the collective bargaining representative.

Airlines, 372 U.S. 682, 690-691 (1963). See also 29 U.S.C. § 185.

With respect to the second prong, the Supreme Court has expressly recognized that the government's interest in labor peace is furthered both by the judicial enforcement of the collective bargaining agreement, Groves v. Ring Screw Works, \_\_\_ U.S. \_\_\_, 111 S.Ct. 498, 502-503 (1990), and by the prompt resolution of employee challenges to union contract administration, DelCostello v. Teamsters, 462 U.S. 151, 170-171 (1983). The Supreme Court has extolled the "therapeutic values" of labor arbitration for the maintenance of labor peace, Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960), but that therapy only works if an arbitration award that an employer refuses to obey is enforceable in court rather than forcing the union to strike to secure compliance. For the same reason, where arbitration is not available, the Supreme Court has discerned in the federal labor statutes a "strong federal policy favoring judicial enforcement of collective bargaining agreements." Groves v. Ring Screw Works, *supra*, 111 S.Ct. at 502. In addition, the anti-free-riding rationale upon which RLA §2, Eleventh is based, applies to the union's cost in enforcing the collective bargaining agreement through litigation or of defending its administration of the contract to precisely the same extent as that rationale applies to enforcing the agreement through grievance handling.

Finally, requiring an objector to pay his share of a suit to enforce a collective bargaining agreement in another bargaining unit has no more of an impact on his First Amendment rights than the requirement that he pay his share of the union's cost in



negotiating the agreement or in taking a position on its meaning in the grievance procedure. See 111 S.Ct. at 1982 (Kennedy, J.) ("I discern no additional burden on free speech from such an arrangement [for allocating litigation costs across bargaining units], so long as the litigation is undertaken in the course of the union's duties as exclusive bargaining representative."). The communicative content of such suits is of a single piece with that underlying negotiations or contract administration.<sup>5</sup>

(d) In any event, even if Justice Blackmun's Lehnert discussion of litigation as a special case was intended to cover all litigation that does not end the matter. For, as we have noted, that paragraph of his opinion commanded the vote of only four Justices. Justice Marshall would have allowed all employment-related litigation to be financed on a cross-unit basis. 111 S.Ct. at 1972-1975. And Justice Kennedy specified that he would allow

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<sup>5</sup> The same analysis justifies charging objectors for the costs of litigation that arises as an incident of the general operation of the union. In Ellis, the Court recognized that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence...." 466 U.S. at 449. Defending, and occasionally filing, lawsuits is a normal cost of "maintain[ing] [the union's] corporate or associational existence...." For example, to carry out its representational functions the union must purchase a certain amount of property and employ a certain number of people, and as a property owner and employer the union will incur the normal run of tort and contract suits that befall other large enterprises in this society. To the same extent that purchasing necessary equipment and employing necessary personnel is chargeable, the cost of contract suits over the purchases and employment litigation brought by union employees is chargeable. As Ellis holds, such expenditures are germane to collective bargaining, and, since they are necessary "if the union is to perform its statutory functions," 466 U.S. at 449, such expenditures entail both the governmental interest in labor peace and the free rider rationale. Finally, as with contract enforcement and DFR defense, the Union's litigation position will be no more controversial than its underlying actions.



collective bargaining-related litigation to be financed on a cross-unit basis, 111 S.Ct. at 1982. Justice Scalia, in his opinion joined by the Chief Justice and Justices O'Connor and Kennedy, did not speak to the issue of litigation, but did state that chargeable expenditures need not be broken down by bargaining unit. 111 S.Ct. at 1980-1981. In this regard, as Justice Kennedy notes, requiring collective bargaining related litigation to be broken down by bargaining unit "makes little sense if we acknowledge, as Justice Scalia articulates, [111 S.Ct.] at 1980-81, that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncontractual ... legal services plan." 111 S.Ct. at 1982.

The fair reading of the Marshall, Kennedy and Scalia Lehnert opinion, then, is that collective bargaining-related litigation is chargeable on a cross-unit basis.

(e) So that there can be no mistaking our position, the foregoing discussion rests on the distinction between "seeking to further political and ideological goals through ... litigation," In re Primus, 436 U.S. 412, 414 (1978), and "litigation [as] ... a technique of resolving private differences." Id. at 428, quoting NAACP v. Button, 371 U.S. 415, 429 (1963). We expressly acknowledge that general litigation -- viz., litigation of an "important political and expressive nature," Lehnert, supra, 111 S.Ct. at 1963 (Blackmun, J.) -- may be charged to an objector only if the union can show a direct relationship to employment conditions in the objector's bargaining unit. At the same time, we

submit that litigation that serves only as "a technique of resolving private differences" arising out of the collective bargaining agreement or the union's activities as collective bargaining representative are chargeable on the same basis as other ordinary collective bargaining costs, which is to say that this sort of litigation can be charged across bargaining unit lines and does not have to be broken down unit-by-unit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on Friday, August 2, 1991, I served the attached supplemental brief of the Transportation Communications International Union on the following counsel by prepaid first class mail:

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## Additional questions for Marsha Berzon from Senator Sessions

1. Please describe and explain any positions you have taken that would preclude federal courts from exercising jurisdiction over employee claims that their union has violated its duty of fair representation. If the National Labor Relations Board were to have exclusive jurisdiction in this regard given the NLRB's action or inaction in promptly resolving these cases, how do you think employees would fare in having their claims heard?

(a) I can recall only one occasion on which I presented on behalf of a client an argument that the National Labor Relations Board, not the federal courts, should have jurisdiction over a particular kind of employee claim of violation of the duty of fair representation. Breininger v. Sheet Metal Workers International Union, 493 U.S. 67 (1989). (I was co-author of the brief for the Sheet Metal Workers). The Supreme Court had previously held that duty of fair representation cases concerning grievance, arbitration, and collective bargaining can go forward in federal court even if the same suit could also be heard by the National Labor Relations Board. Vaca v. Sipes, 386 U.S. 171 (1967). A threshold question in Breininger was whether the Vaca rule applies to fair representation cases arising from the operation of a union hiring hall. We argued on behalf of our client in support of the court of appeals' holding that Vaca does not apply to hiring hall disputes.

The argument was based on then-recent Supreme Court law disfavoring the implication of private judicial causes of action. Actions for breach of the duty of fair representation are not provided for in any statute. The position we presented for our clients was that the Court should not extend a purely implied cause of action any further, because the reasons given in Vaca for implying such a judicial cause of action for certain kinds of breaches of the duty of fair representation do not apply to hiring hall disputes. The Supreme Court did not accept the argument, and extended the implied judicial cause of action for breach of the duty of fair representation delineated in Vaca to cover hiring hall duty of fair representation disputes. (The Court did accept a separate aspect of our argument in Breininger.)

I note that I have answered this question and the others in this set on the assumption that they are requesting positions I have taken as an advocate for clients. As a judge, my role would be entirely different from my role as an advocate. If confirmed, my task would be to consider the factual and legal arguments of advocates for both sides, and then come to a neutral, balanced conclusion on the basis of the facts, precedents, statutes, and constitutional provisions if any. In doing so, I would expect, as many lawyers have done on becoming judges, to reject many positions I have advocated on behalf of clients.

(b) The National Labor Relations Board is much too slow in deciding all manner of cases pending before it, including cases concerning the breach of the duty of fair representation. Employees, unions, and employers are all seriously disserved when cases are not resolved for

years, often making it impossible as a practical matter to restore the status quo or provide an effective remedy if it is determined that an unfair labor practice has indeed occurred.

It is therefore often useful for employees alleging breaches of the duty of fair representation to have a federal court forum available. At the same time, litigation before the NLRB is often advantageous for employees alleging breaches of the duty of fair representation, because the Board's General Counsel provides free, expert representation if he decides that the case is potentially meritorious.

**2. The National Labor Relations Act guarantees workers the right to organize or to refrain from union organization. What are your views on the parameters of this right of employees to refrain from union activities?**

Section 7 of the National Labor Relations Act protects the right of employees to refrain from union activities. Section §8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees who exercise that right. There is a proviso to §8(b)(1)(A) regarding certain union rules concerning membership in the union.

Sections 7 and 8(b)(1)(A) clearly protect nonunion employees from any coercion to engage in union activity. The more difficult legal issues have involved employees who are or were union members, where the issue concerns union-imposed discipline for violation of union rules.

The Supreme Court has delineated the important rights of union members or former union members to refrain from union activity protected by §§ 7 and 8(b)(1)(A) in a series of decisions. Under those decisions, unions may set rules of conduct for union members, as long as those rules do not violate any federal labor policy, and may fine members for violations of those rules. NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967); Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Boeing Co., 412 U.S. 67 (1973). Unions may not, however, fine former members (i.e., those who have resigned) for not obeying union rules (including a rule against crossing a picket line). NLRB v. Textile Workers, 409 U.S. 213 (1972); Machinists & Aerospace Workers v. NLRB, 412 U.S. 84 (1973) (*per curiam*). Nor may unions place limitations on members' right to resign from a union during a strike. Pattern Makers' League of North America v. NLRB, 473 U.S. 95 (1985). Finally, unions violate the right to refrain from union activity if they require members to exhaust internal union remedies before filing suit. NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

**a. Please list and provide copies of positions you have taken with respect to the rights of employees vis-a-vis their labor organization.**

Consistent with the main part of this question, I understand this request to be for copies of positions I have taken on behalf of clients concerning the rights of employees to refrain from union activity. The only issue concerning the right to refrain from union activity on which I



have filed briefs involved the right to resign from a union during a strike. I am attaching the briefs in the Supreme Court in Pattern Makers League of North American v. NLRB, 473 U.S. 95 (1985), setting forth the advocacy position I presented on that issue..

As noted above, my role as a judge would be entirely different from my role as an advocate. If confirmed, my task would be to consider the factual and legal arguments of advocates for both sides, and then come to a neutral, balanced conclusion on the basis of the facts, precedents, statutes, and constitutional provisions if any. In doing so, I would expect, as many lawyers have done on becoming judges, to reject many positions I have advocated on behalf of clients.

**3. You have an extensive record of representing the AFL-CIO-CIO and other labor organizations. Have you ever represented any employees in actions taken against a union? If so, please provide copies and describe these representations.**

I represented employees in a case against a union in Fry v. Bingle, No. 84-1999 (N.D. Cal.). Together with co-counsel, I represented six employees suing their union, the International Typographical Union (ITU), and officers of the Union. The position we advanced on behalf of our clients was that they had been denied their equal rights to vote in a union election and participate in union decisions in violation of §101 of Title I of the Landrum-Griffin Act. The district court issued an injunction against the union. I am forwarding a copy of the primary pleading we filed for our client in the case, a Memorandum of Points and Authorities in Support of Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction.

Other than Fry, I cannot recall a situation in which a client sought to retain me in a case against a union. I have, however, represented many individual employees, both in litigation and in nonlitigation disputes, where no union was a party. I have, for example, represented individual employee plaintiffs as well as defendants in Title VII litigation. In that connection, I have on two occasions represented individuals in unionized companies, arguing on their behalf that their unions may not control their access to employment discrimination remedies, and that they may go forward with their cases in court whether or not their union presses a grievance or arbitrates on their behalf. See Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), cert. denied 118 S. Ct. 295 (1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir.), cert. denied 117 S. Ct. 436 (1996). Additionally, I have represented the California Public Employment Relations Board, presenting positions on behalf of the State that differed from those of a union that was also a party, and I have represented the State of Hawaii in cases in which there was no union party. In short, while I have represented many unions in labor and employment cases, I have represented other clients in this area of the law as well.

No. 83-1894

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

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PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO,  
AND ITS ROCKFORD AND БЕЛОIT ASSOCIATIONS,  
v. *Petitioners,*

NATIONAL LABOR RELATIONS BOARD  
and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,  
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

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**REPLY BRIEF FOR PETITIONERS**

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. The National Labor Relations Board begins its argument by correctly stating that it is the policy of the Labor Mangement Relations Act of 1947 ("LMRA") to protect "the exercise by workers of full freedom of association." NLRB Br. at 12, quoting LMRA § 1, 29 U.S.C. § 151. The Board *assumes* that "full freedom of association" means that an individual is free to terminate his membership in an organization whenever and however the individual chooses and without regard to the rules of the organization. This fallacious assumption is the distorted lens through which the Board reads the language



of the statute, the legislative history, and this Court's precedents. Accordingly, we begin by demonstrating the error of this underlying assumption.

Subject to limitations not relevant here, freedom of association most certainly includes the right of each individual to determine for himself which organizations he will seek to join. But that freedom is a richer and more complex concept than the Board allows. Freedom of association also includes the right of members of an organization, again subject to conditions not immediately relevant, to establish their own rules of membership and to require individuals who seek to join the organization to accept and abide by those rules until the group decides to change the rules. As the Court stated in *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981), in the political context, the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.* at 122. The Court added:

A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.<sup>26</sup>

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<sup>26</sup> Cf. *Ripon Society, Inc. v. National Republican Party*, 173 U.S. App. D.C. 350, 368, 525 F.2d 567, 585 (en banc) ("[a] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution . . .") (emphasis of the court), *cert. denied*, 424 U.S. 933.

[450 U.S. at 124 & n.26.]

The point is not that union membership rules of the kind at issue here are beyond Congress' power to regulate but rather that the Board errs in proceeding on the assumption that the policy of "full freedom of association" stated in § 1 of the LMRA implies a congressional decision to permit employees to join unions on an "at-will" basis even though the union members have established



limitations on the time and circumstances under which an individual who chooses to join the union may resign his membership. To the contrary, the policy favoring associational freedom is better read to mean that Congress intended to protect the right of union members to make and enforce rules binding on all who voluntarily join the organization, including rules governing resignations.<sup>1</sup>

2. The Board attempts to buttress its misconceived view of the "full freedom of association" by asserting that "rules restricting the right to resign from voluntary associations were generally unknown in the common law." NLRB Br. at 19 n.9.<sup>2</sup> If by that the Board means simply that, in general, private associations have not *chosen* to adopt rules restricting the right to resign and that therefore members generally are free to resign at will, the Board may well be correct. But if the Board intends to imply that where the members of an organization adopt a rule regulating resignation that rule would not be enforceable at common law, the Board is simply wrong; as we showed in our opening brief, the common law rule—applied in the numerous cases we cited at pp. 35-37 of our brief—is that "[w]here the rules of an association provide for the withdrawal of members, there can be no withdrawal except in the matter and on the conditions prescribed." Petr. Br. at 35, *quoting* 7 C.J.S. *Associations* § 22. Thus, the common law of membership associa-

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<sup>1</sup> The Board "do[es] not challenge . . . that the disciplined employees voluntarily joined the union in the first instance." NLRB Br. at 17-18.

<sup>2</sup> In support of that statement the Board cites Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930). The Board does not illuminate its citation with any indication as to what within that article the Board believes supports its assertion, and our reading of the article discloses no discussion that in any way speaks to, much less supports, the Board's statement.

tions supports our view—and not the Board's view—of the meaning of associational freedom.<sup>3</sup>

3. The Board's attempt to ascribe to the decisions in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967),

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<sup>3</sup> The Board asserts that the cases we cited in our opening brief applying the common-law rule "are far removed from the union-member relationship." NLRB Br. at 30-31 n.20. But of course our point in citing those cases was to illustrate the *general* rule pertaining to associations, and the Board does not deny that the cases we cited support the statement of black-letter law set forth in text. The Board is thus reduced to arguing that the rule that applied to every other type of membership association did not apply to unions. See NLRB Br. at 29-30 & n.10.

None of the cases the Board cites supports that peculiar proposition. Those cases did not involve a union attempt to enforce a restriction on resignations and so far as can be determined from the opinions, the unions in those cases did not even have a resignation rule. Indeed, in the first case the Board cites, which was decided after the enactment of the LMRA, the court noted that "the Union itself recognized a right to resign," and stated:

We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with respect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the proviso is inapplicable. [*Communication Workers v. NLRB*, 215 F.2d 835, 837 n.5, 838 (2d Cir. 1954).]

Thus, neither *Communication Workers* nor the other cases the Board cites stands for the proposition "that, at the time Congress acted, it was generally understood that . . . members were free to resign at will," NLRB Br. at 29, and the dictum in those cases concerning the freedom of members to resign simply reflect the common-law rule that in the *absence* of a resignation restriction members of a voluntary association are free to resign at will.

The Board also cites in this context *Developments in the Law—Judicial Control of Private Associations*, 76 Harv. L. Rev. 983 (1963). The Board prefaces the citation with the words "see generally"; we have done so and we can find nothing in that Note of relevance to the subject of resignations from unions or other membership associations.

and its progeny the "basic premise that Section 8(b)(1)(A) permits union discipline only over those who voluntarily are then union members," NLRB Br. 15, is equally flawed.

We agree, *see* Petr. Br. 16-17 & n.4, that this Court's decisions establish that union rules are binding only on, and enforceable in court only against, employees who choose to become full union members. But that is because, as the Court has explained, "the power of the union over the member is certainly no greater than the union-member contract." *NLRB v. Textile Workers*, 409 U.S. 213, 217 (1972). In this case, however, the Board is contending that the union's power is *lesser* than the union-member contract—that a critical aspect of that contract, the provision regulating resignations, is unenforceable as a matter of federal law. That proposition hardly follows from the prior holdings confining the union's disciplinary power to the union-member contract. Thus, the fact that union rules are unenforceable against persons who do not choose to become full union members tells us nothing about the extent to which union rules limiting resignation are enforceable against those who do choose to do so.

It is also true that in each case in which this Court has upheld union discipline the union in question had not adopted a rule limiting resignation, and the Court has recognized that where an employee "may leave the union" and has "chosen to become and remain [a] union member," *Scofield v. NLRB*, 394 U.S. 423, 235 (1969), his claim that union discipline is coercive and hence violative of § 8(b)(1)(A) is particularly weak. But that recognition falls well short of an endorsement of the proposition that full union members have an absolute freedom to leave the union however and whenever they desire.

Indeed, in those cases in which the Court has held union discipline of a former member *unlawful*, the Court has relied on the fact that the unions there did *not* have



any regulation governing resignations to prove that the member's resignation ended the contractual relationship between the union and the member and hence ended the union's power to enforce the contract. For example, the Court in *Textile Workers* reasoned as follows:

The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street. [409 U.S. at 217].

Thus, the predicate for the holding in *Textile Workers* was the absence of a rule governing resignations.<sup>4</sup> And the lesson to be drawn from *Textile Workers* and the other cases is that the enforcement of a union rule, through legal procedures, as against one who assented to the rule by voluntarily joining the union generally is not unlawful.

4. The Court has recognized one exception to the general rule permitting unions to enforce the union-member contract: enforcement is not permitted if a particular union rule "frustrates an overriding policy of the labor

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<sup>4</sup> This is clear in the very sentence of *Textile Workers* which the Board quotes in part in concluding its discussion of this Court's decisions. See NLRB Br. at 16-17. The Board's partial quotation attributes to the Court the following conclusion: "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May . . ." *Id.* In fact, however, what the Court actually said is that "*where, as here, there are no restraints on the resignation of members, we conclude that the vitality of § 7 requires . . .*" 409 U.S. at 217 (emphasis added). That sentence read in full leaves no doubt that, at the very least, this Court's decisions do not rest on the premise that the precondition for lawful union discipline is that the disciplined member is free to resign at will.

laws." *Scotfield*, 394 U.S. at 429. The Board argues that a rule restricting resignations does "frustrate" federal labor policy, and the Board points to two sources within the LMRA (aside from § 1 discussed above) which it is said embody a policy allowing union members to resign at will. Neither source provides sustenance to the Board.

(a) The Board first relies on the LMRA provisions respecting union security agreements, *i.e.*, the congressional decision to ban collective bargaining agreements which require employees to become full union members as a condition of employment and to permit only those union security agreements which condition employment on the payment of union dues. See NLRB Br. at 21-24. The Board finds in that congressional decision "a clear policy choice in favor of voluntary unionism." *Id.* at 23. But the Board wholly misunderstands the nature of the policy that Congress in fact adopted.<sup>6</sup>

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<sup>6</sup> In connection with the *Scotfield* qualification quoted in text the Board observes that "a union constitution is best conceptualized as a contract of adhesion." NLRB Br. at 19 n.9. While the relevance of the observation is not immediately apparent to us, we nonetheless hasten to point out that the suggested "conceptualiz[ation]" is in any event unsound. Unlike a contract of adhesion, the terms of a union constitution are determined by the *members* acting through democratic processes, and the terms can likewise be changed by the members if the majority so desires. See *Allis-Chalmers*, 388 U.S. at 190-91 & n.27. Because that is so, no court has declined to enforce a provision of a union constitution on the theory the Board here propounds, and this Court has not only sustained union constitutions but also has deferred to the union's construction of its constitution. See *Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).

<sup>6</sup> The Board also gravely overstates the degree to which the union rule at issue here deprived union members of the freedom to leave the union. The rule at issue here prohibits resignations only "during a strike or lockout, or at a time when a strike or lockout appears imminent." Moreover, that rule—which was adopted by the vote of the members—was enacted ten months before a strike began, and any individual who was dissatisfied with the rule was free to resign during that interval.



The point of §§ 8(a) (3) & (b) (2), as this Court has explained, is to “prevent[] the union from inducing the employer to use the emoluments of the job to enforce the unions’ rules.” *Scofield*, 394 U.S. at 429. Congress understood—as the Board now does not—that there is a world of difference between union actions enforceable against all employees through sanctions applied by the employer (including loss of employment), and union actions that do not affect job rights, enforceable only through internal union proceedings or the courts and enforceable only against those who choose to become full union members. Congress concluded that only the former threatens “voluntary unionism” and Congress acted to secure such voluntarism by barring employment-related sanctions.

There is not one word in the legislative history to suggest that Congress viewed union enforcement of its own rules, including rules restricting resignations, as inconsistent with “voluntary unionism” or that Congress acted to interfere with such enforcement.<sup>7</sup> To the contrary, the legislative history shows that “Congress intended to distinguish between the external and internal enforcement of union rule.” *NLRB v. Boeing Co.*, 412 U.S. 67, 73 (1972). As Senator Taft explained, in discussing § 8(b) (2):

*The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a*

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<sup>7</sup> We note that Senator Ball’s floor statement on which the Board places particular reliance, NLRB Br. at 23, not only fails to support the Agency’s position but is, in any event, without authority, because it was made to explain Senator Ball’s extreme amendment, opposed by Senator Taft and rejected by the Senate on a vote of 21 yeas and 57 nays, to abolish the union shop. See 2 Legislative History of the Labor Management Relations Act of 1947 (GPO) 1418-1420; *id.* at 1420 (Senator Taft); *id.* at 1427-1428 (recording the vote on the Ball Amendment).

member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion. [2 Leg. Hist. 1097].

Thus the Board is correct in viewing the legislative history of §§ 8(a) (3) & (b) (2) as relevant here, but the Board has the lesson of that history exactly wrong; the true lesson is the one this Court drew in *Allis-Chalmers*:

Congressional emphasis that § 8(b) (2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8(b) (1) (A) as contemplating regulation of internal discipline. [388 U.S. at 185]

(b) (i) The Board also attempts to find a right of a union member to resign at will in the conjunction of the LMRA's addition to § 7 of a "right to refrain" from engaging in concerted activities and the enactment at the same time of § 8(b) (1) (A)'s proscription on union "restrain[t] or coerc[ion]" on employees exercising § 7 rights. The Board states that read together these provisions were "intended to insure that employees, including union members, would be protected against union restraint or coercion in any decision to refrain from union or other concerted activity, including a strike." NLRB Br. at 25. The Board's statement is, in terms, unobjectionable, but that statement begs the critical questions: what do "refrain" and "restrain or coerce" mean?

The Board apparently believes that Congress intended those terms to be defined so as to leave those who choose to become full union members free from union discipline for violating a union rule requiring the member's participation in "union or other concerted activity." But the decisions in *Allis-Chalmers*, *Scofield*, and *Boeing* establish that the Board's belief is mistaken. Those decisions teach that disciplining a union member, through legal processes, for

breaching a rule requiring participation in a concerted activity does not "restrain or coerce" the individual in the exercise of his "right to refrain" from engaging in concerted action.<sup>8</sup> And the Board does not explain—indeed cannot explain—why, on its theory, it is permissible for a union to enforce a rule against abandoning a strike, but it is not permissible to enforce a rule against abandoning the union during a strike. Since the one does not "restrain or coerce" the member in the exercise of his § 7 rights, neither does the other.

(ii) Far from supporting the Board's contention that §§ 7 & 8(b)(1)(A) grant union members the right to resign at will, the legislative history of the LMRA shows that Congress affirmatively decided not to interfere with such internal union affairs. The Board's treatment of these aspects of the legislative history cannot withstand analysis.

First, the Board misreads the legislative history of the proviso to § 8(b)(1)(A) which protects "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."<sup>9</sup> The Board contends that "Congress intended . . . to preserve

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<sup>8</sup> *Allis-Chalmers* concludes that this is so because imposing a fine, through legal processes, for breach of a rule to which the member voluntarily assented by joining the union does not constitute restraint or coercion. See 388 U.S. at 179. It is also true that the "right to refrain" stated in § 7 does not and was not intended to connote a right to abandon at will an agreed-upon undertaking. See *Petr. Br.* at 26.

<sup>9</sup> In upholding union discipline, this Court has heretofore found that the discipline was not within the reach of § 8(b)(1)(A)'s proscription, and thus the proviso's "interpretation [was not] necessary to [the] conclusion." *NLRB v. Boeing Co.*, *supra*, 412 U.S. at 71 n.5. The same is true here, but the proviso provides an independent basis for concluding that Congress did not intend to interfere with union rules governing the "retention of membership." Indeed the very purpose of the proviso was to assure that union rules governing the "acquisition or retention of membership" would survive any possible interpretation of §§ 7 & 8(b)(1)(A).



only the power of unions to admit or expel individuals wanting to gain or maintain membership." NLRB Br. at 35. But while the legislative materials the Board cites show that this was *a* purpose of the proviso, the materials do not support the Board's contention that this was the *only* purpose. The Board simply overlooks not only the statutory language but also the authoritative statements of a broader and more general purpose<sup>10</sup>—for example, Senator Ball's statement that the proviso "is designed to make it clear that we are not trying to interfere with the internal affairs of a union," 2 Leg. Hist. 1200, and his further statement that the proviso "covers the requirements and standards of membership in the union itself," *id.* See also Petr. Br. at 19-21.<sup>11</sup>

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<sup>10</sup> Senator Ball's statements with respect to the meaning of the proviso are authoritative as he was the sponsor of the amendment to the Senate bill that added § 8(b)(1)(A), 2 Leg. Hist. 1018, and as such he accepted, as an amendment to his amendment, the proviso proposed by Senator Holland, 2 *id.* 1114. (This is in contrast to Senator Ball's statements with respect to § 8(b)(2), which are not authoritative as he dissented from the consensus on that provision. See n.7, *supra*.)

<sup>11</sup> The Board relies on the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") to limit the reach of the proviso to § 8(b)(1)(A) of the LMRA of 1948, NLRB Br. at 35-36, but that reliance is misplaced. During the course of the House's consideration of the LMRDA, Rep. Powell offered an amendment which would have made it unlawful for a union to "refuse membership, segregate or expel any person on the grounds of race, religion, color, sex or national origin." 2 NLRB Legislative History of the LMRDA at 1648. Representatives Landrum and Griffin opposed that amendment arguing, *inter alia*, that its enactment would overturn the proviso to § 8(b)(1)(A). 2 *Id.* at 1649. But neither Representative Landrum nor Griffin suggested that the proviso applied only to union rules governing admission and expulsion of members; to the contrary, neither representative even used the word "expel" and each stated that the proviso protects union rules governing the "retention of membership." *Id.*

The Board somehow thinks it significant that the LMRDA defines the word "member" to mean one "who has fulfilled the requirement for membership . . . and . . . has neither voluntarily

Second, the Board fails to come to grips with the significance of the fact that in enacting the LMRA Congress expressly rejected a set of provisions, included in the House bill as §§ 7(b) and 8(c), which were designed to regulate internal union affairs including, most particularly, a provision (§ 8(c)(4)) which would have made it unlawful for a union "to deny to any member the right to resign from the organization at any time." See Petr. Br. at 22-32. The Board, ignoring the fact that the entirety of §§ 7(b) & 8(c) were dropped in conference, pretends that a particularized judgment was made to omit § 8(c)(4) and hypothesizes the following explanation: "[b]ecause the more general 'right to refrain' [from engaging in concerted activities] language added to Section 7 encompasses the specific act of resigning from the union, it is reasonable to assume that Congress believed that a specific provision covering resignation was unnecessary." NLRB Br. at 29.

Even assuming *arguendo* that there were some basis for believing that § 8(c)(4) did not fall with the entirety of §§ 7(b) & 8(c), the Board's hypothesized explanation still would not stand for that explanation simply assumes its conclusion—that § 7 was intended to confer a right to resign from a union at will. The Board cites no evidence to support its contention that Congress so understood the "right to refrain" from concerted activities,<sup>12</sup>

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withdrawn from membership nor has been expelled or suspended. . . ." 29 U.S.C. § 402(o). But this definition merely states the universe of possible ways in which one who has acquired membership status can forfeit that status; because Congress was not legislating with respect to ways of retaining membership, no possible inference can be drawn from this definition as to Congress' view in 1959 of union rules limiting resignations. It is noteworthy, however, that in § 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), Congress did carefully protect a union's right to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

<sup>12</sup> As we explained in our opening brief (at 25-26), the stated purpose of the "right to refrain" was only to "assure that . . . the



nor does the Board offer any support for its "reasonable . . . assum[ption]" that § 8(c)(4) was dropped from the House bill because it was seen as "unnecessary."

In fact, the conference report concerning the LMRA belies the Board's theory. That report does *not* state that § 8(c)(4) is contained in substance in §§ 7 & 8(b)(1)(A) and therefore was dropped as "unnecessary" (although the report does make a similar statement concerning *other* provisions in the House bill where that was, in fact, the conference committee's reason for omitting such provisions, *see, e.g.* 1 Leg. Hist. 543-544). To the contrary, the conference report acknowledges that, with two exceptions not here relevant, *all* of the provisions of § 8(c) of the House bill "are omitted from the conference agreement." 1 *Id.* 550.

The fair reading, then, of the conference committee action—especially in light of all the other evidence of the Senate's desire not to intrude upon internal union affairs, *see pp.* 7-8, 10-11, *supra*, — is that, in the face of "a predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 388, 409 (1972), and the need to attract sufficient votes in the Senate to override that veto, here, as with so many other provisions of the LMRA, "obviously the House conceded on this issue to the Senate," *NLRB*

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*Board* will be prevented from compelling employees to exercise such [§ 7] rights against their will."

The NLRB attempts to attribute a broader purpose to that right by quoting Representative Hoffman's statement that § 7 gave workers "the right to join or not to join, to be bound or not to be bound by union rules." NLRB Br. at 25 n.17. But those words were spoken as part of Hoffman's unsuccessful effort to amend the House bill on the House floor to ban the union shop. And even if his statements were authoritative—and they are not—they would establish nothing more than a congressional intent to protect workers from employment-related sanctions in deciding whether to join a union, *see pp.* 7-9 *supra*; nothing in Representative Hoffman's rhetoric suggests an intent to establish a right of union members to resign at will.

*v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 184 (1981). And Congress' action in abandoning the provisions regulating internal union affairs (including the proposed § 8(c)(4)) "strongly mitigates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). See also *Petr. Br.* at 32-33.<sup>13</sup>

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<sup>13</sup> In addition to the provisions discussed in text, the House bill also included, as part of its version of § 8(b)(1)(A), a prescription on union efforts "by intimidating practices . . . to compel or seek to compel any individual to become *or remain* a member of any labor organization"; this language also was omitted from the bill as enacted in favor of the Senate's more limited version of § 8(b)(1)(A). See *Petr. Br.* at 24-34. The Board asserts that "the final version of Section 8(b)(1)(A) was broad enough to include these specific unfair labor practices [included in the House bill] and that the House bill's language was therefore merely redundant." *NLRB Br.* at 28. But the only source the Board cites for this assertion is p. 44 of the conference report, 1 Leg. Hist. 548, which says nothing of the kind. The cited page does not even discuss § 8(b)(1)(A) in terms but rather states that the Senate version of § 8(b) *as a whole* was "broader in scope than the corresponding provision of the House bill"—a reference to the fact that the Senate's § 8(b) included four more subsections than the House's and covered a number of subjects, such as secondary boycotts, not covered in the House's § 8(b). But there is nothing in the conference report to suggest, as the Board urges, that with respect to those subjects that were treated in both the Senate and House bills (such as interference with § 7 rights), the conferees intended, in adopting the narrower Senate language, to give it the same reach as the much broader House language.

**CONCLUSION**

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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PLEASE RETURN  
TO MSB

No. 83-1894

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO,  
AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,  
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

**BRIEF FOR PETITIONERS**

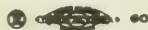
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**QUESTION PRESENTED**

Is the National Labor Relations Board granted the authority by the National Labor Relations Act, as amended, to invalidate provisions in union constitutions and bylaws requiring union members to retain their membership during a strike or lockout or at a time when a strike or lockout appears imminent?



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§ 8(b) (1) (A) .....	<i>passim</i>

IN THE  
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No. 83-1894

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PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO,  
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On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The National Labor Relations Board's decision and order in this case is reported at 265 NLRB 1332, and is reprinted at pp. 9a-44a of the appendix (hereafter "App.") to the petition for a writ of certiorari. The United States Court of Appeals for the Seventh Circuit's opinion and judgment is reported at 724 F.2d 57 and is reprinted at App. 1a-8a.

## JURISDICTION

The Seventh Circuit's opinion and judgment were issued on December 21, 1983. On April 10, 1984, Justice Stevens signed an order extending the time for filing a petition for a writ of certiorari to and including May 18, 1984. The certiorari petition was filed that day and was granted on October 1, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act.

Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A), provides:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this Act: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; \* \* \*.



## STATEMENT OF THE CASE

## A. The Facts

All members of petitioner Pattern Makers' League (hereafter "the League" or "the Union") take an Oath of Membership obligating them to adhere to the Union's "Constitution, Laws, Rules and Decisions." App. 30a. And, League Law 13 provides:

[N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent. [App. 28a, n.3.]

This amendment to the Union's governing laws was ratified in August 1976 by a membership vote after "appropriate notice procedures" (App. 30a), and became effective in October 1976 (*id.*).

The following year, on May 5, 1977, petitioners Rockford and Beloit Associations (hereafter "the Local Unions") commenced a strike against the Rockford-Beloit Pattern Jobbers Association, a multiemployer association. All members of the Local Unions received notice of, and all but one participated in, the secret ballot vote authorizing the strike. App. 30a. All striking members received between \$125 and \$150 a week in strike benefits. *Id.* Nonetheless, and notwithstanding both the restriction on resignation contained in League Law 13 and the members' awareness of that restriction,<sup>1</sup> some eleven members sought to resign their union membership during the strike and then returned to work while the strike was still in effect. *Id.* at 27a-28a, 29a-30a. The direct results of their actions, according to un rebutted testimony, was that the strike was prolonged, and

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<sup>1</sup> "There is no contention \* \* \* that the members who tendered their resignations were unaware of the restrictions on resignation imposed [by League Law 13]." App. 33a-34a.

that it became necessary for the Local Unions to accept a contract embodying substandard wages and benefits. *Id.* at 31a.

The strike ended on December 19, 1977. On January 26, 1978, the Unions sent letters to the members who had sought to resign during the strike, informing them that their resignations could not be accepted because those resignations were in violation of League Law 13, and after appropriate proceedings, the strikebreaking members were fined for working for the struck employers. In response those employers, through their association, filed charges with the National Labor Relations Board (hereafter "NLRB" or "the Board"), claiming that the Unions had violated § 8(b)(1)(A) of the National Labor Relations Act, as amended, by imposing those fines.

#### **B. The NLRB Decisions in the Instant Case and in the Companion *Dalmo Victor* Case**

After a decision by an Administrative Law Judge, the NLRB, "having determined that this and another case involving the right of a labor organization to impose restrictions on a member's right to resign presented issues of importance in the administration of the National Labor Relations Act" (App. 9a), set both cases for oral argument in tandem on January 16, 1980, before the full Board.

After nearly three years of consideration, the companion case, *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), was decided by the Board on September 10, 1982, with the decision in the instant case following on December 16, 1982. In both cases the Board held that the respondent unions had committed unfair labor practices by fining members who sought to resign their membership and returned to work during a strike, even though the union's constitution or laws expressly restrict resignations during strike periods.

In *Dalmo Victor*, four of the five Board members held, in two separate, lengthy, and somewhat divergent opinions, that a union rule permitting union members to resign only if the resignations are submitted at least 14 days preceding the commencement of a strike is unenforceable.<sup>2</sup>

Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." 263 NLRB, at 986. However, "find[ing] it salutary to set forth a general rule for the behavior of parties in the area," these two Board Members decreed that unions ordinarily may prohibit their members from resigning only "for a period not to exceed 30 days after the tender of such a resignation." *Id.*, at 987.

Chairman Van de Water and Member Hunter agreed that the Machinists had committed an unfair labor prac-

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<sup>2</sup> The rule at issue in *Dalmo Victor* provides: "Resignation shall not relieve a member of the obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement." The NLRB originally held that this provision is not a restriction on resignation during the strike period but, instead, a restriction on postresignation conduct, and found an unfair labor practice on that theory. *Machinists Local 1327 (Dalmo Victor)*, 231 NLRB 115 (1977). On review the Ninth Circuit rejected the Board's construction of the clause as "hypertechnical," concluding that the provision "is a restriction on a member's right to resign." *NLRB v. Machinists Local 1327*, 608 F.2d 1219, 1222 (9th Cir., 1979). Because the Board majority had not reached the question whether a union constitutional provision restricting resignation would be valid, the Ninth Circuit remanded the case to the Board. Pursuant to the remand, the Board accepted as the law of the case the Ninth Circuit's construction of the Machinists' provision (263 NLRB, at 984 n.4), and proceeded to decide "whether a union can, pursuant to an internal rule prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose a fine on members who tendered resignations and returned to work during the course of a strike" (*id.* at 984).

tice by fining its resigning members, but challenged their colleagues' 30-day rule as "an arbitrary exercise of this Board's authority" that represented "a transparent effort to achieve a legislative result rather than a reasoned legal conclusion." 263 NLRB at 987. Those two Board Members concluded that *any* restriction imposed by a union upon its members' right to resign would be *per se* unreasonable, and that any fine or any other discipline "premised" on such a restriction would constitute an unfair labor practice under § 8(b)(1)(A). *Id.*, at 988.

Member Jenkins dissented in *Dalmo Victor*, concluding that the Machinists prohibition of resignations during a strike, or within the 14 days preceding a strike, constitutes a reasonable and valid internal union rule explicitly protected by the proviso to § 8(b)(1)(A). 263 NLRB at 994. In his view,

[the union] was entitled to levy fines against the Charging Parties as a means of enforcing a lawful constitutional provision governing retention of membership, a subject expressly excluded from the scope of Section 8(b)(1)(A) by the proviso thereto, and within the ambit of a union's control over its internal affairs. [263 NLRB at 994.]

In the instant case, the Board wrote very briefly on the pertinent issue, adopting both the result and rationale of the *Dalmo Victor* case:

League Law 13 suffers from the same infirmity as did the rule in *Dalmo Victor*. While League Law 13 apparently provides for resignations during non-strike periods, it clearly prohibits any such resignations once a strike has begun or when one "appears imminent." Under the Board's holding in *Dalmo Victor*, League Law 13 can be considered as neither valid nor enforceable. [App. 13a.]<sup>3</sup>

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<sup>3</sup> There were other, separate unfair labor practice charges resolved in the Board decision and order in this case. None of these



Member Jenkins filed a dissenting opinion in *Pattern Makers*, as he had in *Dalmo Victor*, in which he stated:

I would find that League Law 13, as applied herein, is a reasonable and narrow restriction on the employees' right to resign their union membership, and is within the ambit of the Union's control over its internal affairs. Accordingly, I also would find that the fines imposed pursuant to League Law 13 on the 10 employees who crossed the Union's picket lines were lawful and not in violation of the proscriptions of Section 8(b)(1)(A) of the Act. [App. 22a.]

**C. The Court of Appeals Decisions in the Instant Case and in the Companion *Dalmo Victor* Case**

The Unions sought review of the Board's decision herein, insofar as that decision invalidated League Law 13, in the United States Court of Appeals for the Seventh Circuit. That court upheld the Board's ruling.

The Seventh Circuit began from the premise that the instant case is one "present[ing] an apparent conflict between two fundamental policies underlying the NLRA," which that court identified as the right of employees to refrain from collective bargaining activities and the right of unions to regulate their internal affairs without congressional or court interference. App. 3a-4a. The court below while acknowledging (App. 1a) that this Court has twice explicitly *left open* the question whether union constitutional provisions restricting resignations during a strike period are enforceable under the NLRA viewed this Court's decisions as establishing that "[a]n employee's right to resign cannot be overridden by union interests in 'group solidarity and mutual reliance'." App. 6a.

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other Board determinations were contested in the court below (App. 2a-3a, n.1), and no question concerning these holdings is presented to this Court. See p. i *supra*.



Machinists Local 1327 sought review of the Board's decision in the companion *Dalmo Victor* case in the United States Court of Appeals for the Ninth Circuit. That court granted the petition for review and denied the Board's cross petition for enforcement. *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir., 1984).

Unlike the Board and the court below, the Ninth Circuit viewed the new rule against union restrictions on resignations during a strike as one which "frustrates federal labor policy in important respects." 725 F.2d at 1215. Relying on *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Ninth Circuit stressed that:

[N]either Congress nor the [Supreme] Court gave individual members license to avoid union rules designed to protect the welfare of the bargaining unit. [This is why] Congress \* \* \* enacted the proviso to § 8(b)(1)(A), which reserves the unions the power to make reasonable rules regarding the retention and acquisition of membership. [725 F.2d, at 1216.]

Again, unlike the Board and the court below, the Ninth Circuit, while recognizing that "the power of the union over the member is certainly no greater than the union-member contract" (725 F.2d at 1218, *quoting NLRB v. Textile Workers*, 409 U.S., 213, 217), maintained that, under the § 8(b)(1)(A) proviso, the member's obligation is, under the present circumstances, also no *less* than the obligation the union constitution and bylaws establish:

[T]he terms of the contract before us condition the member's right to resign on his promise not to break the strike. If the member can escape his obligations by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of this contract mean little. [725 F.2d at 1218.]

#### **D. The NLRB Decision in the *Neufeld Porsche-Audi* Case**

Subsequent to the Seventh Circuit decision in this case and the Ninth Circuit decision in the *Dalmo Victor* case, the Board, in *Machinists Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB No. 209 (June 22, 1984), returned to the question presented here. In that decision, three members of the Board (Chairman Dotson and Members Hunter and Dennis) stated, "we hold that the [union's] restriction on resignations [at issue], *as well as any other restriction a union may impose on resignation, is invalid \* \* \**" 270 NLRB No. 209, Sl. Op. at 5-6; emphasis added. Member Zimmerman adhered to the position he and Member Fanning had stated in *Dalmo Victor*. *Id.* at 22-23 and *see* p. 5, *supra*.

The Board majority, while noting that this Court has not "expressly address[ed] a union's authority to restrict resignations" (270 NLRB No. 209, Sl. Op. at 6) believed that the "principles embodied" in this Court's decisions "compel the conclusion that \* \* \* *any restrictions placed by a union on its member's right to resign \* \* \* are unlawful*" (*id.* at 9; emphasis added). Those Board members relied in particular on the proposition that "when a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities" (*id.* at 10-11).

#### **SUMMARY OF ARGUMENT**

To make out the § 8(b)(1)(A) unfair labor practice found by the NLRB here it is necessary to show, in the statutory language, not only that the employees in question were "exercis[ing] \* \* \* rights guaranteed in section 7," *but also* that the union "restrain[ed] or coerc[ed]" the employees in the exercise of those rights *and further* that the union's actions are *not* protected by § 8(b)(1)(A)'s proviso which states that the foregoing prohibition "shall not impair the right of a labor organization to prescribe its own rules with respect to

the acquisition or *retention* of membership therein," (emphasis supplied).

A. The plain words of § 8(b)(1)(A)'s proviso read naturally clearly encompass the union resignation rule at issue here. A rule providing that a union member is required to continue his membership during a strike is surely a rule "with respect to the \* \* \* retention of membership;" indeed, it is more clearly such a rule than the only other kind of rule to which the phrase could possibly refer—a rule providing that under certain circumstances a union member will be expelled, *viz.*, deprived of continued membership.

The legislative history not only supports this reading of the proviso, but forcefully negates the proposition that Congress intended by §§ 7 and 8(b)(1)(A) to outlaw union rules restricting resignation from membership.

Section 8(b)(1)(A) and its proviso originated in the Senate in the course of the floor debate on the bill eventually enacted as the Labor Management Relations Act of 1947. Senator Ball, a sponsor of § 8(b)(1)(A), agreed to accept an amendment adding the proviso in its present terms proposed by Senator Holland. Their statements in describing the purpose of the proviso accord with its literal language by confirming that the proviso is intended to cover "rules of membership either with respect to beginning or terminating membership" (Senator Holland) and "the requirements and standards of membership itself" (Senator Ball). Union resignation rules are, on any view, a paradigm example of rules "with respect to \* \* \* terminating membership" and rules on "the requirements \* \* \* of membership itself."

The LMRA also added to § 7 of the original NLRA, the provision enumerating the "concerted activities" protected by the Act, the phrase "and shall also have the right to refrain from any or all such activities \* \* \*." This addition originated in § 7(a) of the House of Representatives Bill. Its proponents explained its purpose



as simply being to assure that the "Board will be prevented from compelling employees to exercise [the] rights [stated in § 7 of the original NLRA] against their will". This limiting explanation is buttressed by the House Bill's structure.

Section 7 of the House Bill was divided into a subsection (a) granting rights to "employees" generally and a subsection (b) granting rights concerning the "affairs of the organization" to "members of any labor organization." This, like the sponsors' statement of the point of the right to refrain amendment, shows that the sponsors of the House Bill did *not* intend through § 7(a) to regulate the relationship between unions and their members by creating a body of membership rights.

What the language, structure and explanations of §§ 7(a) and 7(b) of the House Bill evidence, the language, structure and explanations of §§ 8(b) & 8(c) confirm. Section 8(c), which related back to § 7(b), would have made it an unfair labor practice for unions to "interfere with, restrain, or coerce employees in the exercise of rights granted by § 7(b)," rights, *inter alia*, "to have the affairs of the organization conducted in a manner that is fair to its members." Section 8(c)(4), in terms, would have made it an unfair labor practice for a union "*to deny to any member the right to resign from the organization at any time.*"

Thus, the Board's construction of the right to refrain included in § 7 of the LMRA attributes to its predecessor provision—the House Bill's § 7(a) (and its companion § 8(b))—a meaning which encompasses all of the subject matter of §§ 7(b) and 8(c) of the House Bill, a meaning that phrase will bear only on the wholly implausible assumption than its sponsors intended §§ 7(b) and 8(c) of the House Bill to be redundant.

The House-Senate Conferees who put together the final version of the LMRA added to § 7 of the original NLRA the right to refrain language from § 7(a) of the House Bill and added to the Act the Senate Bill's § 8(b)(1)(A)

including its proviso; the Conference Bill did not include any of the other House amendments to § 7, the House Bill's § 8(b)(1) or any part of the House Bill's § 8(c).

Senator Taft explained that the effect of adopting the "right to refrain" language, "[t]aken in conjunction with section (b)(1) of the conference agreement," excludes "many forms and varieties of concerted activities" from the protections of the Act. The statement of the House Managers provides the same explanation. And the House Managers acknowledged that, with one exception, § 8(c) of the House Bill had been rejected in the Conference.

Given all of the foregoing—and especially the elimination of § 8(c) of the House Bill including its § 8(c)(4)—the governing precedent is *Labor Board v. Drivers Local Union*, 362 U.S. 274, 289, where this Court rejected an earlier Board attempt to read into § 8(b)(1)(A) a union unfair labor practice stated in the House Bill that the 1947 Congress did not choose to enact into law:

Plainly \* \* \* the [union's] conduct in the instant case would have been prohibited if the House bill had become law.

But the House conferees abandoned the House bill in conference and accepted the Senate proposal. \* \* \*

B. In *NLRB v. Textile Workers*, 409 U.S. 203 and again in *Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84, the Court, in order to determine whether a union member has "lawfully resign[ed]" from the union where its constitution and bylaws are silent on the subject of voluntary resignation, looked to the "law which normally is reflected in our free institutions" that defines the "right of the individual \* \* \* to resign from associations." As the Court stated, under that body of law, in that circumstance, "members [are] free to resign at will."

Since, as we have shown, the § 8(b)(1)(A) proviso preserves intact "the right of a labor organization to prescribe its own rules with respect to the \* \* \* retention



of membership," the inquiry here reduces to that undertaken in *Textile Workers and Machinists*: whether under the common law of associations the resignations here were lawful.

The common law decisions establish that an association may place restrictions on its members' right to resign where such restrictions are designed to further a basic purpose for which the association was formed. The Union's resignation rule is, of course, precisely that type of restriction. The Pattern Makers promulgated that rule to protect the common interest of maintaining a united front during the most critical time a union faces—an economic strike. Each member joined the union, or retained his membership when free to resign, with the understanding that he was agreeing not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were agreeing to be similarly bound.

### ARGUMENT

The National Labor Relations Board's decision herein outlines the nature of this case and the positions of its General Counsel, which the Board adopted, and of the respondent Unions with regard to the Board's authority to invalidate a rule embodied in a union's constitution or bylaws defining or limiting the circumstances under which a union member may resign his membership:

The principal issue in this case involves the question of whether [the Unions] violated Section 8(b) (1)(A) of the Act by imposing fines on members who tendered resignations and returned to work during the course of a strike in apparent contravention of [the Unions'] rule [stated in League Law 13] prohibiting resignations during a strike or lock-out or when one appeared imminent.

\* \* \* \*

The General Counsel contends that League Law 13 unlawfully intrudes into the rights guaranteed to employees by Section 7 of the Act and that, conse-

quently, the fines imposed thereunder are unlawful and in violation of Section 8(b)(1)(A) of the Act. [The Unions], on the other hand, assert that League Law 13 constitutes a valid exercise of their right to enact internal union rules governing the acquisition and retention of membership as set forth in the proviso to Section 8(b)(1)(A). They therefore argue that the fines imposed on those individuals who resigned and returned to work during the strike in violation of such rule were lawful. [App. 10a-11a.]

To make out the § 8(b)(1)(A) unfair labor practice found by the Board here it is necessary to show, in the statutory language, not only that the employees in question were "exercis[ing] \* \* \* rights guaranteed in section 7," *but also* that the union "restrain[ed] or coerc[ed]" the employees in the exercise of those rights *and further* that the union's actions are *not* protected by § 8(b)(1)(A)'s proviso stating that the foregoing prohibition "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or *retention* of membership therein," (emphasis supplied). See p. 2 *supra* (setting out the statutory language).

It is our position that the office of the § 8(b)(1)(A) proviso is to preserve for the unions covered by the NLRA the right recognized in the common law of associations—"the law which normally is reflected in our free institutions" (*NLRB v. Textile Workers*, 409 U.S. 213, 216)—to prescribe in the union's constitution or bylaws, which establish "the contractual relationship between union and member" (*id.* at 217), "its own rules with respect to the \* \* \* retention of membership" including the resignation rule at issue here. Congress' purpose in adding the proviso was to make it manifest that § 8(b)(1)(A) does *not* grant the Board the authority to "impair" this basic right of all membership associations.

1. The issue posed here is framed by what this Court has decided and what the Court has left open in *NLRB*

*v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 and its progeny. The most recent of these decisions are *NLRB v. Boeing Co.*, 412 U.S. 67, and its companion case *Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84. The *Boeing* and *Machinists* opinions in concise terms state the relevant background principles.

In *Boeing* the Court first summarized its prior holdings on the meaning of § 8(b)(1)(A) :

We have previously held that § 8(b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). In *Allis-Chalmers* we held that court enforcement of fines ranging from \$20 to \$100 for crossing picket lines did not "restrain or coerce" employees within the meaning of the Act. And in *Scofield* we held that the union did not violate the Act in imposing fines of \$50 and \$100 on members for violating a union rule relating to production ceilings. [412 U.S. at 71-72.]

And the *Boeing* Court then noted that "[i]n deciding these cases, the Court several times referred to the unions' imposition of 'reasonable' fines" and that the "Company contends, not illogically, that the Court's use of the adjective 'reasonable' was intended to suggest to the Board that an unreasonable fine would amount to an unfair labor practice." 412 U.S. at 72. But the Court rejected that contention: "Given the rationale of *Allis-Chalmers* and *Scofield*, the Board's conclusion that § 8(b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct." 412 U.S. at 74.

In the *Machinists* case the Court summarized and followed its ruling in the *Textile Workers* case:

In *NLRB v. Textile Workers*, 409 U.S., at 217, we held that "[w]here a member lawfully resigns from



a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." Since in that case there was no provision in the Union's constitution or bylaws limiting the circumstances in which a member could resign, we concluded that the members were free to resign at will and that § 7 of the Act, 29 U.S.C. § 157, protected that right to return to work during a strike which had been commenced while they were union members. The Union's imposition of court-collectible fines against the former members for such work was, therefore, held to violate § 8(b)(1)(A).

*Here, as in Textile Workers, the Union's constitution and bylaws are silent on the subject of voluntary resignation from the Union. And here, as there, we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. Since there is no evidence that the employees here either knew of or had consented to any limitation on their right to resign, we need "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." Textile Workers, supra, at 216. [412 U.S. at 87-88; emphasis added; footnotes omitted.]*

In sum, under *Allis-Chalmers* and *Boeing*, it is not an unfair labor practice for a union to adopt a rule prohibiting "full union members" from engaging in strikebreaking activity, to fine members who violate that rule and to bring suit to collect such fines in the state courts;<sup>4</sup>

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<sup>4</sup> In *Allis-Chalmers* the Court noted:

It is clear that the fined employee[] involved herein enjoyed full union membership \* \* \* [and] "had by his actions become a member of the union for all purposes . . ." \* \* \* Whether [§ 8(b)(1)(A)'s] prohibitions would apply if the locals had imposed fines on members whose membership was in fact lim-

under *Textile Workers and Machinists*, it is an unfair labor practice for a union that has adopted an anti-strikebreaking rule to impose "court-collectible fines" against a member who has "lawfully resign[ed]" from membership for his actions after resignation (412 U.S. at 87-88); and under *Textile Workers and Machinists*, which "apply the law \* \* \* normally reflected in our free institutions," where there is no provision in the union's constitution or bylaws "limiting the circumstances in which a member could resign," members are "free to resign at will" (412 U.S. at 87-88).

While this Court has settled that much, the Court has also twice chosen to "leave open the question of the extent to which contractual restriction on a member's right to resign may be limited to the Act". *Machinists*, 412 U.S. at 88; *Textile Workers*, 409 U.S. at 217. That is the question presented by this case.

The Board's answer to that question is that § 8(b) (1) (A) of the Act invalidates the "contractual restriction" stated in League Law 13 and, indeed, as the Board's recent comprehensive restatement of its position makes clear, "any restriction[] placed by a union on its member's right to resign" (*Neufeld Porsche-Audi*, 270 NLRB No. 209, Sl. Op. 9). In its *Neufeld Porsche-Audi* opinion, the Board does not discuss, much less analyze, the plain language of the proviso to § 8(b) (1) (A) or the legislative history of the Labor Management Relations Act of 1947 which both added to § 7 of the original NLRA an express "right to refrain from any or all [of

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ited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view.<sup>37</sup>

\* \* \* \*

<sup>37</sup> Under § 8(a) (3) the extent of an employee's obligation under a union security agreement is "expressly limited to the payment of initiation fees and monthly dues . . . 'Membership' as a condition of employment is whittled down to its financial core." *Labor Board v. General Motors Corp.*, 373 U.S. 734, 742. [388 U.S. at 196-197 & n.37.]



the concerted] activities" enumerated in that section, and added to the Act § 8(b)(1)(A) and its proviso. We therefore begin by reviewing these governing materials in interpreting an Act of Congress.

2. The plain words of § 8(b)(1)(A)'s proviso read naturally clearly encompass union resignation rules of the kind here at issue. A rule providing that a union member is required to continue his membership during a strike is surely a rule "with respect to the \* \* \* retention of membership;" indeed, it is more clearly such a rule than the only other kind of rule to which the phrase could possibly refer—a rule providing that under certain circumstances a union member will be expelled, *viz.*, deprived of continued membership. In dryly literal terms, expulsion rules concern not "retention of membership" but the inverse—"nonretention (loss) of membership." The point for present purposes, however, is that in terms of a fair reading of the statutory language, rules requiring continued membership and rules denying continued membership are both well within the normal meaning of the phrase "rules with respect to the \* \* \* retention of membership."

3. The House of Representatives acted first on the proposals to amend the original NLRA that were considered by the 1947 Congress. But both § 8(b)(1)(A) and its proviso are the Senate's product and we therefore turn first to the events in that body.

Section 7 of S. 1126, 80th Cong., 1st Sess., the Senate Committee on Labor and Public Welfare Bill, as reported, tracked § 7 of the original NLRA and the Senate Committee Bill's § 8(b)(1), went only so far as to make it an unfair labor practice for a labor organization to "interfere with, restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" (the unfair labor practice eventually enacted as § 8(b)(1)(B)

of the Act). National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947, 109, 112 (G.P.O. 1948) (hereafter "Leg. Hist.").<sup>5</sup>

In their supplemental views attached to the Senate Committee Report, Senators Taft, Ball, Donnell and Jenner proposed broadening § 8(b)(1) by adding after "coerce" the phrase "employees in the exercise of the rights guaranteed in section 7." S. Rep. No. 105, 80th Cong., 1st Sess., 50; Leg. Hist. 456. During floor consideration of the Senate Committee Bill, Senator Ball did move that amendment. Leg. Hist. 1018. And, during the Senate's consideration of his amendment, Senator Ball agreed to two amendments to the proposed § 8(b)(1) (A), one by Senator Ives striking the words "interfere with" and another by Senator Holland adding the proviso in its present terms. Leg. Hist. 1138-1141.

In offering his amendment to the Ball amendment in a form consistent with the Senate's parliamentary rules—an earlier attempt having been out of order for reasons having nothing to do with the proviso's substance—Senator Holland, after reading the suggested statutory language, stated:

In other words, if accepted by the sponsors of the pending amendment, the inserted words would make it clear that the pending [Ball] amendment would have *no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership*. I understand that the amendment so offered meets with no serious objection of the part

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<sup>5</sup> The Senate Committee Bill created five union unfair labor practices. In addition to its § 8(b)(1) just described, § 8(b)(2) of that bill prohibited union efforts to persuade an employer to discriminate against an employee, § 8(b)(3) imposed a duty to bargain in good faith, § 8(b)(4) dealt with the secondary boycott and § 8(b)(5) concerned breaches of collective bargaining agreements. Leg. Hist. 112-114.

of the sponsors of the pending amendment. [Leg. Hist. 1141; emphasis added.]

In his earlier procedurally imperfect attempt to introduce the amendment, Senator Holland had said:

I have had some discussion with the Senator from Minnesota [Mr. BALL] and the Senator from Ohio [Mr. TAFT] and with other Senators in reference to the meaning of the pending [Ball] amendment and as to how seriously, if at all, it would affect the internal administration of a labor union.

Apparently it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the questions of membership. So I offer an amendment as a substitute for the amendment of the Senator from Minnesota [adding the § 8(b)(1)(A) proviso in its present terms]. [Leg. Hist. 1139.]

In accepting the perfected Holland Amendment, Senator Ball responded:

I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear. I am willing, on behalf of myself and the other sponsors of the amendment, to accept the amendment offered by the Senator from Florida and, if it is necessary, so to modify and perfect my own amendment. [Leg. Hist. 1141.]

At a later point in the debate, Senator Ball, in describing his amendment and the "modification" to that amendment made by Senator Holland, stated:

That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorgan-



ized employees. However, the proviso would not go so far as to permit the union to adopt rules authorizing its agents to threaten and coerce nonunion members in an effort to persuade them to join. *The modification covers the requirements and standards of membership in the union itself.* [Leg. Hist. 1200; emphasis added.]

So far as our researches show, the foregoing are the only direct comments on the meaning and effect of the § 8(b)(1)(A) proviso. And, the sponsors' statements are consonant with the provision's literal language protecting union rules "with respect to the acquisition or retention of membership." Those statements confirm that the proviso is intended to cover "rules of membership either with respect to beginning or terminating membership" (Senator Holland) and "the requirements and standards of membership itself" (Senator Ball). Union resignation rules are, on any view, a paradigm example of rules "with respect to the \* \* \* retention of membership," rules "with respect to \* \* \* terminating membership" and rules on "the requirements \* \* \* of membership itself."<sup>6</sup>

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<sup>6</sup> The question of the extent to which § 8(b)(1)(A)'s terms "restrain or coerce," standing alone, cover union discipline that does not involve a physical wrong or threat thereof or interference with job rights was the occasion of more extended comment. That legislative debate, however, which is reviewed in depth in the Court's opinion in *Allis-Chalmers*, 388 U.S. at 184-190, casts no light on the issue posed here. As noted above, *Allis-Chalmers* holds, and *Boeing* reaffirms, that whatever doubts there may be about the extent to which Congress provided the Board room to invalidate *other* union disciplinary rules, the legislative history shows that rules against strikebreaking enforced against union members through union proceedings and state court actions to collect any resulting fine do *not* constitute unlawful restraint or coercion under § 8(b)(1)(A). Thus, it is entirely lawful for a union to try and fine individuals who are *in fact* union members for violating the union's ban on strikebreaking. And, there is nothing in the debate on the meaning of restraint and coercion under § 8(b)(1)(A) addressed to who is to be deemed to be a union member.

4. The House of Representatives' approach to regulating the relationship between unions and their members was at the furthest remove from the Senate's approach. H.R. 3020, 80th Cong., 1st Sess., the bill reported by the House Committee on Education and Labor, and passed by the House without any change relevant here, did all of the following.

First, § 7 of the House Bill provided:

SEC. 7. (a) *Employees shall have the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (not constituting unfair labor practices under section 8(b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements) for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities: Provided, That nothing herein shall preclude any employer from making and carrying out an agreement with a labor organization as authorized in Section 8(d) (4).*

*"(b) Members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization, to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action by the organization, and to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members. [Leg. Hist., 49-50, 176; emphasis added.]"*<sup>7</sup>

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<sup>7</sup> Section 12 of the House bill, referred to in § 7(a), made all of the following "unlawful concerted activities": "force, violence, physical obstruction or threats thereof in labor disputes \* \* \* picketing in numbers or in ways other than those reasonably necessary to give notice of the existence of a labor dispute at the place being picketed \* \* \* picketing a place of business at which no labor dispute exists \* \* \* sympathy strikes, jurisdictional strikes, monop-



The House Committee Report explained the Committee's addition at the end of § 7 of the NLRA, as enacted in 1935, of the phrase "and shall also have the right to refrain from any or all such activities" as follows:

A committee amendment assures that when the law states that employees are to have rights guaranteed in section 7, *the Board will be prevented from compelling employees to exercise such rights against their will*, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so. [H. Rep. No. 245, 27; Leg. Hist. 318; emphasis added.]

And the Committee Report stated the purpose of the entirely new § 7(b) in these words:

*Section 7(b).*—The bill adds a new paragraph (b) to section 7. This is designed to protect members of those unions that, instead of following fair and democratic processes in managing their affairs, treat their members as pawns and exploit them for the enrichment or aggrandizement of self-perpetuating leaders. The committee included this clause in response not only to the demands of simple justice, but in response also to pleas of many sincere union people who regard more democracy in unions as one of the greatest needs of unionism. *When, under the Labor Act, we confer upon unions the power they have as exclusive bargaining agents, entitled by law to handle all the dealings of employees with their employers, clearly it is incumbent upon us, by the same law, to assure to the employees whom we subject to union control some voice in the union's affairs. This we do by the general provisions of section 7(b), which are implemented by the provisions of section*

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listic strikes, illegal boycotts, sitdown strikes, and featherbedding \* \* \* strikes and other concerted activities in lieu of using peaceful procedures for settling disputes that the National Labor Relations Act provides \* \* \*." H. Rep. No. 245, 80th Cong., 1st Sess., 44; Leg. Hist. 335.

8(c). [H. Rep. No. 245, 28; Leg. Hist. 319; emphasis added.]

Section 8(b) of the House Bill, in turn, created three unfair labor practices, the first of which stated:

(b) It shall be an unfair labor practice for an employee, or for a representative or any officer of a representative, or for any individual acting for or under the direction of a representative, or for or under the direction of any officer thereof—

(1) by intimidating practices, to interfere with the exercise of employees of rights guaranteed in section 7(a) or to compel or seek to compel any individual to become or remain a member of any labor organization; \* \* \*. [Leg. Hist. 51-52, 178-179.]<sup>8</sup>

Section 8(c) of the House bill went on to create ten additional unfair labor practices regulating all major facets of the relationship between unions and their members; the first and fourth of these read as follows:

(c) It shall be an unfair labor practice for a labor organization or any officer thereof, or for any individual acting for or under the direction of a labor organization or for or under the direction of any officer thereof—

(1) to interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in section 7(b); \* \* \*

(4) *to deny to any member the right to resign from the organization at any time*; \* \* \*. [Leg. Hist. 52-53, 179-180; emphasis added.]<sup>9</sup>

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<sup>8</sup> Sections 8(b) (2) & 8(b) (3) of the House Bill imposed a duty to bargain on unions acting as exclusive bargaining representatives and forbade strikes and other concerted activities over matters that are not "a proper subject matter for bargaining." Leg. Hist. 51-52, 178-179.

<sup>9</sup> Section 8(c) (2) of the House Bill regulated union initiation fees and union dues; § 8(c) (3) thereof prohibited required participation in union insurance and benefit plans, § 8(c) (5) & (6) regulated numerous aspects of how and for what actions union members may

With regard to § 8(b)(1) the House Committee Report stated:

*Section 8(b)(1).*—This is new, making it an unfair labor practice for labor organizations, their officers, agents and representatives, or for employees, to interfere with, restrain or coerce employees. *There is included in this provision a qualification which is not found in the corresponding paragraph covering employers—namely, that the interference proscribed is interference by intimidation.* Although it is not intended to permit representatives and their partisans and adherents to harass or abuse employees into joining labor organizations or designating them as their bargaining representatives, it is the purpose of the committee to make entirely certain that Congress does not forbid representatives, by reasonable means, to persuade employees to join the unions. [H. Rep. No. 245, 30; Leg. Hist. 321; emphasis added.]

And, § 8(c)(1) & (4) were described as follows:

*Section 8(c)(1).*—Using the device of Section 8(a)(1), the bill makes it an unfair labor practice for unions to interfere with, restrain, or coerce members in the exercise of the general rights guaranteed by section 7(b).

*Section 8(c)(4).*—*The right to resign from any organization is a fundamental right. This section preserves that right for union members.* (If, when a member resigns, there is in effect as to him an agreement permitted under sec. 8(d)(4), his resigning may result in his losing his job, unless his resignation results from an unfair labor practice by the union under sec. 8(b)(1) or under sec. 8(c).) [H. Rep. No. 245, 31-32; Leg. Hist. 322-323; emphasis added.]

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be tried for violating union rules; § 8(c)(7) concerned the subject of union security; § 8(c)(8) required that various union matters be decided by secret ballot; § 8(c)(9) prohibited union spying on members and union intimidation of a member's family; and § 8(c)(10) provided for financial reporting. Leg. Hist. 52-56; 179-183.



Before turning to a consideration of how the very different Senate Bill and House Bill were transformed in conference into the LMRA, it is, we believe, worth underlining two points about the House Bill.

First, the grant to each employee covered by the NLRA § 7(a) of the House Bill of a "right to refrain from any or all of [the concerted] activities" enumerated in that section does not, on its face, appear to be a grant of a right to join a union whose constitution and bylaws specify limits on resignation and then to resign at any time and in any manner without regard to the organization's rules. While a right to "refrain" most assuredly connotes a right not to join the organization at all, that word is not normally used to signify a right to abandon an agreed-on undertaking at will and without regard to the nature of the agreement. And there is not even a suggestion that the sponsors of the "right to refrain" amendment intended any such arcane meaning. The point of that phrase was *not* said to be to add to the rights of employees who become union members vis-a-vis their union but only to "assure that \* \* \* the *Board* will be prevented from compelling employees to exercise such rights against their will \* \* \*." H. Rep. No. 245, 27; Leg. Hist. 318. Thus, according to its sponsors, this amendment to § 7 of the original NLRA was intended to be a limit on what the *Board* could compel employees to do, not a warrant for the Board to invalidate union rules that, in the Board's view, work an unacceptable compulsion on employees.

Second, the division of § 7 of the House Bill into a subsection (a) granting rights to "employees" generally and a subsection (b) granting rights concerning the "affairs of the organization" to "members of any labor organization" is further evidence that the sponsors of the House Bill did *not* intend by § 7(a) to create a body of membership rights for union members or to otherwise regulate the union-member relationship once that relationship is established. And what the language, structure

and explanations of §§ 7(a) and 7(b) of the House Bill evidence, the language, structure and explanations of §§ 8(b) & 8(c) confirm.

Section 8(c) thereof, which relates back to § 7(b), expressly established what can only be called a regulatory code governing the relationship between unions and their members. As we have seen, § 8(c) (1) made it an unfair labor practice for unions to "interfere with, restrain, or coerce employees in the exercise of *rights granted by § 7(b)*," rights, *inter alia*, "to have the affairs of the organization conducted in a manner that is fair to its members." Further, § 8(c) (4), in terms, made it an unfair labor practice for a union "*to deny to any member the right to resign from the organization at any time.*" There is not a hint that §§ 7(b), 8(c) (1) & 8(c) (4) of the House Bill were, "belt and suspenders" style, a mere reiteration of what had already been stated in §§ 7(a) & 8(b) of the House Bill. Indeed, of the three House Bill § 8(b) unfair labor practices, only § 8(b) (1)'s prohibition of "intimidating practices" that "interfere with rights guaranteed in section 7(a) or [that] compel \* \* \* any individual to \* \* \* remain a member" is even arguably addressed to the same subject matter as §§ 7(b), 8(c) (1) & 8(c) (4). But the House Report emphasizes that, as the language of the prohibition states, § 8(b) (1)'s proscription is directed against "interference by intimidation" in the sense of "harrass[ment] or abuse." H. Rep. No. 245, 30; Leg. Hist. 321. It stretches language past the breaking point to say that a provision in a union constitution limiting resignation from membership is intimidation, harassment or abuse.

5. Insofar as their actions are relevant here, the LMRA Conferees added to § 7 of the original NLRA the phrase from the House Bill "and shall also have the right to refrain from any or all such activities" and added to the Act the Senate Bill's § 8(b) (1) (A) including its proviso; the Conference Bill did not include any of the other House amendments to § 7 outlined above, the



House Bill's § 8(b)(1) or any part of the House Bill's § 8(c).

Senator Taft, the Chairman of the Senate Conferees, introduced the Conference Bill to his colleagues by stating:

The Senate and House bills followed in some ways the same general division of the matters which were considered in the Senate. However, they were basically so different in many respects that I suppose there may have been a hundred possible differences to be considered, and they were considered for nearly 2 weeks with the House conferees. I think that as a general proposition I can say that the Senate conferees did not yield on any matter which was the subject of controversy in the Senate; certainly not on any important matter. The bill represents substantially the Senate bill. Concessions as to language were made here and there. [Leg. Hist. 1526; see also *id.* at 882 (Rep. Hartley).]

With regard to §§ 7 & 8(b)(1)(A), Senator Taft's "summary in detail of the principal differences between the conference agreement and the bill which the Senate passed" advised:

*The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from concerted activities and collective bargaining if they choose to do so. Taken in conjunction with the provisions of section 8(b)(1) of the conference agreement wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, many forms and varieties of concerted activities which the Board, particularly in the early days, regarded as protected by the act, will no longer be treated as having that protection.*

\* \* \* \*

Section 8(b) contains the provisions of the conferees' agreement with respect to unfair labor practices by labor organizations or their agents. *Paragraphs 1(a) and 1(b) relating to acts of restraint or coercion by labor organizations are identical with the paragraph dealing with the subject in the Senate amendment.* [Leg. Hist. 1539; emphasis added.]<sup>10</sup>

The otherwise voluminous statement of the managers on the part of the House attached to the House Conference Report shows a well-advised reticence on the provisions at issue here.

The addition of the "right to refrain" to § 7 and its relation to § 8(b) (1) (A) is explained in the same words used by Senator Taft in his detailed analysis except that

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<sup>10</sup> After the vote on the conference report, Senator Taft, in a supplement to that analysis added:

Section 7. In this section guaranteeing the right of employees to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, there has been inserted the language "and shall also have the right to refrain from any and all of such activities \* \* \*." It is contended that the inclusion of the new language destroys collective bargaining and legalizes the device of the yellow-dog contract. There is similar language in the Norris-LaGuardia Act, a statute outlawing the yellow-dog contract. Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act. (See *Pittsburgh Plate Glass Co.*, 66 NLRB 1083.) The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively. The reason for its inclusion was that similar language had appeared in the House bill and since section 8(b) (1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights guaranteed them in section 7, the House conferees insisted that there be express language in section 7 which would make the prohibition contained in section 8(b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line. [Leg. Hist. 1623.]

the last sentence of the House Manager's explanation includes the following concluding phrase: "since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39-40; Leg. Hist. 543-544. And the House Managers described § 8(b) (1) as follows:

Under the new section 8(b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. *This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12(a)(1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12(a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act.* Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8(b) (1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to re-



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instatement. [H. Conf. Rep. No. 510, 42-43; Leg. Hist. 546-547.] <sup>11</sup>

It bears emphasis that each of the foregoing explanations of the effect of adding a "right to refrain" to § 7 and the § 8(b)(1)(A) union unfair labor practice to the Act, like the House Report's explanation of the addition of that right to § 7(a) of the House Bill (*see* p. 25 *supra*), claims only that the purpose is to narrow the Board's authority to bring coercive or otherwise unlawful activity within the protections of the Act; there is not even a suggestion of a purpose to regulate the relationship between unions and their members.

Finally, while the House Managers' statement never mentions § 7(b) of the House Bill and the determination not to include that provision in the Conference Bill, the fate of § 8(c) of the House Bill is acknowledged:

*Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5))*

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<sup>11</sup> In explaining the decision not to include § 12 of the House Bill in the Conference Bill, the House Managers returned to the same theme:

Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8(b)(1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c). [H. Conf. Rep. No. 510, 59; Leg. Hist. 563.]

and has already been discussed. *The other parts of this subsection are omitted from the conference agreement as unfair labor practices*, but section 9(f)(6) of the conference agreement requires labor organizations to make periodic reports with respect to many of these matters as a condition of certification and other benefits under the act. [H. Conf. Rep. 510, 46; Leg. Hist. 550; emphasis added.]

In sum, there is not a word in the explanations of the Conference Bill claiming any of the following:

- That the addition of the “right to refrain” to § 7, taken separately and/or in conjunction with the inclusion of § 8(b)(1)(A) and its proviso in the Act, is intended to grant the Board the authority—expressly granted in §§ 7(b), 8(c)(1) & 8(c)(4) of the House Bill none of which were included in the Conference Bill—to make union rules restricting resignation from membership an unfair labor practice.

- That the addition of the “right to refrain” to § 7 in conjunction with the prohibition of § 8(b)(1)(A) is intended to limit or to override the § 8(b)(1)(A) proviso’s protection of union rules “with respect to the \* \* \* retention of membership”.

- That the addition of the “right to refrain” to § 7 is intended to grant union members a right to resign at will in contravention of the union’s rules limiting resignation.

6. Given the foregoing legislative history, the governing precedent is *Labor Board v. Drivers Local Union*, 362 U.S. 274, where this Court rejected an earlier Board attempt to read into § 8(b)(1)(A) a union unfair labor practice stated in the House Bill that the 1947 Congress did not choose to enact into law:

Plainly \* \* \* the [union’s] conduct in the instant case would have been prohibited if the House bill had become law.

But the House conferees abandoned the House bill in conference and accepted the Senate proposal. \* \* \*



This history makes pertinent what the Court said in *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 99-100: "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation \* \* \*. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." [362 U.S. at 289-290.]

And the express protection for union membership rules stated in § 8(b) (1) (A)'s proviso together with the legislative history we have outlined unequivocally demonstrates that the Board's major premise for its conclusion that § 8(b) (1) (A) is a grant of authority to invalidate all union restrictions on resignation from membership is wrong. The essence of the Board's rationale as most recently restated is:

[R]estrictions on resignations impair the fundamental policies found in the express language and consistent interpretation of Section 7. That section expressly grants employees "the right to refrain from any or all" protected concerted activities. *This statutory right encompasses* not only the right to refrain from strikes, but also *the right to resign union membership*. [*Neufeld Porsche-Audi*, 270 NLRB No. 209, Sl. Op. 10; emphasis added.]

The short but complete answer is that neither § 7, nor any other provision of the NLRA as amended by the LMRA, "encompass[] \* \* \* "the right to resign union membership." The 1947 Congress rejected §§ 7(b), 8(c) (1) & 8(c) (4) of the House Bill which did encompass that right and chose instead to enact the proviso to § 8(b) (1) (A) so as "*not [to] impair* the right of a labor

organization to prescribe its own rules with respect to the acquisition or retention of membership.”<sup>12</sup>

7. In *Textile Workers*, and again in *Machinists*, the Court held that “Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct.” See *Machinists*, 412 U.S. at 87, quoting *Textile Workers*, 409 at 217. In those cases, the Court looked to the “law which normally is reflected in our free institutions” and that defines the “right of the individual \* \* \* to resign from associations” to determine whether a union member has “lawfully resign[ed] from membership where the union’s “constitution and bylaws are silent on the subject of voluntary resignation.” *Machinists*, 412 U.S. at 88.

As the Court stated in *Machinists*, under that body of law, in that circumstance, “members [are] free to resign at will.” 412 U.S. at 87-88. See also 7 C.J.S., Associations, § 24 (“[I]n the absence of any statute or rule of the association to the contrary, a member may resign or withdraw from the society at his pleasure”); *Communication Workers v. NLRB*, 215 F.2d 835, 838 (2d Cir. 1954) (“Concededly the Union Constitution and bylaws are absolutely silent as to whether a member can volun-

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<sup>12</sup> The *Neufeld Porsche-Audi* Board’s discussion of the “fundamental policies” of the Act rests on the supposition that *Scofield v. NLRB*, 394 U.S. 423 states the “appropriate test to evaluate the lawfulness” of union resignation rules. 270 NLRB No. 209, Sl. Op. 9. *Scofield* states that to be valid under § 8(b)(1) (A) union rules that address the substance of what union members may do without being subject to union discipline, must *inter alia*, “impair[] no policy Congress has embodied in the labor laws.” 394 U.S. at 430. It is our view that the *Scofield* test does not apply to a rule that does no more than state how and at what times an individual may become a member or how and at what times an individual may resign membership. We do not develop this point more fully because as shown in the text, union resignation rules do not in any event impair any policy that Congress has embodied in the labor laws.

tarily resign. Hence we think that the common law doctrine on withdrawal from voluntary association is apposite. Under that doctrine, a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association.”); *Braddom v. Three Point Coal Corp.*, 288 Ky. 734, 157 S.W.2d 349, 352 (1941) (adopting C.J.S. statement and noting that the union’s bylaws and charter did not prescribe either the duration of membership or the method of termination); *Wall v. Bureau of Lathing & Plaster*, 117 So.2d 767, 771 (Fla. 1960) (“[W]here there is no provision for resignation, the general right of a member of a voluntary association to withdraw therefrom at any time, and have his resignation effective immediately, must prevail.”).

Since, as we have shown, the § 8(b)(1)(A) proviso preserves intact “the right of a labor organization to prescribe its own rules with respect to the \* \* \* retention of membership,” the inquiry in this case reduces to that undertaken in *Textile Workers* and *Machinists*: whether under the common law of associations the resignations here were lawful. And, under that body of law, where there is a “contractual restriction on a member’s right to resign” (*Machinists*, 412 U.S. at 88), the rule is as follows:

An affiliation with an association ordinarily is viewed as constituting an implied agreement to be bound by its constitution and bylaws. \* \* \* A member, by becoming such, subjects himself, within legal limits, to the power of the association to make and administer its own rules, and accordingly, is subject to the regulations governing membership and the rights of the members, as set forth in its charter, constitution and bylaws. \* \* \* *Where the rules of an association provide for the withdrawal of members, there can be no withdrawal except in the manner and on the conditions prescribed.* [7 C.J.S. Associations, §§ 6, 19, 22; emphasis added; footnotes omitted.]



See also 6 Am. Jur. 2d Associations and Clubs, § 26; *Colonial Country Club v. Richmond*, 140 So. 86 (La. 1932) (when resignation must be delivered to secretary of club by January 1 to be effective, delivery to the club's "golf professional" insufficient); *Boston Club v. Potter*, 212 Mass. 22, 98 N.E. 614, 615 (1912) (resignation not permitted while back dues continue to be owing); *Ewald v. Medical Society*, 70 Misc. 615, 128 N.Y.S. 886, 888, 891 (N.Y.App. 1911) (upholding enforcement of provision in county medical society's bylaws that "[n]o resignation shall be accepted from a member [who is] \* \* \* under [ethical] charges," in part because "any discreditable act of a member in his professional relations tends to discredit the [entire medical] society"); *Associated Press v. Emmett*, 45 F. Supp. 907, 919, 921, 923 (S.D. Cal. 1924) (upholding enforcement of provision in wire service's bylaws stating that members of wire service may resign from membership only upon two years' notice or consent of the Board of Directors, whichever comes sooner.) Compare *Haynes v. Annandale Golf Club*, 4 Cal. 2d 28, 47 P.2d 470 (1938) (bylaws providing without more that resignations must be "accepted" to be effective are unenforceable).

The earliest American case in point we have found is *Troy Iron and Nail Factory v. Corning*, 45 Barb. 231 (N.Y. 1864). In *Troy Iron*, an association of landowners, formed to improve the quality and flow of a stream running through its members' property, sued a member who had attempted to resign and had refused to pay his dues because he had concluded that his membership benefits were not commensurate with his dues payments. The Court entered judgment for the association, approving the association's rule that no member may resign so long as he continues to own or occupy land that would be benefitted by improvements in the flow of the stream:

It would be impossible, as a condition of withdrawal, to deprive them entirely of the use of the water

power which had been largely increased and furnished them by the improvement made by the association, and utterly impracticable to restore the parties to the same equitable footing which they relatively occupied before the improvements were made by the association. [45 Barb., at 255-256.]

A more recent decision to the same effect is *Leon v. Chrysler Motors Corp.*, 350 F. Supp. 877 (D.N.J. 1973), *aff'd mem.*, 474 F.2d 1340 (3rd Cir. 1974), which held that automobile dealers who join other dealers in a mutual advertising association are bound by a clause in their membership agreement providing that no dealer may withdraw from membership except with the consent of a majority of the association's members:

[T]he promise of each [dealer] to join was an incentive for all to assent to mutual cooperation. Indeed, it was a powerful incentive, as any nonassociating dealer would reap the harvest of the Association's labor without shouldering his fair share of the costs. The same would be equally true of those who joined but later seceded. To prevent a potential floodtide of withdrawals, the Associations adopted [the majority approval requirement]. \* \* \* That obligation may not now be dishonored simply because plaintiffs have become convinced they made a poor bargain. [350 F. Supp. at 886, 888.]<sup>13</sup>

These cases, and others like them, establish that an association may place restrictions on its members' right to resign where such restrictions are designed to further

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<sup>13</sup> See also *Kingston Dodge Inc. v. Chrysler Corp.*, 449 F. Supp. 52 (M.D. Pa. 1978), another mutual advertising case, where the court similarly held an automobile dealer bound by his agreement not to resign from the association unless the majority consented to such withdrawal. ("[T]o permit a member to withdraw against his solemn promise, which incidentally was the bargained for consideration, would not only harm the remaining members but would enable the withdrawing member to still reap the benefits of the association's mass advertising." 449 F. Supp. at 55.)



a basic purpose for which the association was formed. The Union's resignation rule is, of course, precisely that type of restriction. See *Allis-Chalmers*, 388 U.S. at 181-182.<sup>14</sup> The Pattern Makers promulgated that rule to protect the common interest of maintaining a united front during the most critical time a union faces—an economic strike. Each member joined the Unions, or retained his membership when free to resign, with the understanding that he was agreeing not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were agreeing to be similarly bound.

In the context of this strong interest in group solidarity, the result under the established common law principles is clear: While no employee in the bargaining unit is required to join the union in the first place, once he joins and begins receiving the benefits of union membership, the fundamental law of associations dictates that he may be bound by a union resignation rule of the kind at issue here, to which he agreed and from which all members mutually benefit, requiring him to continue his membership when the union is in greatest need of solidarity.

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<sup>14</sup> The Court said there:

National Labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

\* \* \* \*

Integral to the federal labor policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. *That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . ."* [388 U.S. at 180-181; emphasis added.]

**CONCLUSION**

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

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CLERK, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTH

CARL M. FRY; NEOMA R.  
SCHULTZ; ARNOLD C. SEAL  
AGOSTINO A. STAGLIANO;  
ROBERT BOZARTH; and RAL  
KESSLER;

Plaintiffs,

vs.

JOE BINGEL; ALLAN J. HERI-  
TAGE; ROBERT L. WARTINGER;  
RAY BROWN; THOMAS W.  
KOPECK; and INTERNATIONAL  
TYPOGRAPHICAL UNION,

Defendants.

*Attachment  
See Sessions  
63*

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ON NO.

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' APPLICATION FOR  
TEMPORARY RESTRAINING ORDER  
AND MOTION FOR PRELIMINARY  
INJUNCTION

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8	S. Brill, <u>The Teamsters</u> (1979)	56
9	A.Scott, <u>Law of Trusts</u> (3d ed. 1967)	41
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## INTRODUCTION AND STATEMENT OF FACTS

Through gross and discriminatory manipulation of union election results in disregard of the union constitution and in direct violation of Titles I and V of the Labor Management Reporting and Disclosure Act of 1959, ("LMRDA") defendants have installed themselves in office as the Executive Council of the International Typographical Union ("ITU"). On the purported basis that endorsements by some local union officers of presidential candidate Robert S. McMichen were made in violation of federal law, they have perpetuated in office defeated former president Joseph Bingel, who not only received identical endorsements but also made illegal use of ITU funds, facilities and employees in support of his own candidacy and that of allied candidates for Executive Council office. Defendants have, at the same time, refused to act on challenges to the elections for other Executive Council positions that are based on precisely the same conduct relied on to justify disregard of the presidential election results.

In further disregard of the will of the majority of the union membership, who voted for President-elect McMichen and the contrary policy towards merger which he represents, the illegally constituted Executive Council, led by defendant Bingel, has now completed a "merger/affiliation" agreement with the International Brotherhood of Teamsters ("Teamsters") and is making massive expenditures of ITU resources to promote that agreement.<sup>1/</sup> They have done so while refusing to negotiate in good faith with an AFL-CIO affiliate, the Graphics Communications International Union ("GCIU"), which is ready and willing to explore merger possibil-

<sup>1/</sup> Much of that promotion is being and has been conducted by ITU Representatives, employees of the ITU, who are appointed by and are under the direct supervision and control of the ITU President. See Harris Declaration, Exhibit A, ITU Book of Laws [hereinafter "ITU Book of Laws"], Bylaws Article X, Section 1.

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ities. If ratified in a membership referendum vote scheduled for May 16, 1984, the agreement with the Teamsters will irrevocably alter the very foundations of the ITU, terminating its long-time status as an independent union associated with the AFL-CIO and transforming it into a subordinate division of the Teamsters under the complete control of the Teamsters' leadership.<sup>2/</sup>

If defendants are allowed to proceed, ITU members will be forced to consider this drastic step, heavily promoted by the illegally constituted Executive Council, without ever knowing what alternatives for true merger with an AFL-CIO affiliate could be negotiated by legitimately elected leadership exploring that possibility in good faith. Therefore, in order to prevent defendants from further and irretrievably violating plaintiffs' and other union members' rights to democratic governance of their union, this court should, while plaintiffs' claims are adjudicated on the merits, enjoin defendants from perpetuating defeated incumbent Bingel in office and from taking the irrevocable step of holding the May 16 referendum vote.

1. The 1983 ITU Election Campaign.

The single, overriding issue in the recently completed ITU elections was the differing policies of the presidential candidates towards merger with another international union.<sup>3/</sup> Incumbent President Bingel favored immediate and ex-

<sup>2/</sup> Though labeled a "merger/affiliation" the proposed agreement is in reality a takeover by the Teamsters of the ITU, which would become a subordinate "trade division" subject to the complete control of the Teamsters leadership. See pages 11-13, Infra. AFL-CIO President Lane Kirkland has made it clear that any affiliation of the ITU with the Teamsters would compel the immediate separation of the ITU from the AFL-CIO. See Harris Declaration, Exhibit G (October 6, 1983 AFL-CIO Statement). The Teamsters were expelled from membership in the AFL-CIO in 1957 because of corrupt practices.

<sup>3/</sup> The ITU, the nation's oldest labor organization, has a uniquely democratic tradition of competition for leadership between two political parties — the Progressives and the Independents. Candidates for office in the 1983 elections were not, however, divided along traditional party lines. Incumbent President Bingel

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clusive negotiations with the Teamsters. His opponent, Vice President Robert S. McMichen, favored first pursuing negotiations aimed at merger with another AFL-CIO union, in particular, the Graphic Communications International Union ("GCIU").

Incumbent Bingel's open support for an agreement with the Teamsters began at the August 1983 ITU Convention in San Francisco. Without consulting First Vice President McMichen, Bingel invited Teamsters' President Jackie Presser to address the Convention. McMichen Declaration, ¶ 9.<sup>4/</sup> Presser told the ITU delegates that he "wanted to make [them] part of the Teamster family" and distributed literature extolling the benefits of merger with the Teamsters. Harris Declaration, Exhibit B Hereinafter "1983 ITU Convention Proceedings", at 22c-25c; McMichen Declaration, ¶ 10. In obvious reference to the ITU election of officers to be held in November of 1983 and to the candidacy of incumbent Bingel, whose support for a merger with the Teamster would become increasingly obvious thereafter, an August 8, 1983 letter from Presser, distributed to the ITU delegates at the Convention, urged

(Footnote continued)

headed a slate of Progressive Party candidates which included: for Vice Presidential positions B and C, respectively, incumbent Robert J. Wartinger and Allen J. Heritage; for Vice Presidential position A, Raymond Brown; for Secretary-Treasurer, Robert Petersen. Incumbent First Vice President McMichen, though himself a member of the Progressive party, opposed incumbent Bingel for President in the 1983 elections because of their split over what the union's policy towards merger should be. The other candidates for international office opposing the Bingel slate were: for Vice President, position A, William Boarman; for Vice President, Position B, Billy Joe Austin; for Secretary-Treasurer, incumbent Thomas W. Kopeck. See McMichen Declaration, ¶¶ 3-5.

<sup>4/</sup> On the agenda of the Convention was a proposed merger agreement with the Newspaper Guild ("the Guild"), which, had it been approved by a vote of the Convention, would have been submitted to ITU members for a referendum vote. President Bingel scheduled Teamsters President Presser's speech on the second day of the Convention, prior to the scheduled consideration of the Guild merger. The Guild merger proposal was voted down by the Convention.



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1 them to "think about what the Teamsters can offer, before you make a final deci-  
 2 sion on the ballot you'll cast this fall" McMichen Declaration, ¶ 10.

3 Without any authorization from the Convention and over the protests of Vice  
 4 President McMichen, Bingel proceeded after the Convention and during the ensuing  
 5 election campaign actively to pursue a merger agreement with the Teamsters. Nu-  
 6 merous meetings were held with Teamsters officials,<sup>5</sup> and Bingel directed ITU at-  
 7 torney Ronald Rosenberg to negotiate a merger document with Teamsters' counsel.  
 8 McMichen Declaration ¶ 19; McMichen Declaration, Exhibit A [hereinafter "Mc-  
 9 Michen Exhibit A"], Attachment 2 (October 13, 1983, Executive Council Docu-  
 10 ment). On October 11, 1983, Bingel, along with forty members of the ITU staff,  
 11 including officers and representatives from around the country, toured Teamsters  
 12 headquarters in Washington and met with Teamsters President Presser and other  
 13 Teamsters officials. McMichen Declaration, ¶ 20.

14 On October 10, 1983, little more than a month before the elections, incum-  
 15 bent President Bingel sent to all ITU members a letter discussing the prospects of  
 16 merger with the Teamsters. McMichen Exhibit A, Attachment 2. On October 13,  
 17 1983, the ITU Review, the union's official weekly newspaper, dedicated its first  
 18 three pages to an article on merger with the Teamsters. That article displayed a  
 19 picture of Bingel meeting with Teamsters President Presser while touring  
 20 Teamsters headquarters in Washington, and reprinted the Bingel letter mailed three  
 21 days earlier. McMichen Exhibit A, Attachment 2.

22 During the reelection campaign, Teamsters President Presser continued his  
 23

24 5/ First Vice President McMichen, a member of the Executive Council, was ex-  
 25 cluded from many of the meetings concerning merger. McMichen Declaration ¶ 13.  
 26 In this and other ways defendants conspired during the campaign to exclude Mc-  
 Michen from development of ITU policy and to limit his contact with other ITU  
 leaders and ITU rank and file members. See McMichen Declaration, ¶ 11-14.

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1 attempts, begun at the San Francisco Convention, to persuade ITU members to  
2 support an agreement with the Teamsters. He made it clear that such support  
3 meant support for Bingel's reelection campaign. Presser wrote a letter, published  
4 by the San Francisco - Oakland ITU Retirees Club, promoting his proposal for  
5 merger of the ITU into the Teamsters. See Kessler Declaration, ¶5 and Exhibit B.  
6 That letter was subsequently revised to add specific praising references to incum-  
7 bent President Bingel:

8 I was impressed with the leadership of your President  
9 Joe Bingel, at the Convention and his continuing efforts to  
10 follow the mandate of that Convention to seek a viable  
11 merger. Joe and I have had many discussions since the Con-  
12 vention, and both agree the interests of the members must  
13 be foremost in any merger agreement. I look forward to  
14 working closely with your President, Joe Bingel, in making  
15 possible the affiliation or merger of the ITU with the IBT.

16 Kessler Declaration ¶6 and Exhibit C. Despite the fact that the ITU had never  
17 before used its mailing lists to circulate a document on behalf of any other organi-  
18 zations, and in direct violation of the ITU Book of Laws,<sup>6/</sup> the revised letter was  
19 then mailed, over the protests of Vice President McMichen, to all retired ITU  
20 members at Teamsters' expense. Id. Retirees are voting members of the ITU and  
21 compromise approximately 45 percent of the electorate.<sup>7/</sup>

22 In response to Incumbent President Bingel's promotion of merger with the  
23 Teamsters, and his failure to pursue merger within the AFL-CIO, a number of local  
24 union officers took positions on the merger issue in the officer columns of their  
25

26 <sup>6/</sup> The ITU Book of Laws provides: "No political group or party may be financed  
by other than members of the union. . . . Acceptance of money or indirect  
financial help of any kind for political purposes from other than members of the  
union is prohibited both as to candidates and others acting in their behalf or  
working for their election." ITU Book of Laws Bylaws Article XI, Section 8(c).

<sup>7/</sup> Retirees would, however, lose their right to vote under the proposed agree-  
ment with the Teamsters.

regularly published local union publications and endorsed international officer candidates based on those positions.<sup>8/</sup> Some local union officers endorsed Bingel and other Progressive Party candidates and voiced support for a merger with the Teamsters. For example, President W. Edward Cox of San Francisco - Oakland Mailers Local No. 18 wrote, in the November 11, 1983 edition of the newsletter financed by his local union:

Your cooperation in voting for the above mentioned candidate will in my opinion bring about a speedy and successful merger with the International Brotherhood of Teamsters under the leadership of JOE BINGLE

VOTE BINGLE, HERITAGE, BROWN, WARTINGER, PETERSEN on November 18, 1983.

McMichen Declaration, Exhibit C hereinafter "McMichen Exhibit C".

Other local union officers opposed Bingel's policy of immediate merger into the Teamsters. For example, Bertram Powers, president of New York Typographical Union No. 6, wrote in his column in the October 1983 local union newsletter:

My reasons for supporting McMichen are that I believe he will bring our Union into a merger with the other printing trade unions. I am opposed to President Joe Bingel's attempt to make an end run around the newly formed Graphic Communications International Union to merge the ITU into the International Brotherhood of Teamsters.

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<sup>8/</sup> Endorsements by local union officers of candidates for ITU offices were by no means a new development during the 1983 campaign. Within the ITU's unique two party system, such endorsements have been a long tradition. Indeed, the ITU Constitution formerly required that each candidate for International Office receive a minimum of fifty endorsements from local unions. The 1983 election was the first election under new rules which provided for a nominating convention in place of the endorsement requirement. See McMichen Declaration, ¶ 32.

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Harris Declaration, Exhibit H.<sup>9/</sup> The October 1983 edition of the Typographical Reporter, the monthly newsletter of Detroit Typographical Union No. 18, printed letters from both candidates, McMichen and Bingel. See McMichen Declaration, Exhibit K. McMichen's letter indicated his intention to "[a]ggressively pursue an EQUITABLE merger with the Graphic Communications International Union." Id. (page 3 of Newsletter). Bingel wrote that "there can and will be only one substantive merger discussion at the present time, and the discussion will be with the IBT [the Teamsters]." Id. (page 4 of Newsletter). William J. Croteau, the President of the Detroit local, endorsed McMichen in his column:

For ITU President - I will support and recommend Bob McMichen . . . He is a strong leader and one who will fight for his programs to turn this Union around. One such program includes merger with the 220,000 - member GCIU.

Id. (Page 2 of Newsletter).

## 2. The Election Results and the Actions of the Canvassing Board

The Canvassing Board met on November 30, 1983 to tabulate the results of the November 16, election. It announced the following official tabulation of votes for international offices:

President	Bingel, Joe	21,935
	McMichen, Bob	26,855
Vice President	Heritage, Allan J.	32,448
Vice President	Wartinger, Robert L.	25,345
	Austin, Billy J.	19,933

<sup>9/</sup> Powers also wrote a letter to Local 8 members on his personal stationary, which stated:

Bingel, while pretending to be open to merger with our fellow printing trade workers in the Graphic Communication International Union, secretly has the ITU on a fast track for merger with the International Brotherhood of Teamsters. You can stop Bingel's machinations by throwing him out of office.

Vice President	Brown, Ray	23,724
	Boorman, Bill	21,644
Secretary-Treasurer	Petersen, Robert E.	17,815
	Kopeck, Thomas W.	30,387

See McMichen Declaration, Exhibit F Hereinafter "1983 ITU Canvassing Board Report", at 1.

The duties of the Canvassing Board are strictly limited by the ITU Constitution and By-Laws to certain ministerial functions directly associated with the tabulation of votes. See ITU Book of Laws, *supra*, Bylaws, Article XI, Sections 21-25, 26(2).<sup>10/</sup> The Board, controlled by active supporters of incumbent Bingel and the rest of the Progressive Party slate, proceeded, nonetheless, without precedent, to arrogate to itself the authority to hear election protests based on alleged violations of federal law.

Despite identical endorsements of his own candidacy,<sup>11/</sup> incumbent Bingel challenged the election of his opponent McMichen on the basis that endorsements of McMichen by local officers in union financed publications violated federal

(Footnote 9 continued)

Harris Declaration, Exhibit L

<sup>10/</sup> The Constitutional rules governing the ITU are contained in what is called the "ITU Book of Laws." The Book of Laws is divided into the Constitution, Bylaws, General Laws and Convention Laws.

<sup>11/</sup> The record showed endorsements for Bingel by local union officers in official union publications in each of the following locals:

<u>Locals</u>	<u>Bingel Vote</u>	<u>McMichen Vote</u>
San Francisco M-18	245	177
Montreal No. 145	2318	148
Toronto No. 91	465	278
Totals	3028	503

See McMichen Declaration, Exhibits A, D and K. Harris Declaration, Exhibit C Hereinafter "ITU Official Election Returns".



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law.<sup>12/</sup> On that basis, the Canvassing Board ordered that the presidential election be rerun. It then proceeded — despite the fact that Bingel, besides benefiting from identical endorsements (including one from Edward Cox, himself, Chairman of the Canvassing Board),<sup>13/</sup> had made extensive use of ITU funds, facilities and employees in support of his reelection campaign (See McMichen Declaration ¶ 24-30, Exhibits A and C)<sup>14/</sup> — to order that the defeated incumbent Bingel remain in

<sup>12/</sup> Bingel claimed that the endorsements violated section 401(g) of the Labor Management Reporting and Disclosure Act, 29 U.S.C., § 481(g), which prohibits the use of union funds to promote candidates in a union election. It provides that: "No moneys received by any labor organization by way of dues, assessment or similar levy, and no moneys of an employer shall be contributed to promote the candidacy of any person in an election subject to the provisions of this subchapter." That section has been applied exclusively in cases involving endorsements of incumbents. Its primary purpose has been to prevent incumbent officers from stifling dissent and perpetuating themselves in office.

The record before the Canvassing Board showed endorsements of McMichen by local union officers in five local union publications. The vote totals in those five locals were as follows:

<u>Locals</u>	<u>Bingel Vote</u>	<u>McMichen Vote</u>
Philadelphia No. 2	172	735
New York No. 8	860	3998
Detroit No. 18	238	758
Cleveland No. 53	279	333
Phoenix No. 352	58	177
Totals	1807	5992

1983 ITU Canvassing Board Report, supra, at 3; ITU Official Election Returns, supra.

<sup>13/</sup> Finding that the total number of votes for McMichen in all locals in which McMichen received endorsements -- 5,992 votes -- exceeded his margin of victory -- 4,920 votes -- the Canvassing Board concluded that the endorsements could have affected the outcome of the election and that the presidential election must be rerun. See 1983 ITU Canvassing Board Report, at 3. But if the votes for Bingel in locals in which he received endorsements, a total of 3,845 votes, were also discounted, McMichen would remain the winner by a large margin.

<sup>14/</sup> Candidate McMichen has filed a complaint with the Department of Labor under Title IV of the LMRDA challenging extensive use of union funds in support of Bingel and Progressive Party vice presidential candidates. McMichen Declaration, ¶ 42 and Exhibit P. In attempting to present evidence to the Canvassing Board to

office in the interim. To this day, more than four months after the Canvassing Board's decision, no rerun of the presidential election has ever been scheduled.

In response to Bingel's election protest, candidate McMichen and unsuccessful vice presidential candidate Billy Joe Austin protested the results of the vice presidential elections in which the Progressive Party candidates received the majority of the votes.<sup>15/</sup> Their protests were based on endorsements by local union officers in union financed publications identical to those which led the Canvassing Board to invalidate the presidential results,<sup>16/</sup> and on the extensive use of ITU funds,

(Footnote 14 continued)

that effect, McMichen found that ITU staff members were unwilling publicly to come forward without job protection. Their fears were not unfounded since during the campaign ITU staff members had been fired for supporting McMichen. Robertson Declaration; Ridenhour Declaration. Despite a Canvassing Board recommendation that job protection be provided, the Executive Council, controlled by the Bingel slate, refused McMichen's request that it provide such protection for employees who come forward with evidence supporting election protests. (McMichen Declaration, ¶ 36.)

<sup>15/</sup> McMichen maintained that the Canvassing Board had no authority to hear election protests. McMichen Declaration, ¶ 37. He tendered counter protests only contingent upon the Board's rejection of his position and assumption of such authority.

<sup>16/</sup> For example, successful Progressive Party Vice Presidential candidate Robert Wartinger received endorsements by local union officers in seven official publications in the election campaign for Vice President "B". The vote totals in those locals was as follows:

<u>Locals</u>	<u>Wartinger Vote</u>	<u>Austin Vote</u>
New York No. 6	3576	995
Detroit No. 18	535	395
San Francisco No. 18	228	173
Cleveland No. 53	337	212
Toronto No. 91	393	260
Montreal No. 145	2205	336
Totals	7286	2271

See McMichen Declaration, Exhibits A, C, D, J and K; ITU Official Election Returns. The opposing candidate, Austin, received the endorsement of one local union publication, the Philadelphia No. 2 newspaper. He received 706 votes from that local. Wartinger's margin of victory was 5,413 votes. ITU Official Election Returns, supra.

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MEMORANDUM OF POINTS AND AUTHORITIES

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employees and facilities in support of the entire Bingel slate of candidates. See McMichen Exhibits A & C. Despite clear federal regulations to the contrary,<sup>17/</sup> the Canvassing Board maintained that limitations on the use of union funds in support of officer candidates do not apply to Canadian locals<sup>18/</sup> and refused to consult the Labor Department on that issue when its ruling was questioned. See Gallagher Declaration, ¶7; McMichen Declaration, Exhibit L (January 19, 1984 Canvassing Board Report) hereinafter "January 19 Canvassing Board Report". The Board, on that basis, upheld the vice presidential results. Id.

Despite repeated appeals by candidates McMichen and Austin to the Executive Council, emphasizing in detail the wholly fallacious and disingenuous assumptions through which the Canvassing Board assumed power to hear election protests and the wholly discriminatory manner in which the Canvassing Board ruled on identical challenges to the presidential and vice presidential races, the Executive Council, controlled by defendants, has failed to overturn the actions of the Canvassing Board. See McMichen Declaration, ¶¶36-43, Exhibits H, I, M, N. The Executive Council has also failed to respond to the appeal of 30 local union officers that no merger agreement be submitted to a referendum until the Executive Council is properly constituted and the similar demands of plaintiffs prior to

(Footnote 16 continued)

In the election for Vice President "B," Ray Brown defeated Bill Boarman by 2,080 votes. 1983 Canvassing Board Report, supra, at 1. Taking into account only Montreal Local 145, where Brown was endorsed in the official union newsletter, and received 2,249 votes (ITU Official Election Returns, supra), Brown's election should have been invalidated under the standard presumably applied by the Canvassing Board.

<sup>17/</sup> See 29 C.F.R. § 452.13.

<sup>18/</sup> The successful Progressive Party vice presidential candidates, like incumbent Bingel, received a large number of votes in Canadian locals in Montreal and Toronto whose officers had endorsed the Bingel slate in official, union-financed publications.

commencing this lawsuit. See Olsen Declaration, ¶ 2; Harris Declaration, Exhibit J (March 30, 1984 Telegram.)

### 3. The "Merger/Affiliation" Agreement.

The Executive Council, led by incumbent President Bingel, who presumably retained power only pending a rerun of the presidential election, moved quickly, through the efforts of ITU counsel and employees under the direct control and supervision of the ITU President, to complete what it characterizes as a "merger/affiliation" agreement with the Teamsters. It did so without making a good faith attempt to pursue merger negotiations with an AFL-CIO union.<sup>19/</sup> The completed Teamsters agreement was mailed to ITU members on March 20, 1984 with official notice of a May 16, 1984 referendum. Before and since that time, Bingel has used ITU resources to wage a massive campaign promoting the Teamsters merger agreement. See Olsen Declaration, ¶ 4; Kessler Declaration, ¶ 9; McMichen Declaration, ¶ 24. That campaign includes the scheduling of nine regional "merger conferences" held around the country between March 31, 1984 and May 6, 1984, including one in San Francisco on April 28. Olsen Declaration ¶ 4 and Exhibit D. Promotion of the Teamsters merger has taken place largely through the efforts of ITU representatives, employees of the ITU who are appointed by and work under the direct control and supervision of the President. ITU Book of Laws, Bylaws Article X, Section 1.

By its own terms, the agreement with the Teamsters would become effective

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<sup>19/</sup> President-elect McMichen and Vice Presidential candidates Austin and Boardman, who have challenged the results of the Vice Presidential elections, have taken the position that they will work to place before the ITU membership a merger agreement with the GCIU, an AFL-CIO union. See McMichen Declaration ¶ 52-53; Austin Declaration, ¶ 6; Boardman Declaration, ¶ 6. GCIU President Ken Brown has indicated that merger negotiations between the GCIU and the ITU are likely to be fruitful. Brown Declaration, ¶ 4.



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1 immediately upon approval by referendum. Harris Declaration, Exhibit D (Official  
 2 Notice of Referendum and "Merger/Affiliations Agreement" [hereinafter "ITU/IBT  
 3 Agreement"] at Article III. Far from a "merger" between equals, that agreement  
 4 is, in fact, a takeover by the Teamsters of the ITU, which would become a "trade  
 5 division" within the Teamsters. A "trade division" or "conference," under the  
 6 controlling terms of the Teamsters' Constitution, is governed by Bylaws which are  
 7 subject to the approval of the Teamsters' General President. Harris Declaration,  
 8 Exhibit D [hereinafter "Teamsters' Constitution"], Article XVI, Sections 1-2. "The  
 9 General President reserves the right at any time to make such amendments or  
 10 changes in approved Bylaws as he deems to be in the best interest of the Inter-  
 11 national Union." *Id.* at Section 2. Under the Teamsters' Constitution, the General  
 12 President may appoint "Directors" of a trade division or assume the position of  
 13 Director himself. Teamsters' Constitution, supra, Article XVI, Section 3.<sup>20/</sup>

14 Once the ITU is thus absorbed by the Teamsters as a "conference" or "trade  
 15 division," it could not regain its autonomy except through sacrifice of all its pro-  
 16 perty and funds. The Teamsters Constitution provides in Article XVI, Section 1  
 17 that "Conferences and Trade Divisions shall be organized and chartered as subordi-  
 18 nate bodies." Under Article X, Section 13 of the Teamsters' Constitution (emphasis  
 19 added):

20 When the charter of a subordinate body is revoked, the  
 21 subordinate body or its officers shall be required to turn  
 22 over all books, documents, property and funds to the Gen-  
 23 eral President or his representative, or to the General  
 24 Secretary-Treasurer of the International Union, and should a  
subordinate body secede, disaffiliate, or dissolve or be dis-

25 <sup>20/</sup> Such Directors are employees of the International Union and serve at salaries  
 26 set by the General President. The agreement provides that "[t]he Trade Division  
 Director of the ITU/IBT shall be appointed in accordance with the IBT Constitution  
 from among the pre-affiliation membership of the ITU." ITU/IBT Agreement,  
supra, Article XIX, Section 2.



1 solved, or be suspended, or forfeit its charter, then all  
 2 books, documents, property and funds shall likewise be  
 3 turned over to the General President or his representative,  
 4 or to the General Secretary-Treasurer to be held until such  
time as the subordinate body may be reinstated or reor-  
ganized. If no reinstatement or reorganization occurs  
"within a period of two (2) years such funds shall be trans-  
ferred to the general fund.

5 The "merger" agreement also attempts to circumvent any eventual rerun of  
 6 the 1983 elections.<sup>21/</sup> It provides that,

7 Upon the effective date of this Agreement, the incumbent  
 8 officers of ITU shall become the officers of ITU/IBT. They  
 shall serve until the completion of their present terms. . . .

9 ITU/IBT Agreement supra, at Article XIX, Section 1.

10 In sum, since the San Francisco convention last August, when defendant  
 11 Bingel first interjected the Teamsters' takeover proposal into the ITU's merger  
 12 deliberations, defendants have engaged in a series of actions which, while entirely  
 13 illegal, inconsistent and discriminatory in their application of both ITU and federal  
 14 law, have had one entirely consistent purpose and effect — to prevent a properly  
 15 elected Executive Council majority opposed to an immediate Teamsters merger  
 16 from taking office before the demise of an independent, AFL-CIO-affiliated ITU  
 17 was a fait accompli. If successful, defendants' scheme will have two irreversible  
 18 and interrelated effects. First, ITU members will never have the opportunity to  
 19 select in a validly conducted election the leadership of the autonomous national  
 20 labor organization which has, for 132 years, been the ITU; that organization will  
 21 have disappeared forever. And, second, ITU members will never have an opportu-  
 22 nity to vote on a plan for their union's future course devised by a legally elected  
 23 leadership. The scheme now presented by an illegally elected leadership will be  
 24

25 <sup>21/</sup> According to Labor Department regulations, "[t]he initial selection of offi-  
 26 cers by newly formed or merged labor organizations is not subject to the require-  
 ments of Title IV [of the LMRDA]." 29 C.F.R. § 452.14.

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1 irreversibly in place.

2  
 3 **PLAINTIFFS ARE ENTITLED TO IMMEDIATE**  
 4 **INJUNCTIVE RELIEF**

5 The criteria for granting preliminary injunctive relief are well established in  
 6 this circuit. The moving party must demonstrate,

7 either (1) a combination of probable success on the merits  
 8 and the possibility of irreparably injury or (2) that serious  
 9 questions are raised and the balance of hardships tips  
 10 sharply in its favor.

11 Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d  
 12 1197, 1201 (9th Cir. 1980); See also, e.g., Miss Universe, Inc. v. Fleisher, 605 F.2d  
 13 1130, 1134 (9th Cir. 1979); William Inglis & Sons Baking Co. v. ITT Continental  
 14 Baking Co., 525 F.2d 86, 88 (9th Cir. 1975). Plaintiffs readily satisfy either of  
 15 these two standards.

16 **L THERE ARE SERIOUS QUESTIONS GOING TO THE MERITS AND THE**  
 17 **BALANCE OF HARSHIPS TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS.**

18 As demonstrated below, plaintiffs are more than likely to prevail on the  
 19 merits of their claims against defendants. But, under the clear law of this circuit,  
 20 even if there were doubts about plaintiffs' probable success on the merits, they  
 21 would be entitled to temporary injunctive relief. For there can be no question here  
 22 that plaintiffs' claims present at least serious questions on the merits, and that  
 23 plaintiffs will suffer severe and irreparable injury in the absence of immediate  
 24 injunctive relief, clearly tipping the balance of hardships in their favor.

25 Plaintiffs are asking this court to enjoin a course of conduct by defendants  
 26 which they maintain violates their rights under federal law in multiple ways and  
 which, if allowed to continue while plaintiffs' claims are adjudicated on the merits,

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1 will effectively foreclose those rights forever. Plaintiffs maintain, in essence, that  
 2 defendants have illegally perpetuated their control of the ITU, thus trampling on  
 3 plaintiffs and other individual union members' rights to democratic governance of  
 4 their union. Defendants are now quickly proceeding to use that control to alter  
 5 forever the very nature of the ITU.

6 The Executive Council, as now constituted, has completed and placed before  
 7 the union membership for its ratification an agreement for takeover by the  
 8 Teamsters. By its own terms, that agreement will become effective immediately  
 9 upon referendum approval. At that time, the ITU will have ceased to exist as an  
 10 autonomous labor organization, having been absorbed into the Teamsters as a  
 11 "trade division" subject to complete control by the Teamsters' leadership.<sup>22/</sup> Nor  
 12 could the ITU regain its independent status at a later time without severe hardship.  
 13 Upon its attempt to disaffiliate from the Teamsters, the ITU's books, documents,  
 14 property and funds would be seized by the Teamsters' General President under the  
 15 explicit terms of the Teamsters' Constitution. Teamsters' Constitution, supra,  
 16 Article X, Section 13.

17 Once the agreement with the Teamsters is ratified, plaintiffs and the rest of  
 18 the union electorate will have lost forever their democratic right to choose their  
 19 leadership and to have the future of the union shaped by that leadership. Under the  
 20 terms of the agreement, those in office "upon the effective date of the agree-  
 21 ment", will become the officers of the new ITU/IBT trade division of the Team-  
 22 sters, "serv[ing] until the completion of their present terms." ITU/IBT Agreement,  
 23

24 <sup>22/</sup> Under the Teamsters' Constitution, the Bylaws which govern a "trade divi-  
 25 sion" or "conference" are subject to the approval of the Teamsters' General  
 26 President, who may unilaterally change those Bylaws whenever he deems it in the  
 best interests of the Teamsters to do so. Teamsters' Constitution, supra, Article  
 XVI, Sections 1-2.

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1 supra, Article XIX. Defendants apparently hope thus to circumvent forever the  
 2 assumption of office by President-elect McMichen and thus to frustrate forever the  
 3 will of the union electorate in the 1983 elections. Even if a rerun election were to  
 4 be scheduled, retirees, who are full voting members of the ITU and comprise 45  
 5 percent of the ITU membership, would have no right to vote in union elections once  
 6 the ITU is absorbed into the Teamsters. ITU/IBT Agreement, supra, Article XL.  
 7 They would thus be forever disenfranchised. Moreover, once the agreement is  
 8 finally ratified, the most important issue in the 1983 union elections — policies  
 9 towards merger with another union — will have been forever mooted.

10 Nor can it be said that the plaintiffs' rights are preserved because they have  
 11 the right to vote against the proposed merger agreement. There is general  
 12 agreement that the ITU must eventually seek to merge with another union. The  
 13 clear choice of the 1983 electorate was to seek that merger first within the AFL-  
 14 CIO. But presented with the fait accompli of merger with the Teamsters, and  
 15 given no prospects by the present illegitimate ITU leadership of merger with an  
 16 AFL-CIO union, the electorate is given no meaningful choice and thus no mean-  
 17 ingful right to vote. Indeed, with each day that passes without restoring to  
 18 President-elect McMichen his rightful seat, defendants make more and more diffi-  
 19 cult effectuation of the policy for which McMichen stands and for which the union  
 20 electorate voted — good faith pursuit of a merger with an AFL-CIO union. In the  
 21 meantime, incumbent Bingel, illegally perpetuated in office, continues to use his  
 22 control over ITU staff and resources to spare no expense in promoting ratification  
 23 of the agreement with the Teamsters.<sup>23/</sup>

24  
 25 <sup>23/</sup> Those efforts include, inter alia, the staging of nine regional "merger confer-  
 26 ences" to be held around the country between March 31, 1984 and May 6, 1984. See  
 Declaration of Leon Olsen, ¶ 4 and Exhibit D.

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1 Defendants on the other hand, will suffer no hardship in postponement of a  
 2 referendum vote on the proposed agreement with the Teamsters if they ultimately  
 3 prevail on the merits of this lawsuit. A slight delay and further opportunity for the  
 4 union membership to weigh the merits of the proposed agreement can only serve  
 5 the interests of the union and the legitimate interests of its presumptive leader-  
 6 ship. Defendants agree that the presidential election must be rerun. They can  
 7 have no legitimate objection to having the presidential contest finally resolved  
 8 before taking the momentous and irrevocable step represented by the proposed  
 9 agreement with the Teamsters.

10 Therefore, given the certainly more than "serious" challenges raised by  
 11 plaintiffs to the legality of defendants' actions, this court should enjoin defendants,  
 12 pending adjudication of plaintiffs' claims on the merits, from proceeding with the  
 13 referendum vote and from continuing to deprive President-elect McMichen of his  
 14 rightful office.

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II. Plaintiffs' Claims Are Likely to Succeed on the Merits

A. Plaintiffs Are Likely To Succeed In Their Argument That Defendants Have Denied Plaintiffs Their Equal Rights In Violation of Title I of the LMRDA

1. Section 101(a) of Title I of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") guarantees to union members equal rights to vote and to otherwise participate in union affairs:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws.

29 U.S.C. § 411(a). That section is "a command that members and classes of members shall not be discriminated against in their right to nominate and vote." Calhoon v. Harvey, 379 U.S. 134, 139 (1964). The right to vote thus guaranteed is more than "the 'mere naked right to cast a ballot.'" Bunz v. Moving Picture Machine Operators' Protective Union Local 224, 567 F.2d 1117, 1124 (D.C. Cir. 1977), quoting Young v. Hayes, 195 F.Supp. 911, 916 (D.D.C. 1961). "The existence of a violation depends on whether, under all the circumstances of the case, the union has discriminated against some of its members and robbed their votes of meaning." 567 F.2d at 1124, n.53.

Title I of the LMRDA is applicable in this circuit to the conduct of elections for union office, despite the different remedies for candidate election violations available under Title IV of the LMRDA, 29 U.S.C. § 481 et seq. Kupau v. Yamamoto, 522 F.2d 449, 453-54 (9th Cir. 1980). It is applicable as well to union ballot referenda. Aguirre v. Automotive Teamsters, 633 F.2d 168 (9th Cir. 1980); Turner v. Dempster, 569 F.Supp. 683 (N.D. Cal. 1983). It is therefore necessarily the pertinent standard where there is, as here, an integrated series of activities

1 involving both the negation and manipulation of the results of a candidate election  
 2 and the conduct of a ballot referendum by the illegally elected officers.<sup>24/</sup>

3 In protecting the rights accorded by § 101(a)(1), the courts have been particu-  
 4 larly alert to the fact that discrimination leading to the effective disenfranchise-  
 5 ment of union members can be accomplished by discriminatory application of union  
 6 rules as well as by ballot stuffing or voter fraud. Compare, e.g., Kupau, supra,  
 7 with Aguirre, supra. In Kupau, for example, a union member was allowed to run for  
 8 office despite a challenge to his eligibility but, after he won the election, was not  
 9 installed, on the ground that he was ineligible after all. The Ninth Circuit held  
 10 that the

11 inconsistent and uneven application of the eligibility re-  
 12 quirement resulted in a denial of [the] equal right to no-  
 13 minate and vote under Title I . . . [B]y the about-face on  
 eligibility the union in effect disenfranchised [the] majority  
 of the union's electorate who voted in the election. . . ."

14 622 F.2d at 453-54.<sup>25/</sup> The Kupau court went on to affirm a preliminary injunction  
 15 requiring that the candidate with the highest number of votes be installed in office.  
 16 Cf. Rollinson, supra, 677 F.2d, at 745. See also, e.g., Buzg, supra; Pignotti v.  
 17 Local 3 Sheet Metal Workers, 343 F.Supp. 236 (D. Neb. 1972), aff'd, 477 F.2d 825  
 18 (8th Cir.), cert. denied, 414 U.S. 1067 (1973).

19 As we show below, defendants in this case, through discriminatory manipu-  
 20 lation of union rules governing election results, have prevented President-elect

21  
 22 <sup>24/</sup> Moreover, since the rights protected are the right to vote and to participate  
 23 in union decisions, neither the union majority in a particular election nor the group  
 24 that turns out in a proper election to be in the minority may be disenfranchised,  
 overtly or otherwise. Cf. Buzg, supra.

25 <sup>25/</sup> The Ninth Circuit's other holding in Kupau — that, at least where no rerun of  
 26 a union officer election is sought as relief, an otherwise proper Title I case "is not  
 preempted by the existence of Title IV claims", 622 F.2d, at 445 — was later re-  
 affirmed in Rollison v. Hotel, Motel, Restaurant & Construction Camp Employees  
Local 879, 677 F.2d 741, 745 (9th Cir. 1982).

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Robert S. McMichen from assuming office, instead perpetuating in office the unsuccessful candidate for President, incumbent Joseph Bingel. By doing so, by discriminatorily refusing to process at all challenges to the vice presidential elections precisely parallel to those which unseated McMichen, and by arbitrarily refusing to schedule a rerun of the presidential election in advance of the planned merger vote, defendants have disenfranchised in three different respects the majority of the union members, including plaintiffs, who voted for McMichen. First, those union members have been denied for a prolonged period of time the right to an effective vote on their union's leadership. Second, because the issues in the presidential election focused so closely on the proposed Teamsters takeover, a vote for McMichen was necessarily a vote for seriously exploring affiliation with an AFL-CIO union rather than rushing toward an immediate vote on the Teamsters' proposal; by refusing to seat McMichen, or even to hold a rerun in advance of the referendum he has consistently opposed, defendants have voided plaintiffs' votes opposing pursuit of the Teamsters' takeover. And third, because the Teamsters agreement, if ratified, would continue in office as officers of the ITU division of the Teamsters, without any rerun, those in office when the merger is approved, the denial of an equal vote in the officers' election would become permanent and irremediable if the merger goes forward.

2. In determining whether a union member's equal right to vote has in fact been violated by discriminatory application of union rules,

the court will . . . consider whether the union has flouted its rules; the egregiousness of the violation, if any; the bad faith in which the violation occurred; and the impact of the violation on the election's outcome.

Bunz, supra, 567 F.2d, at 1124, n.53. We have already shown that the impact of the various violations was to distort in three different critical respects the outcome,

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both as a vote on candidates and as a vote on issues, of the November election. We proceed below to demonstrate that this result was accomplished by an application of numerous union rules in a manner so "inconsistent and uneven" (Kupau, supra, 622 F.2d. at 453) with each other, with past precedent, and with the plain language of both the union Constitution and federal law as to constitute violations both egregious and in obvious bad faith.

In the first place, the ITU Canvassing Board, the entity responsible for the refusal to seat Mr. McMichen as President of the ITU, has no authority whatever under the ITU Book of Laws to decide election challenges such as that brought by defendant Bingel. The Canvassing Board is an entity charged with an important role in the conduct of ITU elections, but the role is a limited one. The Board's mandate is simply to count and tally the votes sent in by local unions (deciding in the process disputes over voter eligibility) in the presence of observers appointed by each candidate for election.<sup>26/</sup> The Canvassing Board is expressly directed that "[c]andidates for [international office] who receive a majority of all votes cast shall be declared elected." ITU Book of Laws, supra, Bylaws, Article XI, Section 25

<sup>26/</sup> Those sections of the ITU Constitution concerning the Canvassing Board provide in full:

Sec. 21. It shall be the duty of the Canvassing Board to meet on the fourteenth day following an International election, organize by electing a chairman and in the presence of the International President and Secretary-Treasurer, open the box containing the election returns from local unions, open all returns and notify by wire local unions whose returns show minor irregularities or discrepancies and begin the canvass of the vote. Upon completion of such canvass, the Canvassing Board shall submit a notarized report to the International President and Secretary.

Sec. 22. The Canvassing Board as constituted by this article shall have custody of the returns during the period of the canvass and may designate the manner in which such returns are to be preserved following completion of the canvass and the period of preservation.



(emphasis supplied). Nothing in the Constitution empowers the Canvassing Board to hear protests concerning not the tabulation of the votes actually cast but a challenge to allegedly illegal preelection conduct.<sup>27/</sup>

Despite the seemingly unambiguous limits upon the Canvassing Board's role, defendant Bingel filed with that Board a protest to the election claiming that a longstanding ITU practice — endorsement of candidates for international union office by local union officers in local union publications — violates not a union rule

(Footnote 26 continued)

Sec. 23. The Canvassing Board shall not count votes cast by local unions that have not complied with the provisions of Section 26, Subsection (2) of this article. (Section 26(2) provides that, for its members to be qualified voters, a local union must have "transmitted to the Secretary-Treasurer of the ITU September dues on or before November 20.") (a) The vote of unions shall be counted if they are received before the canvass of the vote is completed. (b) The Canvassing Board shall make a distinct announcement of the successful candidates, who shall assume office beginning on the date provided in the Constitution, Section 3, Article V. (c) Any candidate for a place on the Executive Council shall be entitled to have one representative present at all sessions of the Canvassing Board during the time returns are being canvassed and its report formulated.

Sec. 24. The report of the Canvassing Board shall be printed in detail in the Typographical Journal.

Sec. 25. Candidates for President, Vice President in Vice Presidential Ballot Position A, Vice President in Vice Presidential Ballot Position B, Vice President in Vice Presidential Position C and Secretary-Treasurer who receive a majority of all votes cast shall be declared elected. For all other offices candidates who receive a plurality of all votes cast shall be declared elected. When there is a tie vote between candidates for any office other than President, Vice President and Secretary-Treasurer the decision shall be by lot in a manner to be determined by the tied candidates.

ITU Book of Laws, supra, Bylaws, Article XI, Sections 21-25 (emphasis added).

<sup>27/</sup> Indeed, the Canvassing Board would be a strange institution to entrust with enforcing standards of preelection conduct, since it only meets for the first time "on the fourteenth day following an international election." ITU Book of Laws, supra, Bylaws, Article XI, Section 21 (emphasis added).



but § 401(g) of the Landrum-Griffin Act, 29 U.S.C. § 401(g).<sup>28/</sup>

<sup>28/</sup> It is immaterial to this lawsuit whether or not federal law indeed does prohibit such endorsement. The only pertinent issue with regard to Title I is not whether Title IV was in fact violated and requires a rerun but whether the union, as we contend, applied an "inconsistent and uneven" interpretation of Title IV, see Kupau, supra, in order to keep McMichen from assuming office while allowing other Executive Council members whose election was affected by identical conduct to do so. See p. \_\_, infra.

A letter by Mr. Bingel to the union membership is revealing of the actual and improper reasons motivating Bingel's election protest. His explanation was basically that he believed he had lost because his election strategy — not responding to McMichen's attacks on his character — had failed, and he therefore wanted another opportunity to try to beat McMichen, this time by responding to his attacks:

People's political strategies vary. Some operate under the assumption that "all's fair in love and war," and will consider bending the truth. . . .

I did not feel I had to dignify attacks employing this strategy with a response, trusting that my record would speak for itself. And that such charges as "seeking raw power," "being devious" or "stubborn" or "senile" would strike most ITU members as equally ludicrous and potentially political as they had struck me. Quite evidently this was a mistake.

I mention this to illustrate my reasons for filing a protest in the presidential election results. You should know that I have no problem yielding to an opponent who beat me fair and square. And, I will be completely content to pass the reins of office under the proper circumstances. Stepping down in the present situation, however, would have been tantamount to "abandoning ship" and leaving the ITU to flounder under the questionable leadership and manipulation of some whose motives were suspect.

Harris Declaration, Exhibit J (Bingel letter to ITU membership) (emphasis added).

The problem with Mr. Bingel's explanation is, of course, that character attacks on opposing candidates are not illegal — indeed, are protected (29 U.S.C. § 101(a)(2) — under federal law, nor is there any federal right to change "political strategies" for dealing with such attacks after one strategy has failed. And the "proper circumstances" for "stepping down" are when an incumbent has lost an election, regardless of whether he approves of his successor or believes his "motives were suspect."

That Mr. Bingel's election protest was not any based on any good faith belief that the challenged endorsements had in fact affected the election is confirmed by the fact that defendant Bingel offered, on March 21, 1984, to withdraw the protest

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Because there was no support whatever in the language of the ITU Constitution to support Bingel's choice of forum, and because both McMichen and Jack Gallagher, a member of the Canvassing Board who was a McMichen supporter, protested vigorously that the Canvassing Board lacked any authority to hear the protest (see Gallagher Declaration, Exhibit C), the Board, seeking some support for its jurisdiction, claimed to find it in a ruling of the 1976 ITU Convention:

[The [1976] Convention ruled that the failure . . . to bring [the] protests to the Canvassing Board first constituted a failure to exhaust the required union procedure. Necessarily, therefore, the authority of the Canvassing Board to hear election protests [sic]. Not only did the Convention declare that election protests may properly be heard by the Canvassing Board, the Convention ruled that such election protests must be presented to and heard by the Canvassing Board.

1983 ITU Canvassing Board Report, supra, at 2. But perusal of the 1976 Convention proceedings (see Gallagher Declaration, Attachments A & B) indicates that the Canvassing Board grossly distorted what had occurred.<sup>29/</sup> There is

(Footnote 28 continued)

and allow McMichen to be seated if McMichen would agree to various conditions, including promises to withdraw his Department of Labor challenge to the entire election and not to interfere in any way with the Teamsters merger vote. McMichen Declaration, at ¶ 44.

<sup>29/</sup> Although it was not composed of the candidates themselves, the Canvassing Board was not in any sense itself an impartial entity. Four of its five members had actively supported, by seconding nominations, the Progressive Party slate of candidates, headed by incumbent President Bingel. Gallagher Declaration, Exhibit C (hereinafter "Gallagher Minority Report"), at 3. The Chairman of the Canvassing Board, W. Edward Cox, President of San Francisco-Oakland Mailers Local No. 18, had seconded Bingel's nomination for President. Writing in a local union publication prior to the election, he had, in a statutory violation identical to the one for which he later condemned McMichen, endorsed Bingel and the other Progressive Party candidates as the candidates who would bring about a swift merger with the Teamsters:

Your cooperation in voting for the above mentioned candidate will in my opinion bring about a speedy and successful merger with the International Brotherhood of Teamsters under the leadership of JOE BINGLE!

VOTE BINGLE, HERITAGE, BROWN, WARTINGER, PETERSEN on November 18, 1983.

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nothing in those proceedings which indicates that the Canvassing Board has authority to determine election protests unrelated to voter eligibility or vote tabulation.<sup>30/</sup> Indeed, the Chairman of the 1976 Canvassing Board declared on the floor of the Convention that the "the only duty of the Canvassing Board is to count the votes that are presented to them." Gallagher Declaration, Attachment B [herein-

(Footnote 29 continued)

McMichen Exhibit C, *supra*, Attachment XI. The legal advisor to the Canvassing Board, attorney Ronald Rosenberg, was appointed by incumbent Bingel and was at the time actively negotiating a merger agreement with the Teamsters. McMichen Declaration, ¶ 18.

<sup>30/</sup> There were in fact several election protests made to the Canvassing Board in 1976. The Board acted upon three; all three were directly related to the integrity of the vote totals reported by local unions: two involved dues delinquency questions, an issue expressly committed to the Canvassing Board by the cross reference in Art. XI, §23 of the ITU Bylaws to Art. XI, §26(2); the third involved an admitted refusal by a local union to permit some qualified voters to vote. 1976 Report of the ITU Canvassing Board, at 16; 1976 Convention Proceedings, at 77. There was one complaint the Canvassing Board refused to act upon, ruling it "out of order." Gallagher Declaration, Attachment A [hereinafter "1976 Report of the ITU Canvassing Board"], at 17. It involved a claim that withdrawal of a candidate for the vice presidential election was invalid, and that the election therefore should be rerun. This same claim was then raised with the Executive Council, which decided it on the merits. *Id.*, at 75. The Canvassing Board's refusal to entertain the withdrawal protest was, however, not criticized but affirmed by the Convention. *Id.* Thus, with regard to the only protest which, like the protest in this case, went beyond a simple claim that a local's returns did not represent the actual vote of all qualified voters who tried to cast ballots, the 1976 Convention agreed that the Executive Council, not the Canvassing Board, had jurisdiction.

Finally, a group of other claimed violations was raised at the Convention without having been raised before either the Canvassing Board or the Executive Board; those protests were denied on the ground, in part, that they "were not properly raised before the Canvassing Board and the Executive Council." *Id.*, at 75. But the content of these protests is not reported; as we have seen, some kinds of protests are properly submitted first to the Canvassing Board -- namely, those protests concerning the qualifications of voters and the counting and tabulation of votes. It may be -- at least, the Convention was not informed to the contrary -- that some aspect of the "other violations" concerned matters properly within the Canvassing Board's conceded and traditional purview. Therefore, the Convention proceedings in no way indicate that the delegates intended to support the Board's authority to reach far beyond the language of the ITU Book of Laws to decide a protest involving preelection conduct. At any rate, since the 1976 protesters failed to bring their complaint to either the Executive Council or the Canvassing Board, it was irrelevant which one actually had initial jurisdiction, and the Convention thus had no occasion to, and did not, decide that issue.

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after "1976 Convention Proceedings", at 77. The 1983 Canvassing Board's seizure of power in order to refuse to seat the candidate with the most votes was, therefore, an entirely indefensible application of internal union rules, adopted over vigorous dissent and inconsistent with both constitutional language and past precedent.

The second, and related, instance of an interpretation of union rules so egregiously without justification as to indicate discriminatory disenfranchisement of voters concerns the perpetuation of Bingel in office pending the rerun. Title IV of the LMRDA provides that a

"challenged election shall be presumed valid pending a final decision thereon . . . and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and by-laws may provide."

29 U.S.C. 5482(a) (emphasis added); see also S.Rep. No. 187, 86th Cong., 1st Sess. 22 (1959), reprinted in 2 U.S. Code Cong. & Ad. News 2338 (1959); Kupau, supra, 622 F.2d, at 455 ("the winner of the election remains in office pending resolution of the Title IV proceedings"). Throughout its deliberations, the Canvassing Board maintained that it was endeavoring to treat the protest on the same basis as would the Secretary of Labor. 1983 ITU Canvassing Board Report, supra, at 2-3. Therefore, the Board was compelled to demonstrate that the ITU Constitution provided in some "other manner" for dealing with interim government than that presumed by federal law. The Canvassing Board's attempt to demonstrate that the ITU Constitution provides in "other manner" for conduct of its affairs pending a rerun was, however, wholly disingenuous.

The Board purported to rely, for authority to perpetuate defeated incumbent Bingel, in office on Article V, Section 3 of the ITU Constitution. ITU Book of Laws, supra. That section provides that incumbent officers shall serve "until their successors are elected and qualified." But Article XI, § 25 of the Bylaws com-



mands that the presidential candidate who receives a majority of the votes "shall be declared elected." ITU Book of Laws, supra (emphasis supplied). And Article XI, §23 of the Bylaws indicates that "[t]he Canvassing Board shall make a distinct announcement of the successful candidate, who shall assume office beginning on the date provided in the Constitution, Section 3, Article V" — that is, on "the first day of the second month following the date of election." ITU Book of Laws, supra (emphasis supplied). Thus, while the ITU Book of Laws does provide for the contingency that there might be some delay in completing an election, and allows extending the term of an incumbent in that instance, it also commands, in no uncertain terms, that once the balloting is completed, the person receiving the majority of the votes shall take office on the appointed date. This has been the understanding of the union leadership for many years, and nothing contrary to this construction of the Constitution has ever been done before. See Declaration of John Pilch (former union president who has directly participated in or observed at least 100 local and international ITU elections).<sup>31/</sup>

<sup>31/</sup> Furthermore, perpetuating the incumbent in office under the actual circumstances of this case was indefensible not only on the basis of the ITU Constitution, but also on the basis of the "equitable principles" which underlie Title IV, the statute the Canvassing Board was purporting to implement. Marshall v. Local 1010, Steel Workers, 664 F.2d 144 (7th Cir. 1981). In Local 1010, the Court refused, on the basis that "a suit . . . seeking an injunction to set aside a union election is essentially an equitable proceeding" (*id.*, at 149), to set aside an election for violation of secret ballot requirements where the losers seeking a rerun were incumbents and it was the incumbents themselves who were responsible for the failure to protect the secret ballot (As the Local 1010 Court pointed out (*id.*, at 149-150) Kupau, supra, is another example of a flexible, equitable application of Title IV.)

The incumbent in this case was a candidate for re-election and was soundly rejected by the electorate. His candidacy received precisely the same kind of endorsements in union financed local publications that were the purported reason for rerunning the election, including one by the Chairman of the Canvassing Board. And if all votes for either candidate in a local in which an endorsement were published are discounted, McMichen would remain an overwhelming winner. See p. 9, n. 13, supra.



1 Third, and perhaps the most egregious of the various steps taken by the  
 2 Canvassing Board to deprive plaintiffs and other members of a meaningful right to  
 3 vote was to apply substantive rules governing the validity of the election entirely  
 4 inconsistently, refusing to find violations for actions by supporters of the Bingel  
 5 slate similar to, but much more extensive and prejudicial than those which led to  
 6 the refusal to seat McMichen. For, Bingel slate supporters — including the  
 7 Chairman of the Canvassing Board which declared such activity illegal — engaged  
 8 in precisely the same kind of endorsement activities which led to the invalidation

9 (Footnote 31 continued)

10 Moreover, Bingel not only received endorsements in union financed publica-  
 11 tions, but he also engaged in much more prejudicial, and blatant violations of §  
 12 401(g) of the LMRDA. For example, Bingel cooperated in a mailing by the  
 13 Teamsters to all ITU retirees — 45% of the electorate — supporting Bingel's  
 14 candidacy; that letter was clearly campaign literature, Usery v. Masters, Mates &  
 15 Pilots, 538 F.2d 948 (2nd Cir. 1976); Donovan v. Local 719, UAW, 561 F.Supp. 54  
 16 (N.D.Ill. 1982). And it was illegally financed with a labor organization's general  
 17 funds. (Section 401(g) of Landrum-Griffin, 29 U.S.C. §481(g), prohibits use of union  
 18 dues money by "any" labor organization (emphasis supplied) in a union election.) He  
 19 also, according to allegations made to the Secretary of Labor (McMichen Declara-  
 20 tion, Exhibit P) engaged in extensive use of ITU resources for typing, mailing, and  
 21 delivering campaign literature, as well as for active campaigning. (Plaintiffs are  
 22 unable at this time to provide declarations supporting the very specific allegations  
 23 made in the complaint to the Secretary of Labor, because of defendants' continuing  
 24 refusal to provide assurance that union employees testifying to these illegal  
 25 activities will not be discharged. See McMichen Declaration, 136. The fear of  
 26 reprisal by defendants is in no way speculative; such reprisals against employees  
 who support the McMichen position have already occurred. See Robertson and  
 Ridenour Declarations. If such assurances that further reprisals will not occur are  
 forthcoming, plaintiffs are prepared promptly to provide detailed verification of  
 the allegations contained in the Labor Department complaint.)

It may be true, as the Canvassing Board Report suggests, that an "unclean  
 hands" doctrine can not ordinarily avoid the necessity to rerun a union election.  
 1983 ITU Canvassing Board Report, *supra*, at 3. 1983 ITU Canvassing Board  
 Report, *supra*, at 3. But, an incumbent who engages in massive violations of law,  
 nonetheless loses the election, and then attempts to take advantage of his incum-  
 bency in order to remain in office pending the rerun (which he and his allies then  
 neglect to schedule) ought, as an equitable matter, at least be obliged to surrender  
 his office, pending the rerun. Not the least of the reasons why this is true is that  
 as the losing party, he has no reason to schedule a rerun election promptly, and  
 every reason not to; the result may be, as it has been here, an indefinite delay in  
 the members' right to a valid and determinative election.

of the McMichen victory and did so to an extent which, if we apply the standard purportedly applied by the Canvassing Board to the presidential race, clearly "may have affected the outcome." Thus, had the Board acted evenhandedly, applying exactly the same reasoning to the vice presidential elections as it applied to the presidential race,<sup>32/</sup> the Board would have had to order a rerun of the vice presidential races, and would have had to leave McMichen in his vice presidential office, as the incumbent, pending a rerun of the election for his seat.<sup>33/</sup>

This result, along with McMichen's probable victory in the presidential rerun

<sup>32/</sup> The Board reasoned as follows with regard to the Presidential race: First, citing an opinion solicited from former Secretary of Labor Willard Wirtz, the Canvassing Board determined that the local union endorsements of presidential candidates, because they were carried in union financed publications, violated federal law. 1983 ITU Canvassing Board Report, supra, at ¶3. It concluded further that -- because the total number of votes for McMichen in all of the local unions possibly affected by the endorsements was greater than his victory margin -- the endorsements for McMichen could possibly have affected the outcome of the presidential election. Id. The Board then decided that the Labor Department, if presented with those facts, would order a rerun of the election. It therefore ordered a rerun of the presidential election won by McMichen. Finally, applying a tortured construction of the ITU Constitution (see pp. 28-29, supra, the Board determined that Bingel should stay in office pending a rerun election. Id. at 4.

<sup>33/</sup> The Board had before it clear evidence that officers in Montreal Local 145 had, in an official union publication, announced their endorsement for successful vice presidential candidates Wartinger, Brown and Heritage, as well as unsuccessful presidential candidate Bingel. McMichen Declaration, Exhibit D. Local 145 vote totals included 2,249 votes for Brown. ITU Official Election Results, supra. Since his margin of victory was only 2100 votes that in itself was enough to invalidate Brown's election under the Wirtz formula; pending the rerun, McMichen, as an incumbent whose vacating of a vice presidency resulted in the opening for which Brown ran, would have held office.

Wartinger received 2205 votes from Montreal Local 145. Id. Though that figure was less than his victory margin of 5,374 votes, the Board also had before it evidence that Wartinger had been endorsed an official publication of New York Local No. 6 -- indeed, the very same publication whose endorsement of candidate McMichen was relied upon to invalidate the presidential election. See Harris Declaration, Exhibit H (October Newsletter of New York Local 6); 1983 ITU Canvassing Board Report, at 3. New York Local No. 6 provided Wartinger with 3,570 votes. ITU Official Election Results, supra. The New York and Montreal totals would alone have been enough to invalidate Wartinger's election under the Wirtz formula.

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1 election, would have endangered permanently a pro-Teamsters majority on the  
 2 Board. It also would have assured that McMichen would have to be consulted while  
 3 the negotiations were ongoing. Yet, if the violations in the Canadian locals were  
 4 disregarded, that result could be avoided; the reason is that, with all the Canadian  
 5 votes included in the tally, exclusion of the votes of American voters exposed to  
 6 endorsements in union publications of Wartinger and Brown would not, at least on  
 7 the evidence before the Canvassing Board, have affected the outcome.<sup>34/</sup> And, in-  
 8 deed, the Canvassing Board decided, in the face of a Department of Labor regula-  
 9 tion precisely on point and to the contrary,<sup>35/</sup> that union officers elected in viola-  
 10 tion of American law can hold office, and govern American members, as long as  
 11 the acts comprising the violations take place in Canada. One member of the Can-  
 12 vassing Board, Jack Gallagher, had earlier called Charles Weber, an official of the  
 13 Department of Labor, to confirm the Canvassing Board's view of the law. He had  
 14 been told that that interpretation was wrong. Gallagher Declaration, ¶7. Galla-  
 15 gher so informed the Canvassing Board, and made a motion to the Board to call the  
 16 Department of Labor for a second opinion. The motion failed for lack of a second.  
 17 Id. In addition, although the Canvassing Board had already engaged the services of  
 18 Mr. Wirtz as an expert on Labor Department practice, they did not ask him for any  
 19 opinion on the vice presidential races generally, or on the Canadian question parti-  
 20 cularly. 1983 Canvassing Board Report, supra, at 4 (Wirtz Memorandum).<sup>36/</sup>

34/ The Canadian exclusion did not, of course, avoid the fact that the vice presi-  
 dential races should have been invalidated in any event because of the direct use of  
 ITU resources in favor of the entire Bingel slate. See p. 28, n. 31, supra.

35/ That regulation provides that "votes received from Canadian members in ref-  
 erendum elections held by an International must have been cast under procedures  
 meeting the minimum requirements of the Act." 29 C.F.R. §452.13.

36/ Nor was Wirtz ever presented with the evidence of use of ITU employees and  
 facilities in support of the Bingel slate of candidates.

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Defendants resorted, finally, to one last strategem in order to perpetuate a pro-Teamsters majority in office and avoid seating McMichen even temporarily. The protests to the vice presidential races were based, in part, upon allegations of direct, extensive use of ITU resources to promote the Bingel slate. See McMichen Declaration ¶33, Exhibits A and C. Since virtually all members may have been reached through that use of resources, there would have been no way to avoid finding those violations outcome determinative. The Canvassing Board thereupon departed once more from the federal law they purported to follow so closely with regard to the presidential race, and insisted that the complainants had to come forward with specific proof of wrongdoing.<sup>37/</sup> When the protesters offered to provide that information if the Executive Council agreed to provide job protection for the employees supplying such evidence,<sup>38/</sup> the Council, -- controlled, of course, by the Bingel slate -- refused to assure against terminations for supplying the information the Canvassing Board was demanding. See McMichen Declaration, ¶36. And after the canvassing Board went on to hold against the protestors (McMichen Declaration, Exhibit 2), the Executive Council, on appeal -- which is hardly in need of any information from outside protestors in order to know or find whether its own members have written, typed, printed, copied and distributed Bingel slate literature from ITU headquarters using ITU employees, equipment, and funds -- has simply never acted on that appeal.

3. As the above analysis demonstrates, defendants bent, twisted, and mutilated federal and ITU law in order to oust McMichen from the Executive

<sup>37/</sup> Under federal law, "there is no statutory requirement that the complaining members present proof or witnesses in support of their [internal union] charges." Hodgson v. Local 734, Teamsters, 336 F.Supp. 1243, 1253 (N.D. Ill. 1972).

<sup>38/</sup> The need for such protection had already been demonstrated. See p. 9, n. 14, supra.



1 Council as of January while avoiding a declaration that a majority of the Executive  
 2 Council races, not just one, had to be rerun. The culminating incident in the  
 3 program to accomplish the Teamsters' takeover without interference from a prop-  
 4 erly elected Executive Council was not, however, an event but a non-event: The  
 5 rerun election has never been scheduled. Instead, the merger referendum has been  
 6 scheduled for May 16, 1984.

7 In light of the foregoing chain of events, it is clear "Under all the circum-  
 8 stances of [this case," that the merger election will "discriminate[] against some  
 9 of its members and rob [] their votes of meaning" (Bunz, supra, 567 F.2d at 1124,  
 10 n.53), regardless of how fairly the merger referendum itself is conducted. A  
 11 majority of ITU members, including plaintiffs, voted for a presidential candidate  
 12 who is of the view that a merger agreement with the Teamsters should not even be  
 13 voted upon, at least until a fair attempt to negotiate another merger, preferably  
 14 with an AFL-CIO union, has been made. Without control of the union presidency,  
 15 those favoring immediate merger with the Teamsters could not have commanded  
 16 the ITU staff and resources necessary to complete the agreement and now being  
 17 used in an all out effort to sell that merger to the membership. Moreover, it has  
 18 not yet been determined in a valid election whether or not there is an Executive  
 19 Council majority favoring the Teamsters merger; if candidates Boarman and Austin  
 20 were ultimately elected to office, they would join McMichen in withdrawing the  
 21 merger referendum in favor of vigorous pursuit of a more palatable alternative.  
 22 See Austin Declaration, ¶¶ 5-6; Boarman Declaration, ¶ 5.

23 Any result of the single option merger referendum now offered to the union  
 24 membership is no more legitimate than the Executive Council which has presented  
 25 that single option and used the resources of the union to promote it. The decision  
 26 to hold the merger referendum, and to hold it now, is no more pure, and no less



1 violative of Title I, than is the tainted and illegal chain of events from which that  
2 referendum was generated.

3  
4 B. Plaintiffs Are Likely to Succeed in Establishing That  
5 The Individual Defendants Have Failed to Fulfill the  
6 Fiduciary Responsibility Established By §501 of the  
7 Landrum-Griffin Act, 29 U.S.C. §501.

8 1. Section 501 of the Landrum-Griffin Act, 29 U.S.C. §501, provides, in  
9 part:

10 The officers, agents, shop stewards and other repre-  
11 sentatives of a labor organization occupy positions of trust  
12 in relation to such organization and its members as a group.  
13 It is, therefore, the duty of each such person . . . to refrain  
14 from acquiring any pecuniary or personal interest which  
15 conflicts with the interests of such organization.

16 This section has been interpreted by the Ninth Circuit "to apply to fiduciary  
17 responsibilities of union officials, agents, and representatives in any area of their  
18 authority," regardless of any direct nexus of the alleged violation to the  
19 expenditure of the union's money and property. Stelling v. IBEW, 587 F.2d 1379,  
20 1389 (9th Cir. 1978). In particular, "[t]he allegation that [union] officials have  
21 denied the membership of the union the constitutionally guaranteed right to vote is  
22 a sufficient assertion of a breach of trust on the part of the appellees to invoke the  
23 jurisdiction of §501." Id., at 1389; see also Local 1380, BRAC v. Dennis, 625 F.2d  
24 819, 828 (9th Cir. 1980). Where a Title V claim depends upon demonstrating a  
25 constitutional violation, the question is only whether "[v]iewing the constitution as  
26 a whole, . . . the union's interpretation [is] unreasonable." Thus, while evidence of  
bad faith or conflicts of interest may indicate a Title V violation even in an  
otherwise reasonable application of union rules or public law (Stelling, supra, at  
1389 & n.11), there is no need to establish bad faith or a discriminatory motive  
where the constitutional interpretation is unreasonable.

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2. In this instance, the individual defendants have, as we have already shown, denied plaintiffs their right to a meaningful vote under the ITU Book of Laws, by interpreting the Book of Laws, in a patently unreasonable way to: (1) give the Canvassing Board authority to decide substantive election challenges; and (2) permit the perpetuation in office of a defeated candidate. See pp. 22-23, supra. Additionally, defendants violated plaintiffs' right to a meaningful vote by refusing to undertake a fair investigation of the vice presidential races (pp. 29-30, supra), and by relying on a patently unreasonable, and discriminatory legal interpretation (concerning the application of the Landrum-Griffin Act to Canadian locals). See p. 31, supra.

Furthermore, the individual defendants have both a "personal" and a "pecuniary" interest (§501 of the LMRDA, 29 U.S.C. §501) adverse to plaintiffs' right to cast a meaningful vote in favor of an Executive Council not unalterably committed to the Teamsters' takeover. If that merger occurs, the members of the present Executive Council -- apparently including Bingel, the defeated candidate for President -- will "become officers of ITU/IBT [and] serve until the completion of their present terms." IBT/ITU Agreement, supra, Article XIX, Section 1. Thus, the individual defendants will be secure in their offices until 1986; three of the five Executive Council defendants lack such security now, either because they lost the election in 1983 (Bingel), or because the election they won is being challenged (Brown and Wartinger).

Moreover, the five individual defendants will have the opportunity to earn a considerably higher income than they do now if the Teamsters merger is approved. Presently, the ITU Constitution requires that the five Executive Council officers devote full time to their positions as officers (ITU Book of Laws, supra, Constitution, Art. VI, §§1, 2 & 3), and that their full salary shall be an amount calculated as

1 a multiple of the average full-time weekly wages of members. (Id., Art. VIII, §1.)  
 2 The merger proposal would (1) eliminate the full-time requirement for officers  
 3 (IBT/ITU Agreement supra, revision of Article VI, at p.8), and (2) provide that the  
 4 salary specified in the Constitution shall be only a minimum, and shall be "from all  
 5 sources." Id., Article VIII, §1. Evidently, the intent is to permit the individual  
 6 defendants, like many Teamsters officials (see S. Brill, The Teamsters (1979)), to  
 7 derive huge incomes by serving in several different union positions at once. The  
 8 personal interest of the individual defendants in attaining the opportunity for such  
 9 wealth is an interest directly adverse to the organization's interest in the negoti-  
 10 ation of the merger agreement which is the most advantageous to the membership  
 11 as a whole.

12 The individual defendants have also breached fiduciary responsibilities of a  
 13 traditional financial character. They have authorized expenditure of enormous  
 14 amounts of union funds to "sell" the merger to the membership. They, for example,  
 15 sent personal telegrams to each of 70,000 members reporting on the course of the  
 16 negotiations (see McMichen Declaration, ¶¶ 16, 17 and 54), as well as contracting  
 17 with a professional public relations firm for the production of movies and other  
 18 audiovisual devices. The Executive Council has scheduled nine regional "merger  
 19 conferences" to be held in cities around the country between March 31 and May 6,  
 20 1984, to promote ratification by the membership of the merger agreement. Olson  
 21 Declaration at ¶ 4 and Exhibit D. Since the Executive Council members have, as  
 22 we have seen, a direct and strong personal and pecuniary interest adverse to that  
 23 of the organization in forcing the Teamsters takeover before a valid officer elec-  
 24 tion occurs, the mammoth expenditures they have authorized, and may in the near  
 25 future authorize, in pursuit of that goal violate Title V. The individual defendants  
 26 must therefore be enjoined from making any such expenditures in support of the  
 May 16 referendum.

C. Plaintiffs Are Likely to Succeed in Establishing that Defendants Violated the ITU Constitution.

It has recently become clear that under §301(a) of the Taft-Hartley Act, 29 U.S.C. §185(a),<sup>39/</sup> federal courts have jurisdiction over suits by individual members claiming that an international union constitution or bylaws have been violated. United Association of Journeymen v. Local 334, 452 U.S. 615 (1981); Kinney v. IBEW, 689 F.2d 1223 (9th Cir. 1982). Further, jurisdiction under §301 does not depend on the identity of the parties to the lawsuit; there is §301 jurisdiction, whoever the plaintiffs and defendants may be, if "the resolution of the lawsuit [is] focused upon and governed by the terms of the contract". Paint & Decorating Contractors Assn. v. Painters & Decorators Joint Committee, 707 F.2d 1067, 1071 (9th Cir. 1983). In this case the contract is the ITU Constitution and Book of Laws. Finally, in a suit under §301, there is no need to establish that the constitutional violation was badly motivated or constituted discriminatory action; that the constitution was in fact violated is sufficient. Consequently, for any part of the chain of events already discussed which occurred in violation of the ITU Book of Laws, plaintiffs are entitled to relief regardless of whether or not any statutory rights were violated.

We have already demonstrated (See Part A, supra) that under the ITU Book of Laws (1) the Canvassing Board had no authority to entertain Bingel's election

39/ Section 301(a) provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

1 protest; and (2) both for that reason and because the Book of Laws provides  
 2 directly that the individual with the highest number of votes should take office, the  
 3 refusal to seat McMichen in office pending a rerun was in violation of the ITU Book  
 4 of Laws. On the basis of these constitutional violations alone, McMichen is  
 5 entitled to be seated immediately, pending a rerun election, and the referendum  
 6 election should be withdrawn until placed on the ballot by a properly constituted  
 7 Executive Council.

8  
 9 D. Plaintiffs' Pension Claims are Likely to Succeed.

10 1. The ITU operates a negotiated, jointly trustee pension plan ("ITU-  
 11 NPP") under the Taft-Hartley Act, 29 U.S.C. §186, and ERISA, 29 U.S.C. §1001, et  
 12 seq. McMichen is a union trustee of that plan. Since 1978, he has also served as  
 13 Chairman and sole union representative on the plan's administrative committee,  
 14 which oversees the plan's day-to-day operations. The ITU-NPP declaration of trust  
 15 lists him as a trustee and as a "named fiduciary." It provides for a term of office  
 16 continuing until death, incapacity, resignation or removal; appointment of trustees  
 17 by the ITU Executive Council; removal and replacement of union trustees at will by  
 18 the ITU; and a central role in notification of removal, replacement or succession for  
 19 the ITU President. McMichen Declaration ¶ 45.

20 On August 16, 1983, immediately after the San Francisco convention at which  
 21 McMichen and each of the other pension trustees were nominated as candidates for  
 22 ITU office, management trustee and ITU-NPP Secretary, James Horne, wrote to  
 23 Bingel suggesting that "in view of what transpired at the ITU Convention in San  
 24 Francisco last week" McMichen should be removed as the Union representative on  
 25 the administrative committee. This was followed on August 22, 1983, by a  
 26 memorandum from Bingel, acting as Chairman of the Board of Trustees, asking all



1 trustees for a vote on McMichen's removal; and on August 29, 1983, by a notice to  
 2 McMichen that he had been removed. McMichen Declaration ¶ 46.

3 McMichen and union trustee Kopeck protested the removal. They emphasized  
 4 that all union trustees were engaged in election campaigns, and that McMichen had  
 5 a long record as chair of the administrative committee, unblemished by favoritism  
 6 or partisan politics. These protests failed, however, and trustee Heritage replaced  
 7 McMichen as chairman of the administrative committee.<sup>40/</sup> McMichen Declara-  
 8 tion ¶ 47.

9 In October 1983, at an ITU Chicago Conference, Bingel announced a proposed  
 10 increase in the ITU-NPP benefits and a report by the plan actuary that the Team-  
 11 sters merger "could" result in "advantages to the plan." At the time, no increase in  
 12 benefits had been voted on or fully considered by the trustees. McMichen sup-  
 13 ported a sound benefit adjustment, which was in fact approved in November, but  
 14 was concerned about hastily considered and politically announced changes in the  
 15 plan benefits and about the relationship between any merger with the Teamsters  
 16 and any trend toward Teamster control of the administration or management of the  
 17 plan. McMichen Declaration ¶ 49.

18 Since October, McMichen has received little information about the operation  
 19 of the plan, and his access to plan management has been reduced. He has heard  
 20 "rumors" of his impending removal as a trustee but has received no formal notifica-  
 21 tion of removal. McMichen Declaration ¶ 50.

22 On April 3, 1983, McMichen telephoned the plan's administrator, Carl Hatten,  
 23 and asked whether he would be allowed to attend the April meeting of the pension  
 24

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25 40/ All the correspondence concerning removal of McMichen as chairman of the  
 26 administrative committee continued to recognize him as a trustee. McMichen  
 Declaration ¶ 48.

trustees in his capacity as a trustee. He was told that he would not be allowed to attend as a trustee, and that he must raise any question about this "with the union." McMichen has received no formal notice of his removal as a trustee. Under the plan document, the ITU President must sign such notices. McMichen Declaration ¶ 51.

2. Section 302(c)(5) of Taft-Hartley 29 U.S.C. §186(c)(5),<sup>41/</sup> requires that an employee pension plan, such as the ITU-NPP, managed by a trust fund jointly trusted by union and management trustees, must be managed for the sole and ex-

<sup>41/</sup> Section 186(b) and (c)(5) provide in relevant part:

(b)(1) It shall be unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section. . . .

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon. . . . (c) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

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clusive purpose of benefitting the employees covered by the Plan. In addition, such a plan must be operated under and in accord with a document or declaration of trust. These basic principles of trust conduct and operation are re-enforced by §404 of ERISA, 29 U.S.C. §1104, which provides that an ERISA fiduciary must perform "solely in the interest of the participants and beneficiaries," and in accordance with the plan documents.<sup>42/</sup> Both Taft-Hartley and ERISA incorporate traditional common law trust principles on issues surrounding the appointment and removal of trustees. Under common law trust as well, the trust instrument controls the appointment and removal of trustees, absent legislation dictating otherwise. 2 A. Scott, Law of Trusts, §106, 108 (3d ed. 1967); Bogert on Trusts, §5115. Thus, while there is no statutory requirement of good cause for removal,<sup>43/</sup> trustees do have an obligation to assure that those trustees who, under the trust instrument, are properly seated as trustees are permitted to participate fully in the trust's affairs.

<sup>42/</sup> Section 404 goes on to require that an ERISA fiduciary must act:

- (A) for the exclusive purpose of:
  - (i) providing benefits to participants and their beneficiaries; and
  - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- .....
- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Section 405 of ERISA makes co-fiduciaries liable for a breach fiduciary responsibility of another fiduciary, if the fiduciary knows of the breach and does not remedy it. 29 U.S.C. §1105.

<sup>43/</sup> See e.g., Philadelphia Nat'l Bank v. Employing Bricklayers Ass'n, 160 F.Supp 591 (E.D. Pa. 1959). Culinary Employees Local 555 v. Hawaii Employee Benefit Association, 688 F.2d 1228 (9th Cir. 1982); Lamb v. Covey, 488 F.2d 289 (D.C.Cir. 1974); and NLRB v. Amex Coal Co., 453 U.S. 322 (1981).

1 In at least three ways, the individual defendants have violated their fiduciary  
2 responsibilities under ERISA. First, they removed McMichen as chairman of the  
3 administrative committee for reasons related only to his role in union politics, and  
4 unrelated to his performance of his duties in that critical position. By doing this,  
5 they made one of the most important decisions they make as trustees -- designa-  
6 tion of the two trustees who supervise the day-to-day affairs of the Fund -- turn  
7 on criteria other than the beneficiaries' and participants' best interests. This they  
8 could not do.

9 Secondly, McMichen has never been notified by either the ITU Executive  
10 Council as an entity or the ITU President and Secretary of his removal as a trustee,  
11 nor have plaintiffs and other plan participants and beneficiaries been so notified.  
12 Nonetheless, McMichen has been prevented from attending Fund meetings as a  
13 trustee, and is not receiving the information he is entitled to as a trustee so that  
14 he can protect the interests of plaintiffs and other participants and beneficiaries.  
15 By barring him from their meetings under these circumstances and refusing to  
16 provide him with adequate information on the Fund's affairs, the defendants are  
17 violating their fiduciary responsibilities.

18 Finally, even if there had been a procedurally proper removal of McMichen,  
19 that removal would have been invalid. As we have previously demonstrated, the  
20 Executive Council of the ITU is presently illegally constituted, in particular,  
21 McMichen, not Bingel, should presently be holding the office of President. Notice  
22 signed by the President is one of the steps in the removal process. By barring from  
23 meetings and from access to information a named fiduciary who, if removed at all,  
24 was removed by the action of a person who is an illegal usurper in the office he  
25 purports to hold, defendants have violated their fiduciary responsibilities.

26 It is particularly important in the present circumstances that the ITU-NPP

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1 trustees scrupulously fulfill their fiduciary responsibilities. Present retirees are  
 2 voting members of the ITU. They comprise approximately 43 percent of the  
 3 electorate. The retirees would, however, lose their right to vote when they come  
 4 under the control of the Teamsters. Thus, if the merger document is approved, ITU  
 5 retirees will no longer have any say in the selection of the officers who designate  
 6 the Fund's trustees. Accordingly, unbiased and prudent management of the pension  
 7 plan is particularly important in assuring that the effect of the proposed merger on  
 8 the pension plan is properly compiled, evaluated, and made available to the  
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membership. With the illegal exclusion of the one trustee not irrevocably committed to the Teamsters' merger, plaintiffs' rights to such protection are being violated.

### CONCLUSION

For the reasons stated above, plaintiffs Application for a Temporary Restraining Order and Motion for a Preliminary Injunction should be granted.

Dated: April 10, 1984.

Respectfully submitted,

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## RESPONSES OF RICHARD M. BERMAN

## Questions for all nominees

1. Which current Supreme Court Justice do you most admire and why?

While I respect the Supreme Court and all of the justices, I have greatest admiration for Justice Sandra Day O'Connor. I am impressed by the breadth of experience she has brought to the Court as a former practitioner, state senator and state judge; by her exemplary demeanor; and by her well reasoned and clear written decisions. I appreciate her fact specific approach to case resolution and her ability to articulate the narrowest appropriate legal grounds.

2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

Supreme Court Justice Felix Frankfurter has influenced my thinking in the area of constitutional separation of powers. His deference to the policy and administrative determinations of legislative and executive representatives and to the Constitutional mandate of deciding only real controversies (i.e. "cases or controversies") is clearly compelling. He also argued persuasively that Constitutional questions should be avoided if there is present an alternative ground for case resolution.

3. What does the discretionary powers of the judiciary mean to you?

Judges have extremely limited discretion. Article III of the Constitution compels Federal judges to resolve (only) concrete "cases or controversies" according to text and standards of precedent. Matters must be "ripe", not "moot", and parties must have standing. The courts should neither legislate nor administer the law. Judicial discretion sometimes comes into play where, for example, a judge may select a sentence within a statutory range or where a judge may choose from among calendar and case management options.

4. What, in your view, is the single most important right not protected by the constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view are nonetheless not secured by the Constitution?

## RESPONSES OF RICHARD M. BERMAN

Senator John Ashcroft

## Questions for all nominees (continued)

I do not as a policy matter perceive the need for any rights or protections additional to those already secured by the Constitution.

5. Which law review article or book has most influenced your view of the law?

My view of the law has been significantly influenced by Hart and Wechsler's The Federal Courts and The Federal System (various editions).

6. What role do you think legislative history - by which I mean the various committee report, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

In interpreting a statute, one must look first and foremost to the words of the statute itself as well as to applicable precedent construing the statute. Legislative history should play (only) a secondary role because, among other reasons, legislative intent is most often exceedingly difficult to ascertain.

## RESPONSES OF RICHARD M. BERMAN

## Senator Jeff Sessions

## Questions for all nominees

1. Which current U.S. Supreme Court Justice do you admire most and why?

While I respect the Supreme Court and all of the justices, I have greatest admiration for Justice Sandra Day O'Connor. I am impressed by the breadth of experience she has brought to the Court as a former practitioner, state senator and state judge; by her exemplary demeanor; and by her well reasoned and clear written decisions. I appreciate her fact specific approach to case resolution and her ability to decipher the narrowest appropriate legal grounds.

2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years.

As a Federal judge, I would be bound by all Supreme Court holdings, but I personally believe the Court's decision (written by Justice Blackmun) in Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) is exemplary. At issue in this case was the appropriate standard for admissibility of expert testimony in a Federal product liability case (where infants suffered serious birth defects allegedly because of their mother's use of the drug Bendectin). The Court determined that under the Federal Rules of Evidence opinion evidence should be admitted if it both rests on a reliable foundation and is relevant to the inquiry. In reaching its determination, the Court reversed the lower court rulings and determined that the "general acceptance" or Frye case standard is not applicable in a Federal trial. As a Family Court judge, I am faced daily with cases involving expert testimony, e.g. in contested paternity proceedings and child abuse cases. I appreciate the Daubert decision for its clarity and for the very helpful, practical guidance it provides to Federal trial court judges in assessing the merits of expert opinion.

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Quite apart from a judge's obligation to follow all Supreme Court decisions, it is difficult to categorize any of them (during the last thirty years) as the worst case because of my overriding high regard and respect for the work of Court. At most I would say that I found the Court's divided (5/4) decision in Turner Broadcasting System, Inc. et al. v.

# Senator Jeff Sessions

## Questions for all nominees (continued)

Federal Communications Commission, 117 S. Ct. 1174 (1997) to be somewhat disappointing because, while I fully believe (as did the majority) that promoting fair competition with local broadcast television is a legitimate and substantial government goal, I also feel (as did Justice O'Connor in dissent) that the 1992 Cable Act's "must carry" requirements may, under the First Amendment, be broader than necessary to achieve this goal. Despite this reservation, I would have no hesitancy in applying Turner in an appropriate case.

3. In your personal legal opinion, is the 1996 Habeas Corpus Reform legislation constitutional?

I believe that the 1996 Habeas Corpus Reform Act is constitutional. Aspects of the 1996 Law have already been reviewed and upheld (unanimously) by the Supreme Court. See, Felker v. Turpin, 518 U.S. 651 (1996). See also, Adams v. U.S., \_\_\_ F.3d \_\_\_, 1998 WL 514679 (2d Cir. Aug. 20, 1998).

4. If confirmed, you will preside over many employment discrimination cases as a federal judge.

In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

In any suit challenging a governmental racial preference quota or set aside, I would certainly follow the Supreme Court's ruling in Adarand v. Peña, 515 U.S. 200 (1995) which applied a "strict scrutiny" test.

In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

It is very difficult to overcome "strict scrutiny." A line of cases, including and preceding Adarand, indicate that governmental racial preference quotas and/or set asides have not survived strict scrutiny.



**Senator Jeff Sessions**

**Questions for all nominees (continued)**

5. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

I believe the California Civil Rights Initiative ("Proposition 209") is constitutional. In reversing a Federal District Court ruling, the 9th Circuit Court of Appeals has upheld the constitutionality of Proposition 209. See, Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), cert. denied, 118 S. Ct. 397 (1997).

6. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

Voter referenda should not be subjected to closer scrutiny than legislative enactments. Voter referenda or initiatives, assuming they are otherwise properly adopted, are valid means for citizens to enact legislation. They have been upheld by the Supreme Court. See, e.g., Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912).

7. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

I believe that Congress has the power, under the Constitution, to limit the jurisdiction of the lower federal courts as it did, for example, when it adopted the sentencing guidelines pursuant to the Sentencing Reform Act of 1984. See, Mistretta v. U.S., 488 U.S. 361 (1989), upholding a Congressional delegation of rule-making authority to the United States Sentencing Commission.

8. Last year, Congress, using its power under Article III of the Constitution, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

In your personal legal opinion, is the Prison Litigation Reform Act constitutional?

## Senator Jeff Sessions

## Questions for all nominees (continued)

I believe that the Prison Litigation Reform Act is constitutional. Several Federal Appellate Courts, including the Second Circuit, have upheld the Act's constitutionality. See, e.g., Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); see also Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) cert. denied, 117 S. Ct. 2460 (1997).

9. In your personal legal opinion, is the death penalty constitutional?

I believe the death penalty is constitutional.

Would you personally be reluctant to impose or uphold the death penalty?

I would not be reluctant to impose or uphold the death penalty in an appropriate case.

1. Which current Supreme Court Justice do you admire most and why?

Justice Sandra Day O'Connor deserves particular respect in becoming the first female Justice to serve on the Supreme Court. Throughout her groundbreaking legal career and tenure on the Court, Justice O'Connor has exhibited the utmost integrity and honesty. While I am hesitant to single out one Justice among nine highly accomplished jurists, I believe that Justice O'Connor is especially deserving of admiration and respect.

2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

I believe that Terry v. Ohio, 392 U.S. 1 (1968), represents a particularly well-considered decision. The Supreme Court upheld the conviction of an individual who had been frisked by an officer who had observed the individual's suspicious behavior. The Court thereby established the "stop and frisk" exception to the warrant requirement. The Court held that where an officer has reasonable suspicion of criminal activity, the officer is entitled to conduct a limited search of the person for the safety of the officer and any surrounding persons. Terry v. Ohio thereby advanced the need for public safety and effective law enforcement while still protecting the individual's constitutional right against unreasonable searches and seizures.

Many believe that City of Boerne v. Flores, 138 L.Ed.2d 624 (1997), was an unfortunate decision. In that case, the Supreme Court held that the Religious Freedom Restoration Act was not a proper exercise of Congress' Fourteenth Amendment enforcement power. Nevertheless, as a federal judge, I would be compelled to apply the rulings of the Supreme Court, regardless of whether I personally agreed or disagreed with those decisions.

3. In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

First and foremost, legislation is always entitled to a strong presumption of constitutionality. Therefore, I would begin with the principle that the law is constitutional and that it is within Congress' power to enact that law. I would then look at the precedent of the Supreme Court and my circuit court to determine whether that particular law has been ruled unconstitutional. In Felker v. Turpin, 518 U.S. 651 (1996), the Supreme Court found the law constitutional. I have no basis to disagree with the conclusion of the Supreme Court.

4. If confirmed, you will preside over many employment discrimination cases as a federal judge. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

I would absolutely follow the law as set forth by the Supreme Court. The Supreme Court has held in Adarand v. Peña that racial classifications are unconstitutional unless they are narrowly tailored to meet a compelling governmental interest. The appropriate test would therefore be the strict scrutiny standard, and I would apply that standard accordingly.

5. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

The strict scrutiny standard is the highest level of scrutiny found in constitutional law. Strict scrutiny requires that the government program or statute could be held constitutional only if it is narrowly tailored to meet a compelling governmental interest. Only by meeting that very high standard could a government program or statute survive strict scrutiny.

6. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provisions?

I would look at the precedent of the courts above me for guidance in the determination as to whether the law is constitutional. The Ninth Circuit has held, in Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), cert. denied, 118 U.S. 397 (1997), that the California Civil Rights Initiative does not violate the Equal Protection Clause. I have no basis to disagree with the conclusion of the Ninth Circuit.

7. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

Voter referenda are entitled to the same deference as laws enacted by the legislature. Voter referenda represent the expression of the majority. It would not be the function of a federal district judge to substitute the opinion of an individual for the will of the majority. I would therefore begin with the presumption that a particular referendum as voted by the public majority was constitutional.

8. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

Article III provides that, "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Therefore, by the plain language of the Constitution, and consistent with the holdings of the Supreme Court, Congress has the authority to limit the jurisdiction of the lower federal courts.

9. Last year, Congress, using its power under Article III of the Constitution, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the

**Prison Litigation Reform Act.** In your personal legal opinion, is the Prison Legal Reform Act constitutional?

Legislation is always entitled to a strong presumption of constitutionality. I would therefore begin with the principle that the law is constitutional and that it is within Congress' power to enact that law. I would then look at the precedent of the Supreme Court, my circuit court, and other federal courts to determine whether the particular law has been ruled unconstitutional. I am aware that in cases involving the Prison Litigation Reform Act, the Supreme Court has not found the law unconstitutional, and that nine of our ten circuit courts have ruled that the Act is constitutional.

10. In your personal legal opinion, is the death penalty constitutional?

The Supreme Court has held that the death penalty is constitutional, and I am bound by that decision.

11. Would you personally be reluctant to impose or uphold the death penalty?

Absolutely not. I am bound to follow the law of the United States, and there is nothing within my moral beliefs which would interfere with that duty. As long as the case before me met the standards that the Supreme Court has set, I would follow the law and proceed accordingly.



1. Which current Supreme Court Justice do you most admire, and why?

Justice Sandra Day O'Connor deserves particular respect in becoming the first female Justice to serve on the Supreme Court. Throughout her groundbreaking legal career and tenure on the Court, Justice O'Connor has exhibited the utmost integrity and honesty. While I am hesitant to single out one Justice among nine highly accomplished jurists, I believe that Justice O'Connor is especially deserving of admiration and respect.

2. Which Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

John Marshall (Chief Justice 1801 - 35)

Chief Justice John Marshall was at the forefront of the establishment of the judiciary as an independent and nonpartisan member of our system of checks and balances. His opinions, particularly Marbury v. Madison, firmly established the Supreme Court's power of judicial review, a cornerstone of the separation of powers doctrine. He was also, however, a believer in judicial restraint, and his opinions set forth the broad authority of the legislative branch to carry out its enumerated powers.

3. What does the discretionary power of the judiciary mean to you?

A trial judge has the discretionary power to responsibly, fairly, and consistently manage his or her own courtroom. This responsibility includes presiding over trials, managing the court's docket, and making sentencing decisions within the parameters set down by law. Discretionary power carries with it an obligation to operate the courtroom fairly and consistently so that citizens and litigants are treated with courtesy, respect, and dignity.

4. What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

I do not believe that it would be my function as a federal district judge to find new Constitutional rights beyond those explicitly set forth in the Constitution and those that the Supreme Court has already interpreted. Rather, I would be addressing those Constitutional rights as previously defined by the courts above me. As a federal judge bound by the law, therefore, I would only concern myself with those rights that are protected by the Constitution.

5. Which law review article or book has most influenced your view of the law?

The Common Law by Oliver Wendell Holmes, Jr. (1881).

Even among the many great minds of the Supreme Court, Oliver Wendell Holmes, Jr. stands out as a tremendous legal scholar and brilliant intellectual. Nevertheless, he was a firm believer in judicial restraint and never mistook his own personal beliefs for the law that was to be applied. The Common Law explores the societal and historical bases underlying our modern system of laws and has been rightfully recognized as one of the greatest works of American legal scholarship.

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts, and floor statements -- should play in the interpretation of the text of a statute?

I would first look at the plain meaning of the statute. I would look at any Supreme Court precedent that had interpreted the statute, and any precedent from the Eighth Circuit Court. I think it would also be advisable to look at analogous statutes and discover what interpretation has been applied to those statutes by the Court. Only then would I look at legislative history. I believe that, in certain situations, legislative history can play a useful role in statutory interpretation, but that role should be a very limited one. Unfortunately, the written available legislative history is often disjointed and incomplete. I would therefore view that particular interpretive tool as a last resort.

## GENERAL QUESTIONS FROM SENATOR JOHN ASHCROFT

## WHICH CURRENT SUPREME COURT JUSTICE DO YOU MOST ADMIRE, AND WHY?

Although it is difficult to choose only one current member of the Court, Justice Kennedy seems to embody the qualities that I would hope to find in a Supreme Court Justice. First, as the author of a recent profile noted, "He makes a sincere, and admirable, effort to separate his own moral views... from his jurisprudential conclusions." This indicates that he takes a non-ideological approach to deciding cases and respects the limitations of the Constitution and the importance of *stare decisis*. Second, he is reputed to think long and hard, even to struggle, over his votes, which demonstrates that he appreciates the serious impact that every pronouncement of the Supreme Court will have on literally hundreds of lower court cases for many years to come. Third, together with Justice O'Connor, he occupies the center of the Court. He stands with the majority frequently and rarely dissents. This tells me that Justice Kennedy is comfortable with the Court's current jurisprudence and that he values collegiality and seeks consensus. Taken together, this adds up to a near-ideal portrait of an appellate judge.

## WHICH JUDGE OR JUSTICE HAS MOST INFLUENCED YOUR THINKING CONCERNING THE CONSTITUTIONAL SEPARATION OF POWERS AND WHY?

Justice John Marshall Harlan (the younger) has most influenced my thinking on this issue, not for the results he reached in particular cases — many of which are no longer good law — but rather for the clear, disciplined and far-sighted way that he thought about the systemic consequences of decisions made by the Court on which he sat. Justice Harlan respected the separation of powers among the three branches of the Federal government and in his opinions he deferred to the Executive and Legislative branches in the exercise of their constitutionally-mandated functions. Justice Harlan was also respectful of the separation of powers inherent in our federal system; during his later years, his was a voice of caution, warning that the righting individual wrongs in particular cases could bring about a long-term shift in the balance of power between the State and Federal governments that might result from righting particular individual wrongs.

## WHAT DOES THE DISCRETIONARY POWER OF THE JUDICIARY MEAN TO YOU?

Federal judges have limited discretion in certain areas. They have discretion to make rules, organize their calendars and run their courtrooms. They have discretion to determine many matters during the course of a trial, among them what constitutes relevant evidence; whether expert testimony should be permitted on a particular subject and whether someone's expertise has sufficient scientific or technical validity to warrant presenting his opinions; and whether permitting certain lines of questioning or submitting particular issues for determination will confuse or mislead the jury. They have limited discretion, within the bounds of the Federal Sentencing Guidelines, to set a criminal defendant's sentence.

Federal judges do not have discretion to reject established law or to create law. Nor do they have discretion to decide questions of law without regard to such doctrines as standing, ripeness and above all the constitutional case-in-controversy requirement.

WHAT, IN YOUR VIEW, IS THE SINGLE MOST IMPORTANT RIGHT NOT PROTECTED BY THE CONSTITUTION? IN OTHER WORDS, ARE THERE ANY RIGHTS THAT AS A POLICY MATTER YOU WOULD LIKE TO BE PROTECTED BY THE CONSTITUTION BUT, IN YOUR VIEW, ARE NONETHELESS NOT SECURED BY THE CONSTITUTION?

The Framers intended that constitutional protection -- the highest order of protection under law -- should be reserved for truly fundamental rights. I cannot think of any rights so fundamental as to warrant constitutional protection that are not so protected.

WHICH LAW REVIEW ARTICLE OR BOOK HAS MOST INFLUENCED YOUR VIEW OF THE LAW?

The law review article that most influenced my view of the law -- it is actually an entire special issue of the *Noire Dame Lawyer* -- is Joseph O'Meara's *An Introduction to the Law and How to Study It*, which is a compendium of Dean O'Meara's lectures on legal process and legal methods. Dean O'Meara was a close family friend, and he gave me a copy of his recently-published lectures a few months before I started law school. Reading them was the beginning of my formal legal education, and I have heard no finer or more instructive lectures on the subject.

WHAT ROLE DO YOU THINK LEGISLATIVE HISTORY -- BY WHICH I MEAN THE VARIOUS COMMITTEE REPORTS, HEARING TRANSCRIPTS AND FLOOR STATEMENTS -- SHOULD PLAY IN THE INTERPRETATION OF THE TEXT OF A STATUTE?

Legislative history of the sort described in the question has only a limited role to play in statutory construction. The first and most important place to look when confronted by a question of statutory interpretation is the language of the law. If Congress' intent cannot be determined from the plain meaning of a statute's language, precedents interpreting the law should next be consulted. Analogous laws and decisions interpreting them may also prove useful. As a last resort, one might consult committee reports and hearing transcripts from the legislative debate, but such materials are of limited value, for unless they demonstrate a fair degree of unanimity, this sort of legislative history is far more likely to reflect the predilections of particular legislators rather than the consensus view of the Legislature.



## QUESTIONS FROM SENATOR SESSIONS

## WHICH CURRENT U.S. SUPREME COURT JUSTICE DO YOU ADMIRE MOST AND WHY?

Although it is difficult to choose only one current member of the Court, Justice Kennedy seems to embody the qualities that I would hope to find in a Supreme Court Justice. First, as the author of a recent profile noted, "He makes a sincere, and admirable, effort to separate his own moral views...from his jurisprudential conclusions." This indicates that he takes a non-ideological approach to deciding cases and respects the limitations of the Constitution and the importance of *stare decisis*. Second, he is reputed to think long and hard, even to struggle, over his votes, which demonstrates that he appreciates the serious impact that every pronouncement of the Supreme Court will have on literally hundreds of lower court cases for many years to come. Third, together with Justice O'Connor, he occupies the center of the Court. He frequently stands with the majority and rarely dissents. This tells me that Justice Kennedy is comfortable with the Court's current jurisprudence and that he values collegiality and seeks consensus. Taken together, this adds up to a near-ideal portrait of an appellate judge.

## IN YOUR PERSONAL LEGAL OPINION, WHAT IS THE GREATEST SUPREME COURT DECISION IN THE LAST THIRTY YEARS? WHAT IS THE WORST SUPREME COURT DECISION IN THE LAST THIRTY YEARS?

I do not have a ready answer to either of these questions since, as a sitting State court judge, I have been primarily occupied with applying decisions. If by "great" we mean a decision that is clear, concise and above all conclusive (i.e., not likely to require further explanation and therefore not likely to spawn significant additional litigation), the Court's decision in United States v. Nixon, 418 US 683 (1974), stands out. There, the Court, acting unanimously, articulated a fundamental Constitutional principle (the President is not above the law) in cogent and precise language.

Using the opposite criteria as a measure of "worst" -- i.e., a poor decision is one that is not clear (possibly because the Court is badly divided over the result, the reason, or both), and so is likely to lead to additional litigation -- the Court's 1986 decision in Meritor Savings Bank, FSB v. Vinson, 477 US 57 (1986), seems to fall into this category. This is not because of the underlying principle that sexual harassment in the workplace could constitute discrimination on the basis of sex (a conclusion that seems self-evident), but because the definition of what constituted sexual harassment, as well as the guidelines for how a well-intentioned employer might protect both its employees against unwelcome conduct and itself against litigation, were vague and unsettled. The Court's recent decisions in Burlington Industries Inc. v. Ellerth, 66 USLW 4634 and Faragher v. City of Boca Raton, Fla., 66 USLW 4643, will likely end many of these ambiguities.



IN YOUR PERSONAL LEGAL OPINION, IS THE 1995 HABEAS CORPUS REFORM LEGISLATION CONSTITUTIONAL?

Yes, I believe the law is constitutional, and to the extent it has been reviewed, the United States Supreme Court has so held. Felker v. Turpin, 518 U.S. 651 (1996).

IF CONFIRMED, YOU WILL PRESIDE OVER MANY EMPLOYMENT DISCRIMINATION CASES AS A FEDERAL JUDGE. IN A SUIT CHALLENGING A GOVERNMENT RACIAL PREFERENCE, QUOTA OR SET-ASIDE, WILL YOU FOLLOW THE 1995 ADARAND V. PENA DECISION AND SUBJECT THAT RACIAL PREFERENCE TO THE STRICTEST JUDICIAL SCRUTINY?

Yes, I will follow the Supreme Court's decision in Adarand.

IN YOUR PERSONAL LEGAL OPINION, HOW DIFFICULT IS IT FOR ANY GOVERNMENT PROGRAM OR STATUTE TO SURVIVE STRICT SCRUTINY?

It is very difficult for a government program or statute to survive strict scrutiny. The government must demonstrate both that a compelling governmental interest justifies the preference and that no less restrictive alternative can be found to advance that governmental interest.

DO YOU BELIEVE THAT THE CALIFORNIA CIVIL RIGHTS INITIATIVE VIOLATES ANY FEDERAL OR STATE CONSTITUTIONAL PROVISION?

The Ninth Circuit recently held that the initiative does not violate any provision of either the Federal or the California Constitution. Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (9 Cir. 1997). I have reviewed the decision and see no basis to question it.

AS A MATTER OF CONSTITUTIONAL LAW, DO YOU BELIEVE THAT VOTER REFERENDA SHOULD BE SCRUTINIZED MORE CLOSELY BY THE JUDICIARY THAN LAWS ENACTED BY LEGISLATURES?

Measures initiated by voter referendum do not merit a higher degree of scrutiny than measures passed by legislatures. Like all laws, those adopted by the voters of a State pursuant to that State's lawful referendum process are entitled to a presumption of constitutionality.

DO YOU BELIEVE THAT CONGRESS HAS THE POWER UNDER ARTICLE III TO LIMIT THE JURISDICTION OF THE LOWER FEDERAL COURTS, PROVIDED IT DOES SO IN AN OTHERWISE CONSTITUTIONAL FASHION?

Yes, Congress has such power. The lower federal courts were created by Act of Congress and Congress ordained the limits of their jurisdiction in the first instance. Nothing in the Constitution prohibits Congress from modifying what it has ordained.

LAST YEAR, CONGRESS, USING ITS POWER UNDER ARTICLE III OF THE CONSTITUTION, RESTRICTED THE DISCRETION OF THE LOWER FEDERAL COURTS TO MICRO-MANAGE STATE PRISONS WHEN IT PASSED THE PRISON LITIGATION REFORM ACT. IN YOUR PERSONAL OPINION, IS THE PRISON LEGAL REFORM ACT CONSTITUTIONAL?

Almost every Circuit, including my own (in Benjamin v. Jacobson, 124 F. 3d 162 (2d Cir. 1997)), has upheld the constitutionality of aspects of the Prison Legal Reform Act. I agree with these decisions, and if I were to be confirmed as a District Court judge, I would of course be bound to follow Benjamin.

IN YOUR PERSONAL OPINION, IS THE DEATH PENALTY CONSTITUTIONAL?

Since the Constitution clearly contemplates that the State may deprive a person of life, so long as it affords that person due process of law, I conclude that the death penalty is constitutional.

WOULD YOU PERSONALLY BE RELUCTANT TO IMPOSE OR UPHOLD THE DEATH PENALTY?

I would have no difficulty either upholding death penalty legislation or carrying out my duties thereunder.

**Responses by Alvin K. Hellerstein, to  
General Questions for all Nominees by Senator John Ashcroft**

**Q.** Which current Supreme Court Justice do you most admire and why?

**A.** Justice Ruth Ginsburg. I admire her because we both began our professional careers by clerking for the same United States District Judge, Hon. Edmund L. Palmieri, and for her keen analysis and clear writing.

**Q.** Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?

**A.** Justice Felix Frankfurter has most influenced my thinking concerning the constitutional separation of powers. Through his opinions, Justice Frankfurter influenced federal jurisprudence by emphasizing that the constitutional separation of powers limits the jurisdictional competence of the federal courts.

**Q.** What does the discretionary power of the judiciary mean to you?

**A.** The discretionary power of the judiciary arises from statutes and rules that the judge is required to apply. A judge, for example, has discretion to admit or exclude evidence depending on its qualities of relevance and undue prejudicial affect. A judge does not have discretion to create laws or rights.

**Q.** What in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?

**A.** I know of no rights other than those arising from the Constitution or laws of the United States.

**Q.** Which law review article or book has most influenced your view of the law?

**A.** Hart & Wechsler, *The Federal Courts and the Federal System* (1953) most influenced my view of the law.

**Q.** What role do you think legislative history - by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

**A.** A statute should be primarily understood by its text, its context in the overall statute, and the applicable precedents that may have previously

interpreted the statute. If there is still ambiguity in the words and phrases being interpreted, or in their context or application, the inquiry may have to be expanded to consider the purpose of the statute as explained in any accompanying legislative report. If the ambiguity remains, underlying committee reports, hearing transcripts and floor statements may be considered as aids in understanding the words and phrases of the statute, but not to change the meaning fairly derived from those words and phrases.

**Responses by Alvin K. Hellerstein, to  
Questions from Senator Sessions**

**Q.** Which current U.S. Supreme court Justice do you admire most and why?

**A.** Justice Ruth Ginsburg. I admire her because we both began our professional careers by clerking for the same United States District Judge, Hon. Edmund L. Palmieri, and for her keen analysis and clear writing.

**Q.** In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?

**A.** I believe that, in the last 30 years, Agostini v. Felton, 117 S.Ct. 1997 (1997), is a Supreme Court decision of particular merit. The Supreme Court held that government funds to provide remedial education to economically disadvantaged children can be used to pay for special-education teachers regardless if they teach within, or without, a religious school. The essential criterion was that they should be assigned by the public authority to perform public educational functions, the same as if they were assigned to teach remedial education in the public schools. Thus, the Supreme Court followed a more pragmatic analysis in the very difficult area of interpretation of the Establishment and Free Exercise clauses of the First Amendment. Central Bank of Denver, N.A. V. First Interstate Bank of Denver, 114 S.Ct. 1439 (1994), is a Supreme Court decision that is troubling. The Supreme Court held that section 10(b) of the Securities Exchange Act does not permit claims to be brought against those who aid and abet violations of the statute. As a result of the decision, those who willfully and knowingly make it possible for violators of the Securities laws to commit wrongs, and who share the wrongful purpose of the statutory violators, cannot be easily sued with the direct violators. The Court's sweep appears unnecessarily broad, and Congress narrowed it, in the Private Securities Litigation Reform Act, to make it clear that the SEC could continue to sue aiders and abettors under section 10(b).

**Q.** In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?

**A.** The Supreme Court has held that the 1995 Habeas Corpus Reform Act is constitutional. Felker v. Turpin, 518 U.S. 651 (1996). If confirmed as a District Judge, I would follow that precedent.

**Q.** If confirmed, you will preside over many employment discrimination cases as a federal judge.



In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?

A. If I am confirmed and a suit challenging a government racial preference, quota, or set aside comes before me, I will follow Adarand v. Peña, 515 U.S. 200 (1995) and subject such preference, quota or set aside to strict scrutiny.

Q. In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

A. The standard of "strict scrutiny" is the highest threshold for examining the constitutionality of statutes and regulations.

Q. Do you believe that the California Civil Rights Initiative violates any federal or state constitutional provision?

A. Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), holds that Proposition 209, the California Civil Rights Initiative, is constitutional. I do not disagree with that holding.

Q. As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?

A. Voter referenda should be subjected to no greater scrutiny than laws enacted by legislators.

Q. Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?

A. I believe that Congress has power under Article III to limit jurisdiction of the lower federal courts in a constitutional manner. See, e.g., Benjamin v. Jacobson, 124 F.3d 162, 169 (2d Cir. 1997). The Second Circuit held that the limitation of federal court jurisdiction provided by the Prison Litigation Reform Act was constitutional.

Q. Last year, Congress, using its power under Article III of the Constitution, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.

In your personal legal opinion, is the Prison Legal Reform Act constitutional?

A. The Second Circuit in Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997), upheld the constitutionality of termination provisions regarding prospective relief. I do not disagree with that decision. Other aspects of the statute are entitled to a presumption of constitutionality. Generally, I believe that the jurisdiction of federal courts should not extend to overseeing executive functions.

Q. In your personal legal opinion, is the death penalty constitutional?

A. In my opinion, the death penalty is constitutional, and the Supreme Court has so held.

Q. Would you personally be reluctant to impose or uphold the death penalty?

A. If I were called upon as a District Judge to impose or uphold the death penalty, I would do so.

**RESPONSES OF WILLIAM H. PAULEY III  
TO FOLLOW-UP QUESTIONS**

**SENATOR ASHCROFT**

**General Questions for all Nominees**

**1. Which current Supreme Court Justice do you most admire and why?**

Justice Sandra Day O'Connor. I admire Justice O'Connor because her cogent opinions exemplify judicial restraint and she works to build a consensus among members of the Court.

**2. Which judge or justice has most influenced your thinking concerning the constitutional separation of powers and why?**

Chief Justice John Marshall. Under Chief Justice Marshall's leadership, the Supreme Court articulated the principle of judicial review and established the ground rules for the relationships among the three branches of our federal government.

**3. What does the discretionary power of the judiciary mean to you?**

The exercise of a federal trial judge's discretionary power is limited to matters dealing with administration or procedure to ensure that the litigation process is efficient and fair. Article III courts have limited jurisdiction and a district judge is bound to follow the law as set forth in the Constitution and in federal statutes.

**4. What, in your view, is the single most important right not protected by the Constitution? In other words, are there any rights that as a policy matter you would like to be protected by the Constitution, but, in your view, are nonetheless not secured by the Constitution?**

There are no rights that, as a policy matter, I would like to see protected by the Constitution that are not already secured by the Constitution.

5. Which law review article or book has most influenced your view of the law?

Benjamin N. Cardozo, The Nature of the Judicial Process (1921).

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

Legislative history should play a limited role of last resort in the interpretation of the text of a statute. A court should look first to the plain language of a statute. When the plain meaning of a statute is unclear, then the court should look to relevant precedent. If none exists, legislative history may provide insight if it is unequivocal and clearly expressed. Even then, a district court should proceed with caution and avoid reliance on isolated statements representing the view of a single legislator and not the will of the Legislature.

**RESPONSES OF WILLIAM H. PAULEY III  
TO FOLLOW-UP QUESTIONS**

**SENATOR SESSIONS**

**Questions for all Nominees**

**1. Which current U.S. Supreme Court Justice do you admire most and why?**

Justice Sandra Day O'Connor. I admire Justice O'Connor because her cogent opinions exemplify judicial restraint and she works to build a consensus among members of the Court.

**2. In your personal legal opinion, what is the greatest Supreme Court decision in the last thirty years? What is the worst Supreme Court decision in the last thirty years?**

Although the historical consequence of a decision is difficult to assess within a thirty-year time frame, New York v. United States, 505 U.S. 144 (1992), is among the most significant decisions in the last thirty years. In New York, the Court ruled that a provision of the Low-Level Radioactive Waste Policy Act was inconsistent with the States' sovereignty under the Tenth Amendment. New York is significant because it reaffirmed the Constitution's division of power among sovereigns and foreshadowed the Court's subsequent decisions involving the doctrine of federalism.

One of the worst Supreme Court decisions in the last thirty years is Hewitt v. Helms, 459 U.S. 460 (1983), which held that a Pennsylvania prison inmate had a constitutional liberty interest in remaining in the prison's general population based on certain mandatory language in the state's statutes and regulations. Hewitt spawned years of needless litigation and created a disincentive for states to codify prison management procedures. Although the Court recognized these problems and overruled Hewitt in Sandin v. R.D. Conner, 515 U.S. 472 (1995), the costs of the Hewitt decision were significant.



3. **In your personal legal opinion, is the 1995 Habeas Corpus Reform legislation constitutional?**

All statutes enjoy a strong presumption of constitutionality. Thus, if confirmed as a district judge, I would apply that presumption to this legislation and then look to relevant precedent. I am aware that the capital punishment provision of the statute withstood a constitutional challenge in Felker v. Turpin, 518 U.S. 651 (1996).

4. **If confirmed, you will preside over many employment discrimination cases as a federal judge.**

**In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 Adarand v. Peña decision and subject that racial preference to the strictest judicial scrutiny?**

Yes. If confirmed as a district judge, I will follow the Adarand precedent.

5. **In your personal legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?**

Strict scrutiny is the most demanding standard of review. It requires any government program that differentiates among classes of individuals on the basis of race to be narrowly tailored to serve a compelling governmental interest.

6. **Do you believe that the California Civil Rights initiative violates any federal or state constitutional provision?**

I understand that the Ninth Circuit has held that the California Civil Rights Initiative ("Proposition 209") does not violate the Equal Protection Clause and is not preempted by Title VII. See Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir.), cert. denied, 118 S.Ct. 397 (1997). I see no reason to disagree with the reasoning or conclusion of the Ninth Circuit.

7. **As a matter of constitutional law, do you believe that voter referenda should be scrutinized more closely by the judiciary than laws enacted by legislatures?**

No. An Article III judge should not treat voter referenda differently from laws enacted by legislatures.

8. **Do you believe that Congress has the power under Article III to limit the jurisdiction of the lower federal courts, provided it does so in an otherwise constitutional fashion?**

Yes. Congress has the power to limit the jurisdiction of the lower federal courts.

9. **Last year, Congress, using its power under Article III of the Constitution, restricted the discretion of the lower federal courts to micro-manage state prisons when it passed the Prison Litigation Reform Act.**

**In your personal legal opinion, is the Prison Legal Reform Act constitutional?**

All statutes enjoy a strong presumption of constitutionality. I am familiar with the Prison Legal Reform Act and am aware that the Second Circuit upheld the Act's consent decree termination provision in the face of a constitutional challenge. See Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997). I have no reason to disagree with the Second Circuit's analysis. If confirmed as a district judge, I would be bound by and adhere to the precedents established by the Supreme Court and the Second Circuit.

10. **In your personal legal opinion, is the death penalty constitutional?**

Yes. The Supreme Court has held that the death penalty may be constitutionally imposed provided that appropriate procedural safeguards are established and met.

11. **Would you personally be reluctant to impose or uphold the death penalty?**

No. If confirmed as a district judge, I would follow the law.



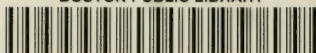








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